Hardman v Batiste
Royal Court
6th September 2016

JUDGMENT
37/2016

Claim for damages in respect of breach of contract

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

(Civil Matter 1885)

BETWEEN:

HARDMAN & HARDMAN

Plaintiffs

-v-

BATISTE & BATISTE

Defendants

Before: Lieutenant Bailiff Her Hon Hazel Marshall QC

And further members of the Court:

Jurat J Ferguson, Jurat C A E Helyar-Wilkinson and Jurat D A Grut

JUDGMENT handed down: 24th September 2015

Counsel for the Plaintiffs: **Advocate M Ferbrache**
Counsel for the Defendants: **Advocate Sarah Collins**

Legislation and Texts referred to:

Guernsey

(a) Legislation:
Section 14(2) of the 2008 Royal Court Reform Law 2008

(b) Texts:
The Guernsey Bar Conditions of Sale (1997 Edition)

Introduction

1. First of all, my apologies to everyone for being slightly later than indicated. It took me a bit longer to put my notes together in a sensible order than I had anticipated. This is an *ex tempore* judgment, of course, not a written judgment. As a result of that, it may be that there will be moments when I might need to ask advocates' assistance in finding dates or something like that that are not readily to hand.

2. This is a claim for damages in the sum of £41,021.28 for breach of contract brought by purchasers in relation to alleged defective completion of building works on a property now known as Barnfield, Longue Rue, Vale but formerly The Barn, by which the property was converted to residential accommodation which the plaintiffs bought from the defendants. The defendants dispute all, save now the sum of £4,251.05 of the claim which they say they offer as compensation for defects which they do accept and they therefore counterclaim for the payment of the balance of a retention of £24,500 which is still held by the parties' common solicitors, Mourant Ozannes, apparently awaiting the outcome of this dispute.

3. The defendants (that is Mr Nigel Batiste and Mr Christopher Batiste) owned land at The Barn as part of the family growing business. They decided to obtain planning permission for residential conversion and to sell the house on. They obtained planning permission in two stages in 2009 to 2010. They employed their cousin, Mr Nicholas Batiste, a builder, to do the bulk of the residential conversion works.

4. The Batiste property was set back from Longue Rue towards the southwest. The Barn property itself was approached up a driveway bordered between an earth bank and hedge on the boundary adjacent to a field on the northwest and the boundary of Longue Rue House and its outbuilding, in particular a garage, on the southeast. That property is owned by a Mr and Mrs Johnson. The two-storey barn was sited with its long wall on the boundary of the adjacent field, and adjacent to it, but not adjoining it, towards the southeast was a part of the property comprising a single-storey garage block. Beyond that land, away from Longue Rue, was the Batistes' further property which had some defunct glasshouses in a line parallel to Longue Rue not far back from The Barn and the garage block.

5. The conversion work was initially to convert only The Barn building to residential with living accommodation below and bedroom accommodation upstairs. It had its main front door entrance in the long southeast wall of this two-storey pitched roof building. Amendment to the planning permission was sought and obtained to extend the conversion to include converting the garage block to a master bedroom suite and to link this to the main two-storey building with a conservatory along the southwest side of the combined property.

6. The plaintiffs, Mr Ian Hardman and Mrs Mandy Hardman, were looking for a suitable house to purchase on Mr Hardman's retirement in 2011. They saw particulars of the property on the

internet. They went to inspect the property and they liked it for various reasons. It appeared to suit their requirements. They made an offer of £670,000 which was accepted, although the property was advertised for a purchase price of £685,000. This was in about June 2011.

7. In July, the agents, Living Room Estate Agents, sent conditions of sale to the Hardmans and they instructed Mr Edward Prentice at Mourant Ozannes to act for them. They were taking a mortgage and consequently a short form survey and valuation was carried out for their proposed mortgagee by Mr David Torode MRICS FASI MCIOB, on 18th August 2011. This expressly stated, however, that it was not a structural survey, although it took into account the general condition of the property for freehold valuation purposes. Mr Torode described the property, according to the requirements of the mortgagee, he concluded that the property was 90% complete and in its current state it was valued at £600,000 but would be worth £685,000 on completion of the work and he described in a note to the mortgagees the state which the property had reached in terms of completion.

8. As I have said, the Hardmans instructed Mr Prentice of Mourant Ozannes to act for them. The defendants also instructed Mourant Ozannes. This created what, in my view, was a difficult situation. Even if not improper, it is not advisable for firms to act on both sides of a sale and purchase transaction in case problems and difficulties arise, as they seem to me to have done in this case.

9. The Hardmans understood, and it has not been investigated as to whether this was right or wrong, that the building was to be completed at the beginning of September. They had sold their own house for a completion on 1st September 2011. Unfortunately, the property was not completed. The Hardmans asked if they could be allowed to take occupation before completion because apparently they were homeless from about 1st September and with relations between the parties being cordial at that time they were allowed to do so on 8th September.

10. The works then continued on around them. It is the defendants' evidence that they regarded them as being complete by November. It is pointed out that the Hardmans were allowed to stay in the property without paying any rent and, indeed, Mrs Hardman was allowed to grow vegetables in a corner of the greenhouse behind the property. There was at that time no boundary fence. These are all evidence, it is said by the defendants, of the nature of the relationship being amicable and their doing their best to assist the plaintiffs.

11. As far as the terms that govern the sale are concerned, both the conditions of sale for the purchase and the conveyance were eventually executed and the conveyance was registered all on 29th September 2011. However, the property was still not entirely finished at that time and consequently terms were drawn up to reflect this. These documents are what formed the basis of the parties' rights and obligations which are in issue in this action and I turn to them now.

12. The conditions of sale comprised in general terms the Guernsey Bar Conditions of Sale (1997 Edition) which gave particulars of the property and the particulars of some personalty (as it seems that some items were being described) as contents. As far as the property was concerned, they indicated who were the vendors' and the purchasers' advocates. They refer to Special Conditions of Sale being on the back page and they were dated 29th September. The parties were the "vendor", Mr Nigel Philip Batiste and Mr Christopher Paul Batiste and the "purchaser", Mr Ian Andrew Hardman and Mrs Mandy Gwyneth Hardman, previously Wallbridge née Butt. The purchase price was given as £636,500, for the property, and £33,500 for contents, total £670,000, and it was stated that "completion shall take place on 29th September 2011". The two parts of the purchase were stated to be conditional upon each other and there was no deposit paid, because of the fact that there was to be a contemporaneous execution of the Conditions of Sale and of the Conveyance.

13. The "general conditions", I do not think I need to refer to in any detail except for condition H which relates to covenants and warranties. This stated, "The vendor covenants with and warrants to the purchaser as follows," and after an initial condition about the vendor never having been in dispute with any person about the property or the contents and the vendor not being aware of any circumstances likely to give rise to any such dispute, the vendor then covenanted that it was absolute owner of the contents free from all encumbrances and then, importantly, at (iii):

> "All development of and other works carried out on or to the property during the vendor's ownership have been subject to proper application to and carried out under and in accordance with all permissions and licences required from the appropriate authorities and all building regulations in force at the relevant date."

Then I do not think I need refer to anything further except the last subclause of H which is (vii):

> "The covenants and warranties given in these conditions of sale shall:
>
> (a) be true at completion as if given at that time; and
>
> (b) remain in full force and effect notwithstanding completion."

14. There was then an addendum to the conditions of sale which is extremely important. It says:

> "In this addendum the following expression shall have the meanings hereby respectively assigned to them:
>
> "the Works" means all those works permitted under planning application numbers full/2009/2310 and varied under planning application reference full/2010/3747 and building control application number FP/2010/1047 and varied under building application reference FP/2011/0037.
>
> "The Additional Works" means the additional works agreed between the vendors and the purchasers and not as shown within the planning and building control application references as listed in 1.1 above and which are as follows:
>
> (a) the installation of brick paving, £7,000;
>
> (b) the erection of boundary wall, £1,000;
>
> (c) the reinstatement of the northwest boundary hedge, £500;
>
> (d) installation of a gate across the driveway, £5,000;
>
> (e) all bathrooms fitted and complete, £5,000;
>
> (f) wood flooring, £4,000;
>
> (g) doors and furniture, £2,000."

15. Then it goes on to state at paragraph 2:

> "The boundaries between the premises and the glasshouses and land retained by the vendor, defined as the retained premises, shall be as shown on the plan."

I will describe that in a moment:

> "3. The vendors for themselves and their successors in title as owners of the retained premises covenant with the purchasers as owners of the premises that they shall at their sole expense and within six months of completion to erect a wooden fence between the points marked A and B, B and C, C and D, D and E, on the plan, which wooden fence once erected shall belong to the premises and install a gate at the northeastern end of points A to B so as not to prohibit the neighbours' enjoyment of the right of way."

16. That last is a reference to a right of way which is enjoyed by the Johnsons up the drive and through an area at the back of the property to their property, in order to obtain access for a sewage lorry and, indeed, the right of way that has appeared from the conveyance to which reference is made provides for the right to have a sewage lorry stop on the particular area, obviously for the purposes of emptying the sewage tank.

17. As far as the points A - E are concerned, point A is a point which goes from the end of a bank which forms part of the Johnson property on the east and then takes a slanted line towards point B which is on a line of the property boundary to the southeast parallel to the outside wall of the garage block and some nine feet from it. This boundary then proceeds to point C which proceeds again at a sloping angle from line B - C to point D which is a point within what was then part of the original site of the greenhouses to which I have referred already. Point D - E then proceeds at a right angle to the fence to the adjacent field when it joins it and provides what would be the "back" fence to the rear garden of Barnfield itself. Those particular matters will require further examination and will have significance in relation to some of the problems complained of but it is that line which, it is accepted, was to be the boundary between the parties, as described in condition 3 of the addendum to the conditions of sale, and was to be fenced accordingly by the vendors.

18. The vendors at paragraph 4 of the addendum covenant that at their own expense and prior to 31st December 2011 they will complete the Works to the satisfaction of the purchasers and it was then provided:

> "On completion the purchasers' advocates shall retain the sum of £10,000 ("the Retention") from the purchase price. Should the vendors not have completed the Works by completion to the satisfaction of the purchasers, then the purchasers shall be entitled to utilise the retention towards the completion of the Works. The purchasers' advocates are irrevocably authorised to pay such part of the retention as is necessary to complete the Works to the purchasers on being advised by the purchasers that the works have not been completed. In the event that less than £10,000 is spent by the purchasers on the Works, the difference shall be paid from the retention to the vendors."

So that condition, it will be seen, refers broadly but without specific identification to the matters that would have been comprised in the planning permissions and building control applications referred to at the beginning of the addendum.

19. By clause 5, the vendors covenant that at their own expense and prior to 31st March 2012 they will complete the Additional Works to the satisfaction of the purchasers and then there is a similar provision in relation to a retention which in this instance comes to the total sum of

£24,500 and is described as the "Additional Retention". It comprises the various sums that I have already read out in relation to the seven items of further works comprised in the Additional Works above and it is provided that should the vendors not have completed the Additional Works by 5pm, on 31st March 2012 to the satisfaction of the purchasers, then the purchasers shall be entitled to utilise the Additional Retention towards completion of the Additional Works. There is a similar provision to the above with regard to the purchasers' advocates being irrevocably authorised to pay such part of the Additional Retention as is necessary to complete the Additional Works to the purchasers on being advised by the purchasers that the Additional Works have not been completed and in the event that less than £24,500 is spent by the purchasers on the Additional Works, the difference shall once again be paid from the Additional Retention to the vendors.

20. As regards further terms, clause 6 provided a right of access to the vendors to have access to come and do the Works and the Additional Works that were outstanding (in fact, I think it probably relates to the Works themselves but, in any event, plainly a right of access would have been implied) doing so as quickly as possible, expressly in a good and workmanlike manner and causing as least possible inconvenience to the purchasers and making restoration of any part of the property disturbed by the Works.

21. I do not think I then need refer to any further terms of the addendum.

22. The conveyance, which was dated 29th September and was duly registered, is a document which takes a fairly conventional form. First of all, it recites who the parties are; it has certain references to definitions; it provides for the conveyance for an estate of inheritance to the purchasers and it describes the boundaries of the property. It contains at clause 4 specifically the fencing covenant which I think repeats, in principle, the covenant with regard to fencing contained in the addendum to the conditions of sale but it states:

> "The vendors for themselves and their successors in title as owners of the retained premises covenant with the purchasers as owners of the premises that they shall at their sole expense and within six months of the date of this conveyance:
>
> 4.1. To erect a wooden fence between the points marked A and B, B and C, C and D and D and E on the plan which wooden fence, once erected, shall belong to the premises and;
>
> 4.2. Install a gate and the said fence to be erected between points A to B in order to allow Mr and Mrs Johnson to exercise their right of way created in the conveyance referred to in clause 5.1 below which gate, once installed, shall belong to the premises."

23. Then clause 5.1 expressly grants or reserves to the purchasers, so as to give the purchasers such rights and make them subject to such servitudes and covenants as are contained in two conveyances, of which one is the one to which I have already referred containing the right for the Johnsons. I think that is probably all that needs to be referred to in the conveyance which was duly registered.

24. It is accepted that the Works and the Additional works were not entirely completed in accordance with the terms of the addendum to the conveyance and that, together with the fencing covenant, forms the basis of the items which are claimed by the Plaintiffs in this matter and of which I will give details at a later point in this judgment. At this point it is appropriate to give a timeline summary of what happened subsequently. There is a great deal of evidence as to the course of events contained in the witness statements of the parties but I do not think it is necessary for the purpose of this judgment to recite it all in detail.

25. Broadly what happened was that, obviously not long after entering into the property, Mr and Mrs Hardman say it emerged that the building was not wind and watertight. They found there was damp penetration and there were draughts. At this time Mr Nigel Batiste attended, tried to rectify the problems but did not succeed. I should say that at various times throughout the history that I am about to recite it appears that Mr Nigel Batiste on occasions, and on other occasions Mr Nick Batiste, a cousin and the actual builder, were approached by Mr or Mrs Hardman and asked if they would deal with problems that were occurring, and one or other of them did do so, at any rate up to November 2012.

26. In November 2011 it emerged that there was water penetration over the door and window in the lounge, with water, even at that stage, running down the walls. It seems that attempts to remedy this were not successful. As I understand it, there were efforts to put silicone around the window frames and so forth to assist the matter but nothing worked fully satisfactorily. There were also problems with drainage, in particular in the master bedroom suite, with water backing up from the bath into the shower, gurgling and, indeed, on occasions smelling. It was also noted in about this time that the cesspit was filling up rather frequently. Problems were reported by the sewage collection man with regard to the exit pipe thrashing around, on emptying. Mr Batiste the builder, put a large, concrete dome on top of the end of the pipe exit point which he said in evidence had been installed with some extra pipe which needed trimming off. There is a dispute between the parties as to the extent to which this, in fact, remedied the problems; the plaintiffs say it was not sufficient.

27. As I have said, the defendants say that the Works, as such, were completed in November 2011. They say they could not proceed to complete Additional Works because Mr Nigel Batiste was actually away from November 2011 until about February 2012. There were still problems emerging at this time but on 24th March 2012 there was a dinner party. Mr and Mrs Hardman invited Mr Nigel Batiste and his wife for dinner. They did not invite Mr Christopher Batiste for reasons that are not entirely clear but it is accepted that, at any rate, the party was between those two couples. (When I say "the reasons are not clear", both sides gave a version of this but it is not necessary to go into it.) At any rate, the defendants rely on this as evidence that there was nothing then really wrong with the building, because they say there was not anything mentioned, at the time, about any real problems.

28. Matters, however, were not all entirely satisfactory, at least as far as the Plaintiffs were concerned. There appear to have still been difficulties about damp penetration and some other matters, drainage matters, that I will go into later, but by July of 2012 it is apparent that the Hardmans decided, nonetheless, that they would release the fund of £10,000 in relation to the Works. They say that this was in order to keep the defendants, as it were, "on side", because there was still so much work yet to be done to remedy the defects that they were living with that they did not want to cause a falling out with the defendants, and a problem which would prevent the works being remedied by that route. Once again, the defendants say that this shows that, in fact, the Works were accepted to be all right and there really was no defect.

29. I make the point here that in answer to a question from me, Advocate Collins on behalf of the defendants agreed that there was no assertion that because the retention fund had been paid over as to £10,000, the plaintiffs were thereby disentitled as a matter of law from recovering any sums in respect of items of work that could have been described as part of "the Works". She said that the reliance placed upon that particular release was that it was submitted to be evidence that, in fact, the defects were really no longer there as regards matters within "the Works" at that time, and consequently to provide support for the defendants' contention that a lot of the defects of which the plaintiffs are complaining were not real defects at all.

30. It is accepted that by mid-2012 the brick paving had not been done. It was at that stage done by the defendants themselves in person and by, some other members of their family who

assisted. However, when this was done it subsequently turned out that there was a lot of ponding of water on the brick paving and the plaintiffs say that in times of heavy rain there was such flooding that they could not even walk to their doors without getting their shoes wet. At the same time flooding of rainwater into the cesspit was discovered and it appeared that this had not been properly sealed, although Mr Batiste, (Mr Nick Batiste in this case) attended in order to try and remedy this defect.

31. The electric gate across the drive which was, in fact, installed was only installed in September 2012. There is a complaint about this because it is said that it did not operate properly and, indeed, on occasions it operated dangerously. Once again, Mr Nigel Batiste was requested to return to deal with it and he did, indeed, come back and do some remedial works in relation to the screws which he said had been supplied too short by his supplier, who had supplied him with the gate and its operating mechanism in the first place. However, according to the plaintiffs it still did not operate properly.

32. At the same time and at about this time the question of the boundary fence still needed to be dealt with, as that had not been completed. It appears that at around the end of September/beginning of October 2012 – in other words, about a year after the conveyance and six months at least after the date for completion of the Additional Works – this matter still needed to be done, but at this point Mrs Hardman discovered that the plaintiffs had unfortunately put up a garden shed in the wrong place. Apparently, although not a large garden shed - we are told it was eight feet by six feet - it must have been substantial and substantially erected. It had been put up in the wrong place because, in looking at the plans that were attached to the deeds to the property, the Hardmans had looked at the plan attached to the addendum to the conditions of sale on which a heavy, black line obscured the stated measurement of the distance which fixed the position of their rear boundary line D – E, and they read the printed figure as 23 feet rather than 28 feet. They had consequently formed the view that they had five feet more land than the plan itself actually disclosed (as confirmed by the conveyance plan), and the garden shed had been erected accordingly.

33. When Mr Batiste came to put up the new fence to enclose the property, and marked it out, this mistake emerged. Mrs Hardman requested that they be allowed to keep the original position of the fence that they thought they had, ie the extra five feet of land, in return for putting up at their own expense the gate, which was to be the gate into the Johnsons' property, and which likewise had not yet been erected by the defendants. At any rate, she said that she put forward a kind of *quid pro quo* arrangement in relation to this. The Batistes were not, however, willing to do this. They did not want to lose any more land and consequently they insisted that, in fact, the fence must go where it was marked on the plan and the shed would have to be moved. In relation to this, it seems that it must have been quite difficult to do this because we are told that it required a crane in order to lift the shed and to move it, but there is no claim in respect of this because the plaintiffs accept that the initial mistake about the position of the shed was their own mistake.

34. However, the shed was then moved to a position whereby, in fact, it straddled the line between points C and D on the plan, and this does give rise to one of the current disputes. The plaintiffs say that the position for the re-siting of the shed was agreed between them and Mr Nigel Batiste and was actually agreed on site. The defendants disagree about this. They say that the plaintiffs moved the shed to a position of their own choosing without proper consultation, and that consequently the shed not being in quite the right place was once again their fault.

35. Some efforts were being made at that time to install the boundary fence. The defendants were doing this in relation to the lines A round to D and had completed some parts of the fence but, at the end of the day, when it came to this part of the fence they instead installed a fence, or more accurately part of a fence, to go around the position of the shed creating a dog-leg

boundary between the points C to D rather than a straight albeit slanted, boundary line, as was shown on the plan.

36. When I say "they erected this fence", the pictures show and, indeed, it was the oral evidence, that beside the shed, the fence was not erected fully and completely along the line. The fence itself had a gap in it and, indeed, it was said by the plaintiffs that the reason why it had been convenient to have a dog-leg fence was because otherwise putting the fence in the correct, straight but angled, line would have required the Batistes to remove a part of the greenhouse which was still upright and undemolished. What happened was that the fence was actually erected by the defendants using one of the stanchions for the old greenhouse structure to connect to the fence, even though that itself did not comply with the boundary along that particular section correctly. At any rate, that is what occurred in relation to the line and angle of the fence at points C to D, and that is another matter that gives rise to one of the myriad of points in this claim.

37. The defendants say that it was the problems with regard to moving the shed which the plaintiffs had put up, and the fact that they (the defendants) were not willing to give over the five feet of land, which they regard as being the point at which relations between them and the Hardmans broke down. After that, they say, the Hardmans became unreasonable. They started quoting terms out of the contract of sale and the defendants feel, quite plainly and very bitterly that they have actually behaved well towards the Hardmans, and have been reasonable towards them, but the Hardmans have been unreasonably over-demanding and complaining, and have unreasonably sought to rely on the terms of the contract.

38. There were, however, during this period still the continuing problems that I have mentioned previously and in November 2012 there was a meeting between the parties at which an attempt to resolve the issues between them was carried out with the agreement of the lawyers. Round about the beginning of November it appears that the two lawyers who were dealing with the matter at Mourant Ozannes spoke to each other with regard to the works, and there was, in effect, an agreement that a part further release of the retention monies would take place related, in effect, to the bathrooms, the wood flooring and the door furniture, and in total, therefore, around about £11,000. This was due to be done but there were still points being raised about other matters that had not been dealt with. In addition, the sum relating to the paving at £7,000 was also expected to be released.

39. This was an agreement that was about to be implemented when Mrs Hardman wrote an email of 5th November, described as "most urgent", to her conveyancer saying:

> "Dear James,
>
> I don't know where we stand on this but please do not pay another penny away. Tonight we heard dripping coming from the back door and water is coming in again above the door frame, dripping down the door and lying on to the floor. We have had problems with this from day one and nobody will accept responsibility for it. Nick Batiste, builder, we understand from Nigel Batiste, won't answer calls or acknowledge he has a duty of responsibility to put this right. It would appear that Bredoyle *[that is the door and window supplier]* have done everything they can to make sure it's not coming from the windows or their seals. We need now to employ a skilled professional to put this right. We are so worried, we have no guarantees of workmanship and I am at my wits' end as to what can go wrong next."

40. She asked him to call her. So it is apparent that at that stage matters were reaching crisis proportions as far as the plaintiffs were concerned. It is said, in effect, that this was the last

straw. Mourant Ozannes were about to release some funds but they were forbidden from doing so by the plaintiffs by that letter, and did not.

41. There were yet other matters that were being undertaken, or considered, at this stage. For example, in November 2012 some works to restore insulation in the main loft of the two-storey building, which was apparently falling off because it had not been firmly enough fixed up. This was a matter which had been supposedly dealt with before by Mr Nigel Batiste, apparently, attending and sticking this up with either silicone or some form of duct tape. It was all once again failing and Mrs Hardman had, in fact, asked that someone attend to see to this again. However, the defendants complain that at this point she actually refused access for the matter to be dealt with further. They say this is unreasonable. (Indeed, one of their complaints throughout this matter is that they say they have not been given a proper opportunity to remedy the defects of which the plaintiffs are complaining.)

42. As I have indicated, there were various other matters that were concerning the Hardmans and it was at this point that they returned to Mr Torode as the surveyor whom they had met previously in relation to the original valuation for their mortgagee, and asked him to inspect and to make a report. Briefly, he looked at these matters and he did prepare a report in March 2013 listing many things which eventually formed the basis of these proceedings and which he said required remedy. At the same time a report was obtained from Drainforce with regard to the drains, and the various persons who had been involved, for example, with the tanking that was supposed to provide a damp membrane and damp proof surface to prevent water penetration to the property were also consulted.

43. Mr Torode introduced a builder, a Mr Andy Le Page, showed him the report and then asked him to give a quotation, as far as he could, for the cost of the works. He gave what was plainly an estimate. It was in the sum of £20,000 at the time, but he indicated and said that this was merely an estimate and, of course, until one actually carried out works, one did not know exactly how much things were going to cost. Matters were at this stage put in hand in order to remedy the defects which the Hardmans put in hand, by this time having had, as they saw it, enough of trying to get the defendants to come back and sort the matters out.

44. I should have said that at this point it appears plain that what happened was that Mourant Ozannes took the view that they could no longer act. This appears to have been prompted by an email from Mrs Hardman dated 26th April 2013 and which she wrote to Advocates Woods and Torode referring to a letter received today which advised them to take independent legal advice. In fact, Mourant Ozannes took the view that they could no longer act for either party slightly before this date. Mrs Hardman's letter referred, however, to the retention sum and the attention of Mourant Ozannes was drawn to the addendum to the conditions of sale and, in particular, clauses 4 and 5 stating that that:

> "If the vendors had not completed the work to the satisfaction of the purchaser, the purchaser should be entitled to use the retention and, indeed, the additional retention and the purchasers' advocates are irrevocably authorised to pay such part of the retention as is necessary to complete the works to the purchasers on being advised by the purchasers that the works had not been completed."

Mrs Hardman continued:

> "In respect of both clauses the works were neither completed in time nor to our satisfaction. I would also like to remind you that we agreed to release the first £10,000 with the explicit promise of the vendor that the works will be completed. We therefore ask you to release the full £24,500 to ourselves immediately as per the above conditions which will cover the cost paid by

> Mr Hardman to date and part of the estimated £20,000 to finish the outstanding works. Should there be a shortfall, which is most likely, we will almost certainly make a claim against the Batiste brothers through petty debts.
>
> The above wording was included to ensure full protection of our rights by Advocate Prentice whilst acting as a partner of Mourant Ozannes. We are calling on this protection and believe we are fully within our rights to do so. We are disappointed this matter couldn't be resolved outside court but thank you for your assistance to date."

45. In fact, as is apparent, the retention has not been released by Mourant Ozannes. That is obviously a matter that is between the Hardmans and Mourant Ozannes, but the fact that it has arisen at all does seem to me to illustrate the difficulties that can all to easily arise when a firm of advocates acts on both sides of a transaction and may consequently be caught up with a dispute in which a conflict of interest may arise between them. The response by Mourant Ozannes to Mrs Hardman was, predictably, that there was a clear dispute as to the extent of the Works and parts of the Additional Works and whether they had been completed, and in the result, they would not release any part of the sum. Consequently, at this stage the Hardmans went to other lawyers and they instructed AFR. The Batistes have instructed Haskins Legal. The matter then proceeded, although in the event proceedings were not commenced until December 2014. In the meantime, works were put in hand by the plaintiffs based on the report that they had had from Mr Torode.

46. These proceedings were commenced in December 2014 and defences were duly served taking issue with the items which are set out as being breaches of contract in a Scott schedule. The terms of the cause in general are that the items which are referred to in the Schedule comprised breaches of contract in that the defendants failed to carry out the development and other works in or to the property, including the Works and Additional Works in accordance with all permission and licences required from the appropriate authority and all building regulations in force at the relevant date including, without prejudice to the generality of the foregoing, install the drains serving the property in accordance with the requirements of the appropriate authorities and building regulations; they failed to carry out the Works and Additional Works to the satisfaction of the plaintiffs; they failed to carry out the Works and Additional Works in a good and workmanlike manner; Further particulars of breach, it is said, are set out in the Schedule which I will come to in a minute. The losses claimed are the total of the sums claimed in respect of the Schedule.

47. The defences which were eventually tabled in February 2015 effectively deny breach of contract except in certain minor respects. They take the point that the requirement was to complete the works to the reasonable satisfaction of the plaintiffs rather than to their satisfaction in any absolute terms; they admit certain rectification works are required, as previously indicated, but which at that stage, in fact, comprised sums amounting to £3,000 odd. It is suggested that there is a lack of full and proper particularisation of the breaches that are actually claimed and, save insofar as is admitted in the answer to the Scott schedule, it is denied that the plaintiffs have suffered any loss whether as alleged in the cause or in the Schedule or at all. There follows the counterclaim by which the defendants claim, as I have indicated, payment of the Additional Retention or at least the balance of the £24,500 above the amount that they had admitted.

48. Matters proceeded forward with expert reports and evidence being required. On behalf of the plaintiffs the expert evidence was given by Mr David Torode who had been involved in the matter for a long time. His report was dated 7th May 2015 and it provided his opinion and comments on the various items contained in the Scott schedule and on which he had previously advised. The defendants obtained an expert report for the purpose of the

proceedings directly from a Mr Gary Michael Naftel whose qualifications are MCIArb MRICS. He is a qualified building surveyor, and gave his history and qualifications and experience, set out the details of the material that he had seen and gave his report on the various matters which, at the end of the day, was actually to the effect that a sum slightly less than the sum offered by the defendants previously was appropriate to be paid, the sum of £2,574.30. He indicated that in respect of about seven of the 25 items listed on the Scott schedule, a small amount should be offered in respect of a possible admission of defect but he made various points as to the absence of any real defect, the fact that he said the works had been unnecessary or had been done for another purpose rather than the purpose simply of repairing the breach, that they had been excessive either in quality or excessive in quantity or that the plaintiffs had, in effect, been overcharged. I will deal with those matters when this judgment gets to individual points.

49. There was an experts' meeting on 16th June. A joint statement was issued by the experts on 22nd July which was to indicate the matters where they agreed and where they disagreed and, in fact, this really simply confirmed differences; it may have varied in a minor respect the amounts that were ultimately accepted to be paid or were being offered because, at the end of the day, there was an amendment to the pleadings whereby a sum of about £4,100 was conceded as being proper deductions from the amounts that the defendants ought to receive from the retention for the property but otherwise it was maintained that they should be paid in full.

50. The matter came on scheduled for a hearing for three days in this court from 1st to 3rd September. In fact - and unsurprisingly given the number of witnesses, the number of points and the experts - it has taken five days, there having been added hearings on 14th September and yesterday, 23rd September. It came on before myself as Lieutenant Bailiff with Jurats Ferguson, Helyar and Grut sitting at the Jurat panel. For the plaintiffs, Advocate Mark Ferbrache appeared and Advocate Sarah Collins appeared for the defendants.

51. The court received evidence of fact from the following witnesses. For the plaintiffs Mr Hardman gave evidence according to a long witness statement describing what had happened and the points of complaint that were made and Mrs Hardman gave evidence broadly confirming what her husband had said and supplementing that where she personally, but not he, had been present for particular matters. They were cross-examined on their witness statements. Also Mr A D Le Page, the builder who carried out the remedial works, gave evidence according to his statement and he too was cross-examined.

52. On behalf of the defendants, Mr Nigel Batiste and Mr Christopher Batiste both gave evidence according to their witness statements on the relations that they had had with the plaintiffs and what had happened, as far as they saw it. Mrs Linda Batiste was called as a witness, although it was not clear to any member of the court what relevance her evidence had to any of the material matters and her oral witness evidence was consequently very short. Finally, Mr Nick Batiste, the builder, a cousin of the defendants, also gave evidence about the work that he had done and expressed his view as to the accuracy or otherwise of the complaints that were made.

53. The Jurats wish to state that they found the Hardmans to be sincere and reliable witnesses, thorough and careful. They felt they gave evidence well. They also felt that they could rely on their evidence and they could say the same as far as Mr Le Page was concerned; they found his evidence satisfactory and something they could safely rely on. They felt, they say, less confidence about the evidence of the defendants. In particular, they are of the view that the defendants' recollections of events may well have been coloured by the perception which I indicated earlier that they had been, as they saw it, taken advantage of by the Hardmans who had unreasonably (in their eyes) sought for matters to be dealt with and insisted on the letter of the terms of the contract that was entered into. The Jurats feel that this evidence, and this

attitude towards their contractual obligations which is, in fact, misplaced, has somewhat coloured the evidence of the defendants, and they therefore do not feel that they can therefore be so confident in relying on the evidence of the defendants. It follows from this that they will place more reliance on the evidence of the Hardmans and Mr Le Page as against the evidence of Messrs Batiste where there is a conflict.

54. As regards expert witnesses, the expert evidence on behalf of the plaintiffs consisted, as indicated, in a report from Mr David Torode. The expert evidence for the defendants was a report from Mr Naftel. Advocate Collins submitted that the evidence of Mr Torode should be viewed cautiously and, indeed, should not be accepted in preference to that of Mr Naftel because of his lack of independence. Her submission was to the effect that because Mr Torode had been involved in the proceedings from the outset as valuer on behalf of the mortgagee and had also given a further report to the Hardmans in March 2012 reporting on the various defects in the property then, when he came to give evidence on the proceedings in court his evidence should be regarded as being partisan in the sense that he would be defending the position that he had already maintained on the Hardmans' behalf. The Lieutenant Bailiff asked her whether she was seriously criticising the integrity of Mr Torode and it seemed to me that what she was really, perhaps, saying was that Mr Torode must inevitably have come to the matter with a preconception which would have prevented him from being objective and impartial. That is a submission that the Jurats, as the Lieutenant Bailiff indicated to them, would have to consider for themselves.

55. As regards the expert witnesses, the Jurats' opinion is that they were not persuaded by Advocate Collins' submission with regard to the alleged lack of independence of Mr Torode. They, in fact, found Mr Torode to be a competent and impressive witness who gave evidence that appeared logical and carefully considered, who answered questions well and was able to deal with matters that were put to him. They felt that they were able to have confidence in his opinion. Regrettably, they did not feel the same way with regard to the evidence of Mr Naftel. The impression which the Jurats gained was that Mr Naftel had, indeed, come to the matter, rather than giving an impartial opinion, with a view of maintaining a case and looking for the points that would actually favour the case that his clients were making. They conclude this from matters in Mr Naftel's report such as his willingness to express his opinion as to the motivation of the plaintiffs - plainly a matter entirely outside his expertise – and his attitude to matters that were demonstrable facts which, when put to him he was then unable to deal with but simply sought a way round. In all, their impression of Mr Naftel was therefore far from favourable on that score and it follows in consequence that where there is simply a conflict of evidence between that of Mr Torode and Mr Naftel, they prefer the evidence of Mr Torode.

56. Pursuant to section 14(2) of the 2008 Royal Court Reform Law 2008 the Lieutenant Bailiff did not sum up to the Jurats in open court but retired with them. In the course of this she reminded the Jurats of their respective roles, namely that the Lieutenant Bailiff is the sole judge of matters of law and procedure and that the Jurats must follow her directions on those matters but that the Jurats are the sole judges of questions of fact. She directed the Jurats that insofar as she might ever herself appear to express any views on the facts when guiding their deliberations, the Jurats must ignore these and they should form their own independent judgment.

57. The remainder of this judgment therefore sets out the law on which the Lieutenant Bailiff advised the Jurats in the course of their deliberations. Insofar as holdings of law are referred to, they are holdings of the Lieutenant Bailiff and where this judgment sets out findings of fact and reasons therefor, they are the findings and the reasons of the Jurats.

58. With regard to issues of law there are, in fact, few that appear to arise. The first general issue raised was whether on a true construction of the documents that I have read the reference to

works being done to the satisfaction of the plaintiffs must mean to the *reasonable* satisfaction of the plaintiffs. Advocate Collins submitted, that that plainly must be the case. I did not understand Advocate Ferbrache to dissent from that. It is quite plain that at the extreme, it cannot be the case that the plaintiffs can simply express dissatisfaction on an entirely arbitrary or unreasonable basis. In my judgment, therefore, there is implicit in this term, and I think Advocate Ferbrache accepted this, that the satisfaction of the plaintiffs was to be judged on an objective basis and consequently one could review any expression of dissatisfaction by the plaintiffs to see whether in all the circumstances that was reasonable. Nevertheless, that would, of course, leave open an area within which, if a reasonable party might express dissatisfaction the fact that the reviewer, (be it in this case a judge or a Jurat) might come to a different conclusion, was not really to the point. The point was whether the *plaintiffs'* dissatisfaction or satisfaction had been within the bounds of reasonableness and the Lieutenant Bailiff therefore advised the Jurats accordingly on that issue.

59. The second issue of law which arose generally was that Advocate Collins argued that because the doctrine of *caveat emptor* applies in the law of Guernsey, the Hardmans could not claim in respect of any defects in work which were there when the property was purchased, ie at 29th September 2011. Advocate Ferbrache, in answer to that, points to the general conditions H3 and H7 in the Conditions of Sale which refer to the warranties that were actually given by the vendors in that case, and to the fact that they continue and subsist both up to and after completion. The Lieutenant Bailiff agrees with Advocate Ferbrache on this construction. The doctrine of "buyer beware" is simply a doctrine which negates any general implication of representations on a particular matter being made to the proposed purchaser. In fact, the position, in the case where a warranty is given is that what the buyer is "bewaring of" is only of there being some defect in respect of matters that are not warranted. There is no need to "beware" in respect of the subject matter of warranties because they are warranted. Consequently, the warranties given in respect of the quality of the works are not to be negated or to be reduced by virtue of this doctrine. The Lieutenant Bailiff therefore advised the Jurats that they did not need to have regard to that doctrine; they need have regard only to the principles with regard to assessment of the scope of the warranties, covenants and suchlike matters, in themselves.

60. It follows that the questions for the Jurats to decide in relation to each item on the Scott schedule for which money is claimed is whether they consider there was a breach of the contract in the particular terms as to completing the relevant works: firstly in time, secondly, in a good and workmanlike manner and of proper materials, thirdly, to the reasonable satisfaction of the purchasers or, fourthly, indeed, in any other respect which might arise in relation to a particular item in the contract and constitute a breach of its terms.

61. If and where the Jurats found such a breach, the next question would then be, what was the proper amount of the damage suffered by the Hardmans in respect of such an item? Bearing in mind the various objections raised, the Jurats would have to consider: firstly, the objection that the defendants had not been given a fair opportunity to rectify works where this had been raised, but had simply been faced with a claim, after November 2012. They would have to consider whether that was a reasonable reaction of the Hardmans to the situation in which they found themselves. They would secondly have to consider objections that the work done by the plaintiffs had been wholly unnecessary, as it was said, not done to remedy a breach of contract in that they did not remedy an actual defect or were "betterment" in the sense of providing something better than what the plaintiffs were entitled to expect by way of performance of the contract. They would also, thirdly have to consider whether they were excessive in their costs for being of too high quality or of being excessive in their costs for being an overcharge by Mr Le Page. These being the various points that were raised, the Jurats would have to consider each argument as it applied to any particular item claimed.

62. As to all these points the general direction given by the Lieutenant Bailiff to the Jurats was that they must consider the issue whether the Hardmans had behaved reasonably in the expense which they had incurred and as to which there was no dispute as to the fact of such amounts having been incurred, and which they were seeking to recover from the defendants. This was the issue raised by Advocate Collins as being the plaintiffs' obligation to mitigate loss. The obligation arises on the basis that the party who has suffered loss is obliged to take all reasonable steps to ensure that that loss is kept to a minimum; they must not overspend or be extravagant, as it is unreasonable to do so.

63. Consequently that issue would have to be judged on that principle. The Lieutenant Bailiff advised the Jurats, however, that in considering this they could take the following matters into account. Firstly, by this time in the history, it was the defendants who, by definition, should have provided the relevant item to the relevant standard, and the plaintiffs would be remedying the defendants' breach of contract. One only gets to this position if, in fact, a breach of contract has been found. It might be thought to lie ill in the mouths of defendants to complain and nit-pick about what the plaintiffs did when they (the defendants) were in breach. It would follow that the burden would really be on the defendants to show that what the plaintiffs did was unreasonable if they wanted to rely on the objection that they had failed to mitigate their loss. The duty to mitigate one's loss only goes so far as obliging a party who has been placed in an invidious position by the admitted unlawful act of the defendant to be reasonable in doing what he did to attempt to remedy it; therefore, there was a reasonable latitude to be allowed to the plaintiffs in considering the question whether they had mitigated their loss.

64. The second point which is linked to this is that if one is remedying someone else's breach of contract by a failure to complete works, it is likely to be reasonable to do the works in a proper fashion according to current good practice. If one is remedying a breach of contract by poor workmanship, it is similarly likely to be reasonable to do the works to proper objective standards. Consequently, arguments that the works could have been done more cheaply or in a less thorough way were to be viewed against that background and the Jurats, (the Lieutenant Bailiff suggested) might test any objection by asking whether it appeared that if the party concerned, here the plaintiffs, had been spending their own money without recourse to anybody else, they would reasonably be likely to have done what they did or whether they would have done something lesser.

65. Thirdly, it was pointed out that, broadly, the defendants did not take any issue with the costs of what the plaintiffs actually did as being excessive for the works actually done. There were one or two exceptions, in respect, for example, of the rigid insulation being replaced and the costs in relation to removing and reinstating the garden shed, where this point was apparently taken but, the defendants generally only tended to argue that the work actually done was excessive work. This, as already indicated, meant arguing that the result which the defendants had undertaken to achieve could have been achieved and reasonably should have been achieved (not quite the same thing) by other, lesser, works than the plaintiffs did, ie that the works that the plaintiffs did either went further than reasonably necessary to achieve the proper result, or were of a higher quality than reasonably necessary, or introduced an element of improvement which was outside and beyond what the defendants had undertaken to achieve.

66. So these were the general directions which the Lieutenant Bailiff gave to the Jurats with regard to their deliberations about the individual items on the Scott schedule. Where any further directions are particularly material with regard to an item, they will be referred to in due course. With this introduction, therefore, I turn to the issues on the Scott schedule.

67. Items 1 and 2 refer to water entering through the head and reveals of the external door opening in the west gable of the lounge and the oversized door and frame fitted into the

external door opening in the west gable wall of the lounge resulting in the door hinges being sunk into the plasterboard reveals. They are dealt with together at an actual cost of £1,178.50. The complaint, in effect, was that the original door was too big; it had been rammed in and buckled the tanking, which was the damp proof tanking, and the breach therefore alleged was poor workmanship. The dispute between the parties rested really on the scope of the works necessary to deal with this.

68. This was part of the Works, and the defendants' expert, Mr Naftel, accepted that the works did not fulfil the contract – in other words, that the plaintiffs' dissatisfaction was reasonable. He suggested that a sum of £500, though, was a fair offer to deal with this because, he said, the damp proof tanking could have been adequately repaired using the original installed door units (which the purchasers, he suggested, had accepted because they had not objected to these as doors any earlier) by taping the tanking material to the door frame. It was not necessary, as Mr Torode said, to put in the material extending beyond the door frame; it only needs to extend far enough to deposit water on top of the frame because once this was taped, that would keep the water out of the interior of the room and Mr Naftel expressed his personal opinion that the plaintiffs were opportunistically seeking to get a new door of a preferred design. The defendants themselves say that the door was not too big, and it was in place before the sale of the property.

69. The claim, however, is not in respect of the charge for a new door because this was apparently obtained from Bredoyle at no additional extra cost. This door is, in fact, shorter, and smaller than before, the result being that it will now open and close properly, when before it did not. The previous door, it appears and Mr Torode suggested, had actually been constructed to a size that did not take due account of the thickness of the plasterboard that was going to be placed on the walls, - which was why the hinges had to be recessed. Mr Torode also said that, in practice, the tanking material would require to be extended so that it came beyond the outer edge of the wall itself now that the original tanking had been buckled by ramming the original door frame in and had split, and he said that this was the advice that was given by the tanking manufacturer. He pointed out that this was recommended good practice in the installation of tanking in itself, and Advocate Ferbrache submitted that the plaintiffs were not required to accept a "fix", as it were, in terms of the quality of the job, but were entitled to expect to have what they originally had contracted for. This was especially if it was good practice but also because this was required by the damp tanking manufacturer to support the guarantee of the integrity of the damp proof system which the Hardmans were entitled to. Consequently, it was entirely reasonable to remedy the matter by removing the door, repairing the tanking in the way indicated and restoring the door. These were the charges which had been made.

70. The Jurats are satisfied that this item is properly claimed, that this response was a reasonable response by the Hardmans to the position which they were in for the reasons indicated by Advocate Ferbrache, and they will award that item.

71. Item number 3 is a similar matter relating to damp ingress over the window. This arose because of water stains through the reveal above the window in the west gable. The answer here that was given by the defendants' expert was that the damp staining that was complained of could have been caused by condensation rather than water ingress. He disputed damp visibility on the plasterboard. and that the tanking was incorrectly fitted as before; therefore there was no defect proved (he said) and therefore no works were necessary. Mr Torode said that the matter was exactly the same as the matter in relation to the door; it required taking the window out and trimming it back, which effectively happened, to the correct size and re-positioning the damp proofing and so forth to the outside. A lot was made of the fact that Mr Torode did not take any moisture readings to justify (it was said) his opinion that there was damp in the wall. Equally, however, Mr Naftel had not taken any damp readings either.

72. The Jurats, at the end of the day, have decided that they prefer the evidence of Mr Torode with regard to this. They therefore award this item. They take the view that this is a matter that is properly claimed for similar reasons as above, and consequently item 3 is awarded.

73. With regard to the lime pointing, there is item 4 which is to the effect that the lime mortar pointing to the external face of masonry walls was generally insufficiently bedded in the joints, and was breaking away in places. The remedy intended was to chop out the defective pointing, chase out deeper grooves between the stones and re-point with matching lime mortar and sharp sand. The cost of this was some £586. The dispute in this instance is: was there a defect at all?

74. Mr Torode says that when he inspected the pointing it was badly done because it was not bedded deeply enough; if you do not bed it deep enough it can fall out easily. It required to be overhauled and re-bedded properly. The narrowness of the grooves between the stones, which was prayed in aid by the defendants as being making it impossible to insert pointing to a great depth, was really irrelevant because, he said, one needed either to dig deeper or widen the grooves and on no basis should re-pointing properly done in a building refurbished at the time this was done have been falling out by the time, some 18 months later, when he carried out his detailed inspection.

75. This was one of the items which Advocate Collins said depended on the "buyer beware" argument that I have already rejected as a matter of law, because, she said, it was in place before the completion of the conveyance. I observe that it was not, of course then visible, and the complaint here made is with regard to quality of workmanship. The dispute between the experts is really the factual dispute, whether the pointing was too shallow and was falling out, or was so brittle that it was on the verge of falling out, which was the factual evidence given by Mr Torode from his inspection. The defendants objected from their own personal knowledge that this could not be the case, and produced a photograph showing them actually doing part of the pointing and indicating, it was submitted, that, in fact, the depth of the pointing was perfectly adequate. Mr Naftel supported them, but from the photograph.

76. The claim, it is to be observed, is a general one about overhauling, and was not necessarily a claim in relation to the entire pointing everywhere. With regard to the question of whether pointing was falling out or not at the time, and whether it had been properly done, the Jurats prefer the evidence of Mr Torode to that of Mr Naftel and the defendants. They are satisfied that the pointing was not done properly and that consequently it was reasonable and proper that it should be overhauled and they will allow this item. They do not consider, and they are not satisfied by the proposition that over a period of 18 months pointing could reasonably have been falling out to the extent that was indicated to be factually the case here. They are satisfied that this item was required and was reasonable.

77. Item number 5 is the quality of fencing and I am going to leave that until I deal with item 25 in relation to the positioning of the shed.

78. This means, moving on through the Scott schedule, that one then comes up to items 6, 7, 8 and 9 which together are the defects that are complained of in relation to the drainage system.

79. Item 6 is the cost of enlargement of a rear soakaway. This is a matter I have not yet mentioned. The plans for the drainage to the property as converted showed what had been known as grey water, (which is a minor species of foul water coming from wash basins and suchlike, and is to be contrasted with noxious effluents that comes from a toilet) drained to the rear of the property passing along the back wall of the garage block towards the northwest where it would descend into an interceptor and then go through drains laid underneath the position of the new conservatory that was being erected to connect the two, continuing to the

front of the property, connecting there to a further interceptor and on to an existing cesspit in the front yard to the property.

80. What, in fact, happened was that whilst the toilet which was in the corner of the garage block nearer to the conservatory was, in fact, connected up to drains in the manner indicated, (ie draining out under the conservatory and forward to the cesspit at the front), the outflow from the wash basin, shower and bath in the en-suite bathroom in this converted garage block was not. These outflows were, in fact, piped to a new and completely extra soakaway that was dug in the rear part of the garden, beside the fence D – E, which also took rainwater from the downpipes on the property as well.

81. This was not according to the plans on any basis and there has been a lot of dispute about whether it could, or should, be taken to have been reasonably acceptable when the works were done as explained below. This dispute is connected with item 7 which was the re-routing of the foul water drainage, generally around the house.

82. What happened was that what the plaintiffs did was what they were advised by Mr Torode. This was that what was now going to be necessary was to re-route the toilet drainage, picking up also the bath/shower/basin water drainage on the way, back towards the southeast of the property, around the garage block and out to the cesspit and the drainage at the front by that route – in other words, not going underneath the conservatory but going round the building. There were two reasons for this: firstly, the plaintiffs had obtained a report from Drainforce in March 2013 which did a camera survey of the various drains in order to try and find out what was going on and causing the smells and the back-ups of water within the en suite which they had complained of. This report indicated that, firstly, there was evidence of blockages in the section of drain from the toilet outlet that had been installed underneath the conservatory, which therefore indicated that there were question marks about the integrity and reliability of that section. Secondly, if it had been attempted to try to use the drain that was underneath the conservatory by re-connecting the bath and shower and wash basin grey water into the drain from the toilet so as to exit by the route which was originally envisaged by the plans, one simply could not obtain enough fall in the pipework to enable that to be done. This has been a point of great contention between the parties' experts.

83. So to deal with both these points, item 6 and item 7, the routing of the internal drainage system was re-routed around the outside of the garage, and the soakaway in the rear was enlarged to a suitable capacity but thenceforth would take only storm water.

84. In respect of his advice to do this work, Mr Torode says that what happened was that having actually ascertained what the state of the drain system was, which plainly was not and cannot arguably be in accordance with the plans that were approved by building control, and in trying to consider what was the best thing to do, he consulted building control as to what they might require and this was the answer that they came up with. Consideration was given to attempting to lay the drains in accordance with the plans but this simply could not be physically done because of the falls that were required and in the end building control both required that the drains be laid in the way that they were re-laid, and also required that the soakaway at the rear, albeit never one that was actually on the plan at all, should be enlarged in order to be of adequate capacity, because it is liable to overflow.

85. It is the case, and this is relied on by the defendants, that this is an area with a high water table. It is inclined, therefore, to flood on occasions and consequently this was a matter that would need to be taken into account in relation to the design and capacity of any drainage system that was undertaken. What has happened in relation to these defects is that Mr Torode says, in relation to the flooding of the garden and the backing up of bath water complaint, that there was no rear soakaway on the deposited plans and that on investigation of the grey water drainage system this was found to be run into such a soakaway, which was not just

inadequate, but in fact illegal. It was illegal because it was contrary to building regulations to run grey water into a soakaway taking storm water, and it was also shoddily constructed, full of builders' rubbish and detritus and so forth at the rear of the property. Building control, when they were consulted, required the grey water to be piped into the proper drainage system and also required the enlargement of the soakaway.

86. The defendants say that the rear soakaway was an "extra", it was not required by the plans but it was actually installed because when they did the drainage works Mr Batiste took the view that the existing soakaway or cesspit at the front of the property was not going to be adequate; the cesspit was not going to be able to cope with all the water that was put through, and therefore it was in fact to the advantage of the plaintiffs to have this additional soakaway at the back. He also says that this rear soakaway as a soakaway was working correctly; the problems were due to the high water table and not any defect in the soakaway, and it was not necessary to enlarge the soakaway.

87. It is quite plain in relation to this issue that the plaintiffs can complain that they undoubtedly did not get work according to the plans. The real issues on this particular point, are whether the soakaway needed enlargement, and in context of the works that were required to re-route the foul drainage system, the other issue that arises, and, of course, what is said in relation to this is also related to the soakaway point, and I will come back to that in a moment. In relation to the other issue, Mr Torode says that the foul water drainage from the toilet was found to be prone to blockages by the survey owing to the poor construction of the gradient. Bellying of the pipes was discovered, and evidence of previous blockages. Poor access to the inspection chamber prevented good inspection, cleaning and access, and this was apparent from the Drainforce report. It was not possible to allow the continued system of grey water drainage into the rear soakaway because this was contrary to the applicable building regulations.

88. The building regulations in force at the time were those pre-2012 and they required that there be a separation of drainage as between rainwater or storm water on the one hand, and foul water, which included grey water, and bath water, as well as sewage and other effluents, on the other. The two, rainwater and foul water, should never come together. The position, Mr Torode said, was that that was the original position and while the regulations appear to have been relaxed in 2012 to allow that on occasions one may actually pipe grey water into a storm water soakaway, that would require a permit and special permission to do so. It was not in accordance with the regulations that actually applied to this development because its status was to continue under the original regulations, and in fact, when building control was approached they would not permit it. Consequently, the plaintiffs were obliged, in effect, to do what building control really wanted. As previously indicated, it was not possible physically to connect the bath and basin water drainage to the relevant interceptor, and the foul water drainage therefore, with the problems that had been revealed by the Drainforce survey underneath the conservatory, meant that the only viable solution to meet both this problem and the soakaway problem was to construct a new drainage system for both around the outside of the former garage block.

89. Mr Naftel's evidence was that grey water drainage to the soakaway was permissible under the building regulations in force when the remedial works were done. He therefore contended that the plaintiffs had not mitigated their loss because they should have persuaded building control to allow this. Consequently, they had not done what they should have done, which was either to persuade building control to allow the grey water to remain routed into the soakaway or alternatively to re-route the drainage from the bath to the existing under-conservatory drainage from the toilet. His contention was that it was perfectly possible to divert the bath and basin drainage to the relevant interceptor in the system and that the levels were, in practice, adequate for this. This was because you could cut back and adapt elements of the pipe system, and you did not require the depth of protective material for such piping

prescribed by building regulations, in this location. Therefore his submission was that the issue could have been dealt with in that way and therefore at the cost proposed by Drainforce, at the initial stage, namely £1,500.

90. In the course of cross-examination Advocate Ferbrache put to both Mr Naftel and Mr Batiste that the pipe that was being used was a "flexible" pipe which both of them appeared at first to dispute, until this was demonstrated by reference to definitions in the Guernsey Technical Standard. Such a pipe, consequently could not simply be installed and left, but would require to have an encasement in concrete underneath the ground surface. When this was pointed out to Mr Naftel, he nonetheless said that in his view you did not require to have that depth, (100 millimetres) of concrete above the pipe and below any surface because there would not be any traffic on it and that requirement was only in relation to places where one might need vehicles and such like and, hence, heavy pressure. It was pointed out that this was not what the regulations said but Mr Naftel persisted in his views.

91. At the end of the day, the position then is that the plaintiffs undoubtedly did not get work according to what they were entitled to according to the plans and what they did get was not satisfactory because it did not work properly in the context of either an appropriate drainage system that did not back up or smell, or a system where the relevant soakaway did not flood unduly. Mr Naftel appeared to regard a high water table as being something that provided an excuse for a soakaway not working rather than it being a matter that would need to be taken into account by the dimensions of the soakaway, or whatever system was introduced.

92. The Jurats unanimously prefer the evidence of Mr Torode as regards these drainage items both as to what was physically possible and with regard to permissions. They are satisfied that what the plaintiffs did in context was reasonable. The plaintiffs were, of course, faced with a situation that they now had a drainage system that was in contravention of building regulations and in those circumstances it is right to say they could hardly be negotiating from a position of strength. It is no part of the position of a plaintiff faced with a difficulty like that to fall over backwards in order to seek to protect the pocket of the defendant who has done wrong, and that is consistent with the direction which the Lieutenant Bailiff gave the Jurats that the question of reasonableness should take into account what was reasonable so as to achieve what the plaintiffs were reasonably entitled to expect under the contract, but starting from the situation in which they found themselves. Consequently, the Jurats allow both those items.

93. I turn then to item 8. This is the pipe work to remote sewage emptying point. This issue arose because the remote emptying point for sewage is down the driveway to the property and out on to Longue Rue. Mrs Hardman gave evidence that initially at the very beginning when the sewage from the cesspit was emptied it was said by the sewage operative to be "thrashing around" and consequently unsatisfactory and probably indicative of a leak. The Batistes, - Mr Batiste, the builder - came back to remedy this by putting a concrete dome over the top of the end of the pipe to the actual entry point itself and cutting off the end of the pipe, which he said had been superfluous anyway.

94. The result, however, was still not entirely satisfactory and when this was investigated it appeared that both the plan and what had been installed was, in fact, a standard form of orange pipe which was "grade B", whereas normally Mr Torode said, although I do not think Mr Naftel agreed with him, it would be normal to install a blue or grey pipe that was a heavy duty "grade C" pipe for water under high pressure. Mr Naftel relied on the fact that the lower grade pipe was, in fact, specified by the plan and he also relied on a reported conversation with building control who said that if you did use that kind of pipe it would be all right provided it was thoroughly encased in concrete, either of 100 or 150 millimetres all round. Consequently, he said, there was, in reality, no defect. His reasoning for this was that there was no building regulation actually requiring heavy duty pipe, it was not specified in the

contract, the building control officers had told him the orange pipe would be acceptable if encased in concrete and his clients had told him that it was encased in concrete. He was therefore of the opinion that there was no defect requiring remedy.

95. The plaintiffs, on the other hand, (Mr Torode, and I think the Hardmans also) say that, when the matter was investigated and the pipe was exposed, it turned out that the orange pipe along its length had not been fully encased in concrete. It might have been laid on concrete but it had not been fully encased. It therefore did not comply even with the possible solution that building control might have been willing perhaps to approve. In the circumstances, even though the pipe installed was of the relevant grade on the plan, (grade B), it could not have been regarded as having been installed in a good and workmanlike manner, because it had not been encased in concrete as required either by building regulations or by good practice and, indeed, (Advocate Ferbrache pointed out) there is a note on the plan for which the planning permission was granted which states that the works will be done in a good and workmanlike manner, such that proper installation is implicit in the plans themselves.

96. So there is a factual dispute as to whether the pipe was still unsatisfactory in operation after the concrete dome was added. The defendants say that this cured the matter and that they were told this by the sewage operative who also apparently empties Mr Nigel Batiste's sewage tank, as well. There is also a factual dispute in any event, as to whether, if it was not, it was nonetheless fully encased in concrete as per plans, regulations and building controls.

97. On this item, the Jurats prefer the evidence of the plaintiffs, and of Mr Torode in particular. They find that this item was not installed to the proper standard required by building regulations and by good practice, and was not satisfactory. They also find that once this was discovered it was reasonable for the plaintiffs to do as they did, and replace the pipe that was at best not satisfactory even if it might be working after a fashion, but was not in accordance with what they were entitled to have under the contract, with a version that would comply with the contract. They do not regard that as being betterment, but as simply actually restoring the position to the standard as it should have been.

98. Item 9 is the existing cesspit and interceptor at the front of the property which was found to be not sufficiently watertight. The contractual obligation here is, of course, for the Works themselves to be constructed in a good and workmanlike manner and to the reasonable satisfaction of the plaintiffs. The position was that the existing cesspit was found to be filling up over quickly. It was discovered, albeit some time later, that this appeared to be owing to excessive rainwater ingress, - water (storm water in other words) actual flowing into the cesspit itself.

99. The plaintiffs say, through Mr Torode who inspected this, that the interceptor and cesspit were inadequately sealed causing a lack of water tightness to an unacceptable degree. They were apparently supposedly sealed with a metal plate but some expanding foam had been used which was not effective. The remedy was to seal properly the entrance pipes of the interceptor and the cesspit itself according to a "hot bonding" process, and this is what was done.

100. Mr Naftel on behalf of the defendants said that the works that he understood had taken place originally, and by way of remedy, were adequate, - certainly once a rubber flange was added round the pipe and screwed in for added sealing - so the pipes had been properly sealed. He suggested that the pipes and actually the cesspit had been disrupted by works at the remote entry point. He was adamant that no requirement for hot bonding of the chamber itself was required but he later accepted that this was not what was being suggested; it was only hot bonding of the entry pipe around to the top of the cesspit, to seal the top of the chamber. Hot bonding the entire chamber was neither what was advised nor what had been done.

101. In the event, the difference between the parties, therefore, is whether this work needed to be done or not and the Jurats prefer the evidence of the plaintiffs, the factual evidence as to the actual fault and they also prefer the expert evidence of Mr Torode and they will award that item.

102. It occurs to me at this stage that I should have said, if I did not say earlier, that apart from the evidence of witnesses there was, of course, considerable photographic evidence throughout the case of pictures that had been taken by the plaintiffs and by Mr Torode, by Mr Naftel and, indeed, as works were done originally by the defendants themselves, which the court was able to look at and consider in connection with a lot of the items that were in dispute.

103. Item 10 was excessive rainwater ponding on the brick paved area at the front of the house. The contractual obligation in this case would be under the Additional Works which had to be constructed in a good and workmanlike manner and to the reasonable satisfaction of the plaintiffs. Evidence was given as to the extent of ponding and the fact that it happened. The defendants and Mr Naftel accepted that there had been ponding but they said, in principle, that ponding was inevitable because this is an area prone to flooding with a high water table, and they disputed that any ponding was excessive.

104. The matter had been remedied by the installation by the plaintiffs of an ACO drain, firstly, near the cesspit and, secondly, also near the wall of the conservatory. It was objected that this was never part of the contract in any event and was never part of the paving and was therefore betterment and was not reasonably required. In other words, it was an improvement over what was contemplated by the contract which the plaintiffs were therefore not entitled to claim for.

105. Mr Torode says that the defect occurred because the falls which had been laid in constructing the paving were laid badly, such that water actually flowed towards the building instead of flowing away from it. His evidence was that in that situation the only practical way of remedying this without re-laying the whole of the paving, ie lifting it all and re-laying it to proper falls, was to install the ACO drainage that would take the excess water away, which is what had been done.

106. Mr Naftel, as I have said, said that ponding was inevitable and relied heavily on the fact that the design drawings showed proper and adequate cross falls and he suggested there was no reason to think that these were not adhered to. I pause to observe that that approach rather ignores the effects in practice. Mr Naftel said that, in any event, the ponding of the water towards the building was not a problem because of the damp proof course in the walls. In the end, however, he did agree that ACO drains were the only sensible way to prevent ponding which you could not walk through without getting your shoes wet.

107. The defendants also objected that they were not given the opportunity to re-lay the paving which they said had obviously "settled" and could all easily have been taken up and re-bedded. The ACO drain was therefore not necessary, and the plaintiffs had spent too much on this.

108. The Jurats are satisfied by the factual evidence that there was ponding in this area of the pavement. They are also satisfied that it was beyond that which would reasonably have to be anticipated. They find that the design ought to have allowed for this and, indeed, the workmanship ought to have allowed for this. They are satisfied that the excessive ponding was caused by inadequate falls being laid. They note that by this stage works were not being done, in effect, by Mr Batiste as a builder but were in reality being done by the defendants themselves and with assistance from other members of their family, on a sort of do-it-yourself basis.

109. The Jurats then ask themselves whether in all the circumstances the installation of an ACO drain was a reasonable method of reducing the ponding to a reasonable level or whether it was excessive, and they have formed the view that, in fact, the installation of the ACO drains was reasonable. It was an alternative to taking up the paving and attempting to re-lay it, with the difficulties that that might have entailed and the question of whether that could or would be done fully satisfactorily in the circumstances and the disruption that it would cause. Their view is accordingly that it was reasonable to remedy this defect by installing the ACO drains, and this was not a "betterment".

110. They similarly form the view, as they have done in relation to other matters, that by the time these works came to be done it was not unreasonable for the plaintiffs not to ask the defendants to carry out works to remedy any further defects. The time had long gone on during which the defendants had been given the opportunity to remedy various defects which they had failed to achieve. In those circumstances there comes a point where it is quite reasonable for a party to say "Enough is enough. I do not have to give you any more opportunity and, indeed, I have lost sufficient confidence in your work such that if further matters arise I cannot be required to have you back to try and do it again". Consequently, they allow item 10 as well on the Scott schedule.

111. Item 11 is the absence of a timber gate on the line A-B. This is part of the fencing covenant in clause 4.2. The plaintiffs installed the gate that was to give access for the Johnsons' sewage lorry. Their complaint in this instance is that this was not done in a reasonable time. Even if there was no time limit in the conveyance itself, it is apparent how reasonably quickly that ought to have been done, and it should have been done, in compliance with the general timetable of all other matters that were in the contract.

112. It is agreed that this gate was not installed, and the dispute between the parties is whether the gate that was actually installed by the plaintiffs was of an unreasonably high quality. The plaintiffs say that because the defendants had not carried out their contractual obligation they did it themselves, they did it with a gate that was reasonable, of appropriate quality and at a sum that included the installation costs of doing it, of £2,484.

113. The defendants say that they were not given the reasonable opportunity to install the gate and if they had done, they would have installed a less high quality, and possibly a smaller gate. In fact, in some of the evidence it was suggested that the defendants did not have a particular regard for the Johnsons and were wishing to keep the gate down to a minimum, rather resenting the fact that the Johnsons had not actually agreed give up their right of way. It is not necessary for a finding of fact on that to be made.

114. The defendants say, as I have said, they were not given the opportunity to install the gate and if they had done so, Mr Naftel says you could have got an appropriate gate for some £500; that is all, therefore, that the plaintiffs should be able to recover. It is not entirely clear whether Mr Naftel's evidence was the cost of merely a gate or was intended to include installation. The impression was that he was talking merely about the cost of the gate and ignoring the matter of installation but the issue really is whether the plaintiffs installed a gate of appropriate quality that they were entitled to do, or of unreasonable high quality in all the circumstances.

115. In this context the Jurats again prefer the evidence of the plaintiffs which was to the effect that it was a reasonable gate to install in all the circumstances, fitting in with the fence that they were otherwise entitled to have and were having on the property. They are of the view that if the plaintiffs had been putting up the gate themselves voluntarily, they would probably have done the same thing. They therefore do not regard the argument of excessive quality as being justified and they are content that the entire cost of this item at £2,484 is allowed.

116. Item 12 is the installation of an electric gate on the driveway. The two issues that arise here are whether the plaintiffs were entitled to an electric gate at all or whether, in any event, the gate installed was actually below quality in the first place. The plaintiffs say that the gate that was referred to in the contract was plainly an electrically operated gate, having regard to the agent's particulars which specifically had said this, although this was not directly incorporated into the contract. The say that this is supported by the fact that the wiring for it, which was installed and visible before completion, was there - and, indeed, they say was pointed out to them as being for this gate by one of the defendants, although this is disputed - and the quantum of retention in respect of this item, which was as much as £5,000. The further point, of course, is also that, in any event, what the defendants installed under this obligation was actually an electric gate but was defective and was not to their reasonable satisfaction because of the fact that it kept breaking down and, indeed, operated on one occasion in a dangerous way. The plaintiffs say that the work they did to remedy their position was appropriate and the parts replaced were given back to the defendants. The total cost was £3,478.

117. The defendants say, first, that the plaintiffs had no right to an electrically operated gate because the contract only says "a gate". They say, in any event, that the gate supplied was up to standard and was left operational; they remedied it once when the screws fell out and they blamed Mr Le Tissier for having supplied screws that were too short when he supplied the gate or the parts of the mechanism to operate it. They also say they were unreasonably not given the opportunity to return and make a further remedy by replacing a bolt, which they had intended to do if the gate did not operate, once again. Therefore, they say the plaintiffs should not recover anything.

118. The Lieutenant Bailiff directed the Jurats that on the true construction of the contract and conveyance and in the events which had happened, the gate that was referred to in the obligation with regard to "a gate across the driveway" was an electrically operated driveway gate. This is a matter of law, being the construction of the contract. The Lieutenant Bailiff holds that this was plainly the true meaning of the contract in the context of the objective facts. The only evidence that it was not so was that of Mr Christopher Batiste, who objected that this obligation was "taken out" because the paved driveway was intended to be in lieu of electric gates. This was a contention that arose only in the course of evidence but there was no evidence that this notion was ever made known to the plaintiffs. In any event, it was inconsistent with the fact of an electric gate installation being attempted, and both the paving sum and the large retention sum for gates being included in the contractual provisions. There is also the matter of the further indication of an electric cable having been installed. The plaintiffs were never cross-examined upon their evidence that this was for a gate, or the defendants' assertion that it was only intended for lights.

119. In the circumstances, therefore, the relevant obligation relating to an electric gate by direction of the Lieutenant Bailiff, the decision for the Jurats becomes whether the gate that was installed was of appropriate operational quality or standard and whether the plaintiffs unreasonably failed to give the defendants the opportunity to remedy any defect. In this context the Jurats once again accept the plaintiffs' evidence of both the deficient operation and the events which have happened and they are satisfied that the plaintiffs behaved reasonably in the steps they took to get an electric gate installed across this driveway, in the sum of £3,478.

120. The next item is item 14, a relatively small item, which is the stand for a hot water cylinder. The hot water cylinder in the cupboard, (I think it was) in the garage block was installed as part of the obligation for the Works, and was to construct it upon a stand taking it up to an appropriate height. The dispute is whether the stand for this cylinder was up to a proper standard or was too flimsy or weak to support the cylinder adequately. This arose because it was discovered by the plaintiffs, after some time, that the cylinder had sagged leaving it

dangerously tilted towards and, indeed, touching an electric distribution board. On investigation it was found that the stand had been constructed of plywood which was too thin to support the likely weight of the cylinder when filled with water.

121. This defect is not accepted by the defendants. They deny that the photograph before the Jurats shows any tilt or, at any rate, indicates it with sufficient clarity. They say that the stand was perfectly adequate, and Mr Naftel gives it as his opinion that it could have been expected to give way earlier, ie when it was filled. If it had not done so then the sagging, or tilting, must have been caused by the plaintiffs' own builder.

122. This issue, therefore, is whether, on assessment of the available evidence, the stand for the hot water cylinder was constructed to a good and workmanlike manner and objectively should have been regarded as reasonably satisfactory. On the balance of probability the Jurats accept the evidence of the plaintiffs. They are satisfied that the cylinder was tilting unreasonably and having considered the various explanations for the tilt that are put forward, they are satisfied that, accordingly, the stand was not constructed of properly robust materials or in a good and workmanlike manner. They therefore award this item in the sum of £422.98.

123. Two items then arise in relation to the cost of insulation. There is firstly the insulation in the bedroom wing, ie the garage wing, where the issue is as follows. It was accepted that the insulation that was installed above the master bedroom was not installed to full thickness. It was initially agreed that 200 mm was installed and it should have been 300 mm, although the difficulty with this is that that is not possible in the centre of the construction within the roof without taking up decking that had been installed for storage purposes at a, no doubt, rather large cost, or losing the storage space. £300 is nonetheless offered by the defendants as being an appropriate compensation sum, because the defendants accept, through Mr Naftel, that there was a nominal failure to comply with the insulation regulations. They do not accept that this caused any damp or any other matters that the plaintiffs had also complained of.

124. The plaintiffs say that there was condensation in the ceiling owing to a lack of insulation, and that when they then discovered the lack of insulation and the defects, what was done was reasonable to improve the situation as much as possible. What they did - or what their builder did - was to put extra insulation in the side areas, ie where there was no decking, to obtain insulation there, and to compress the insulation into the area below the decking, to provide as much as possible. In order to do this work they had to construct hoods around the lights recessed into the ceiling; even if these should not strictly be called "fire hoods" it was necessary as a matter of good practice to provide protection round the uplighters in the ceiling that protruded through, and this was a necessary part of adding the insulation.

125. As I have said, the defendants do not accept that there was any condensation. They argue that only 150 millimetres of insulation was installed at the sides of the room owing to limits under the pitched roof, and this therefore did not even bring the matter up to regulations. They say that the hoods constructed over the lights were unnecessary and the works that were done were therefore excessive, exorbitant and were beyond mere good practice. They say £300 is the reasonable cost of doing what was appropriate, which presumably was just adding another layer of carpet insulation to provide the required thickness.

126. The Jurats have considered the circumstances here and the evidence and they take the view that what the plaintiffs did was a reasonable reaction in the circumstances to try to remedy as far as was sensibly possible the admitted shortcoming in the case of the insulation not having been to the required standard in accordance with building regulations, and in order to ensure that it should do as good a job as possible. In this instance they prefer the evidence once again of Mr Torode to that of Mr Naftel and they accept the plaintiffs' factual evidence. They are also satisfied that the work done to construct hoods over the light fittings was reasonably necessary in the circumstances. They will therefore award this item in the sum of £1,505.

127. The second insulation item related to rigid insulation boards in the main roof of the property. These were boards installed between the rafters on the slope, the internal slope, of the pitched roof and the issue was that these fell out. They had been supported; it appears from the evidence, by orange string nailed across the gap between the rafters to hold them in place. This did not appear to be working - whether as a result of gravity or wind is not clear. At any rate, the evidence is, and I think this is accepted, that one of the Mr Batistes had gone back and sought to remedy this at times by putting silicone between the rafter and the insulation board, or alternatively by sticking the insulation boards together with some form of tape. This was the situation that pertained in November 2012 when, once again, the insulation boards were dislocated. This was the item in respect of which Mrs Hardman had originally sought Mr Batiste to come back once more and do works but eventually, when he did turn up, said that they did not want him doing works at all any more and sent him away. That is a matter that the defendants rely on, on the basis that that was unreasonable, and they should have been given the opportunity to remedy this defect.

128. What happened was that this defect was remedied by Mr Hardman's builders in the sum of £396. The evidence is that what was done was to support them better with screws actually screwed into the side of the rafters and therefore holding them more firmly in place. The total work which was eventually said to be done in this respect, when Mr Le Page eventually produced his work sheets in relation to the job, was for one man for one week, in effect, but this said to be a fiddly job in a confined space. It was awkward to do and that was the justification of this amount of work.

129. There was a good deal of cross-examination about this and the question of whether, in fact, this work had ever been done at all. Mr Naftel said that the means of support originally used was entirely normal and adequate; he had inspected, and his inspection did not even indicate that the work had been done; the charge was therefore plainly excessive and would have been excessive for this kind of work in any event. However, his inspection on examination turned out to have been rather cursory. He had simply gone up into the hatch gap and stood half way into the loft and looked around. He had conducted no direct or closer inspection.

130. At the end of the day, once again the issue here for the Jurats is, firstly, the issue of whether the works were actually done to begin with, and if so whether they were necessary. The Jurats accept, having looked at the photographs and having heard all the evidence, that these works as claimed were necessary and they accept that they were done, in fact. They once again prefer the factual and expert evidence of the plaintiffs and Mr Torode to that of the defendants and Mr Naftel.

131. The next question is whether it was unreasonable for the plaintiffs not to allow the defendants the opportunity to try and remedy this matter. Again, the Jurats are satisfied that it was not unreasonable. On the clear evidence, there had been previous attempts on at least one and probably two occasions to remedy the defects in this part of the works, that had not worked. There comes a point where it is not reasonable to allow a builder yet another opportunity to come back and do work that has not been done properly in the first place.

132. The final issue, however, is the question of the reasonableness of the charge. This is put in issue because it is said that £396 was an overcharge. The point here that was made was that the builder's time sheets were produced only very late in the day, and it was suggested by Mr Naftel that when time sheets are produced late in the day they very often tend to have been produced only for the very purpose for which they are now sought. He criticised Mr Torode for not having sought time sheets originally and made sure, therefore, that the works as charged were only charged at what he (Mr Naftel) would have said was a reasonable fee and a reasonable amount.

133. The Jurats have considered this question, ie that of excessive charging, carefully because it arises in other contexts as well. There are hints here, and also, in particular, in relation to the shed, of a suggestion that the cost of the works which the plaintiffs actually did was excessive, not because what they did was excessive but because they were being overcharged. The specific argument put forward is that it was wrong to allow the works of repair to be done on a time and material basis rather than obtaining a fixed price contract. The Jurats reject that argument. They are of the view that in a circumstance like this the householder cannot be held necessarily to have to obtain a fixed price contract, firstly because it is probably not easy to do that bearing in mind the evidence there was (and which they accept) that until one starts doing the job one does not know what is actually going on and what may have to be done. They do not regard it as unreasonable to have proceeded the way the plaintiffs did.

134. Secondly, the arguments that are raised against Mr Torode, even if they were the case (and the Jurats are not satisfied that they are because they accept Mr Torode's evidence and take the view that his approach to the matter was reasonable), that would be a complaint against Mr Torode. In regard to that, the Jurats do agree that it might have been useful and preferable if Mr Torode had, indeed, insisted on time sheets being produced and produced to him at the time, but that falls rather a long way short of anything that can be laid at the door of the plaintiffs, who were reasonably relying on Mr Torode's advice. Mr Torode's evidence was that he knew that Mr Le Page was a reasonable and competent builder, he knew Mr Le Page was a builder whose habit was to charge his operatives at a standard rate of charge, even though other parties might charge less for labourers and more for specialists, (a matter which Mr Naftel criticised because he said that could well have produced a different result,) but Mr Torode took the view that, overall, when these sums were presented by Mr Le Page as being sums for which he proposed to charge, they were a reasonable charge.

135. The Jurats are not satisfied that that was an unreasonable course to take, although, as indicated, they take the view that with at least the benefit of hindsight it would have been better if Mr Torode had been more closely supervisory of what went on. However, that is not the issue in this case. The issue is whether the Hardmans behaved reasonably in response to the situation in which they found themselves because of the proven breaches of contract by the defendants. The Hardmans took professional advice. They acted on that professional advice. They do not, and the Lieutenant Bailiff so advised the Jurats, need to go so far as to second guess that professional advice for the benefit of the defendants, if it is *prima facie* reasonable and if they have no reason to think that it is unreliable. They are entitled to proceed on the basis that what they have been advised is what, in fact, a reasonable person would do.

136. In the circumstances, therefore, the fact that the Hardmans accepted Mr Le Page's bill and Mr Torode's supervision and advice that that should be paid means that the Hardmans behaved reasonably in response to the situation in which they found themselves. Instructing this work to be done, which the Jurats have found was done as Mr Le Page said, was therefore a reasonable thing to do and paying the amount that was charged was a reasonable step taken in the course of remedying the damage. It was not to be regarded, therefore, as a failure to mitigate loss in the way the plaintiffs behaved. Consequently, item 16 is allowed in full as well.

137. Item 17 is, in fact, agreed. It was the absence of a guard rail at £120.

138. Item 18 was the replacement of an earth bank outside, which is also agreed at £199.50.

139. Item 19 I think was a matter as to which no charge, and thus no loss, was alleged and consequently it does not figure.

140. Item 20 is that of moisture penetration to the wall of the west gable. This is only capable of being a breach of the contractual obligation for the Works to be done in a good and workmanlike manner and to the reasonable satisfaction of the plaintiffs. What happened was that Mr Torode advised that in the light of the damp problems being experienced, the west wall should be sealed in order to ensure that water penetration ceased. He said this was a cheaper option than opening up the wall to investigate the problems. Consequently it is submitted by the plaintiffs that this was a reasonable course of mitigation of damage in all the circumstances. It was also pointed out that the plaintiffs instructed the tanking expert in this regard. The cost of this is £850.

141. Mr Naftel says that it was actually totally unnecessary because a properly installed tanking system as there was, or at least as there would have been with the result being in accordance with Mr Torode's advice rather than Mr Naftel's advice, would in fact prevent water penetration. It was also Mr Naftel's opinion (although clearly outside his expertise) that the plaintiffs had done this for cosmetic reasons.

142. The issue here is: was this work necessary to bring the building up to the standard that the plaintiffs could reasonably expect under the contract or a reasonable thing to do in the circumstances in which they found themselves in order to mitigate the damage that they were suffering because of the water penetration which was a result of a breach of the contract, or did it go beyond that?

143. The Jurats have found this probably the most difficult point in the case. In the end, by a majority, they have come to the conclusion that it was excessive and should not be allowed. Jurats Helyar and Grut are of the opinion that it should not be allowed. Jurat Ferguson, in the minority, was of the opinion that it was reasonable to carry out this work to remedy obvious defects, and said it should be allowed. However, in the event and by a majority, the decision on item 20 is that that item is not allowed and consequently this £850 out of the claim will be rejected.

144. There then follows in the Scott schedule two items which again are not said to cause any loss.

145. Item 23 is the cost of the drain camera survey conducted by Drainforce. Once again, this arises as a consequential loss of the alleged breach of contract in relation to the drains which, in fact, has been found. The dispute here is whether it is recoverable at all. It was said by the defendants that it was not necessary and it was not recoverable because, in practice, it did not show any defects, Mr Naftel relying on the point that as far as the defects were concerned there was a statement on the top of the report that "no defects were detected".

146. Advocate Ferbrache pointed out that if you looked further down the report there were references to defects in the printed entries relating to the commentary on the drain run and actually, if you looked at the overall executive summary of the report, it was apparent that the report as a whole was saying that the drainage system in general was defective. The other point that was submitted by the defendants was that you could detect any real problems with the drainage system visually, and without a survey. The plaintiffs say that the survey was necessary because both Mr Torode and Mr Chescoe of Building Control agreed it was necessary. It was needed to identify problems and there were, in fact, defects in the drain which it showed up.

147. The Jurats have concluded that, in this context, commissioning a drain survey in the situation in which the plaintiffs found themselves was a reasonable response to the problems with the drains and that, in practice, it did disclose defects. Thus, the question whether it would have been allowable if, in fact, it had not disclosed any defects does not arise. They consequently allow the relevant sum (£353.50, I think it is) in relation to that item.

148. The defendants had offered to split this cost 50/50. It is, however, an item which the Lieutenant Bailiff advised is a matter which, in law must be awarded one way or the other. If one has liability for the full cost of an item, one does not avoid that liability simply by offering to split it which is what the defendants have done. Only if that offer is actually accepted by the other party as a compromise of the claim in that respect, does it affect liability.

149. Item 24 is a damaged blind behind the door. This was, at a late stage but shortly before the proceedings, accepted in the sum of £454 odd. That leaves lastly items 25 and 5 which is the combination of the fencing problem, the fencing covenants and the shed. As far as the fence is concerned, the issue in relation to the fence between most of the points D and E is the quality of the fence that was actually put up. There is also an issue about whether, in fact, it can be said that the fence was actually put up at all at the end of that run of D - E right by the position D, and along the run of C - D which was the place where the shed was.

150. With regard to the quality of the fencing, it is not disputed by the defendants that it was not completed. The majority of the D - E run was not completed and the defendants have offered £500 as being a reasonable sum for putting up appropriate fencing in this regard. That is Mr Naftel's assessment of an appropriate figure.

151. The next question is whether, though, the fencing actually done was objectively reasonable in quality because the plaintiffs say that they had to replace the fencing that was put up. A further point then arises because it is said that the fencing that was put up by the plaintiffs was unreasonably a betterment because it included the insertion of gravel boards along the base of the fence panels to support the fence panels when that had not been in the original specification and was not required as part of a fence that the plaintiffs would have been obliged to accept.

152. Mr Torode says that the fencing that was actually erected was inadequately supported to withstand the wind: the posts were not long enough, the excavation was not deep enough and the concrete base was not deep enough. The workmanship was also poor because the posts were not the same height. What happened was that this was replaced carefully using the existing fence panels, providing proper length posts and foundations and using gravel boards because it is good practice to do so in wet conditions so as to make for economical replacement of the fence against rotting because that way one does not cause the more expensive fancy fence panels to rot but only a "sacrificial strip", as Advocate Ferbrache described it, to be inserted below, that could readily be taken out, replaced and put back if it does rot.

153. Mr Naftel says that the ordinary fencing was all right, and, in fact, he suggested this was even accepted by the plaintiffs because of an email written by Mr Hardman to the Batistes at one point, in which he said that it was good to see that the fencing towards the south, points A - C and so forth, had been erected and looked good. (Mr Harman had said that this was written to encourage the Defendants to get on with the job.) Consequently, Mr Naftel said, on the face of it, it was apparent there was not any real defect in relation to that fence at all. The remaining 50% was admittedly not done but could have been done for the £500 that was offered. Gravel boards were: (a) not necessary because, in fact, gravel boards were only appropriate to cope with slopes ie where the land on which the fence was being erected sloped and (b) unreasonable to insert, because this was betterment. It was pointed out by Advocate Ferbrache though, that, in practice, when one looked closely at Mr Naftel's report he had accepted that the fence that was erected, whilst it might be adequately erected to support the weight of the fence, was unlikely to stand up in winds. It was submitted that a reasonably satisfactory fence should be capable of withstanding winds.

154. The factual issues regarding the fence, therefore, are first whether the fence as so far installed was of good and workmanlike quality and to the plaintiffs' objectively reasonable satisfaction: (a) as a matter of fact and (b) and as a matter of overall objective assessment. If not, then whether the replacement fence installed was of appropriate quality, or the gravel boards were excessive.

155. Having considered this carefully, the Jurats find in favour of the plaintiffs on this matter as well. They are of the view that the fence as installed was not adequately installed; it should have been capable of withstanding winds and they accept the points made on the plaintiffs' behalf about its inadequacy. They are also persuaded on the evidence that the use of gravel boards was a reasonable matter of good practice in the circumstances of this installation. They are not satisfied that this is a matter that caused any significant additional expenditure but, in any event, they conclude that, in fact, it was a proper approach to take in an area which admittedly is prone to damp.

156. Consequently they will award the figure under item 5. However, this brings in also the question of item 25 which relates to the boundary arrangement in the southwest corner. The contractual obligation relating to this is the fencing covenant, ie the duty to arrange the boundary in the correct place and to erect the fence in due time. This was the obligation undertaken by the defendants. The dispute is whether the plaintiffs' costs of eventually erecting the fence in the correct place at the southwest corner and of moving the shed in the second occasion (only) are recoverable as having been loss caused consequentially by the defendants' breaches of contract. The builder's invoice itemises costs of the above in relation to taking down the existing shed, breaking up the base, erecting the fence, removing the shed to a new position, installing the base and erecting it and including a step.

157. The factual matters are that the plaintiffs say that when they first put the shed up in or before October 2012, they thought that they did it where it would and could go and it was only when Mr Batiste started putting up the boundary fence posts that it turned out to have been in the wrong place. They accept, however, that that was their mistake. They are not seeking to claim, therefore, the costs of moving the shed from its first position to its second position. What they are seeking to claim is the cost of subsequently moving it from the second position to its third position, wholly and obviously on their property, in order to enable the fence to be erected in the proper boundary position as it should have been, under the defendants' covenant.

158. They say that when they moved the shed the first time (ie to its second position) they moved it to a position where Mr Nigel Batiste wanted it in order to make the boundary a series of straight lines, as I have already explained. When the fence still was not erected fully or was erected only badly, and when relations between them deteriorated to an extent that they really could not carry on, this arrangement whereby a dog-leg boundary would be accepted by both parties for their mutual convenience, - ie the plaintiffs having their shed where it was put, and the defendants not having to take down a part of the greenhouse to accommodate the plan boundary, really failed. Accordingly their only choice was now to ensure that there was strict accordance with the contract and with the boundary that the defendants had originally insisted upon and this therefore included having to move the shed which had been placed where the defendants had wanted it to avoid having to take down the greenhouse, although not properly within the plaintiff' property. The cost of all this, therefore, should be recoverable from the defendants in the sum of £1,752.

159. The defendants say that the plaintiffs put the shed up at all times at their own risk because they should have consulted the defendants and that all the later further problems flowed from this because the defendants then could not put the fence in its right place at this corner. The defendants deny, as a matter of fact, that they approved the second position of the shed. They say the plaintiffs went ahead and moved it without allowing the defendants the opportunity to

erect the fence in its correct place, a similar argument as made before. They then could not do so because this line was actually blocked by the shed in its second position. They therefore, should not have to pay for the fence which they were prevented from erecting and they do not accept any responsibility for the cost of moving the shed the second time. They say that these latter costs are excessive in any event, although I note that that was not actually an allegation that was made in the pleading, merely in evidence

160. The first issue for the Jurats to decide, therefore, was what actually happened with regard to the movement of the shed from its first to its second position. Having considered the evidence, they have come to the unanimous conclusion that they prefer the evidence of the plaintiffs in this matter. They are satisfied that the position of the shed in its second position was agreed or approved or acquiesced in by Mr Batiste and, indeed, that this happened on site. This is, I pause to observe, consonant with what one would really expect in the circumstances where initially a shed has been erected in the wrong position and one does not want to get it wrong or unagreed a second time. However, the Jurats' base their decision on their preference as regards the factual evidence of the parties. Therefore, the question arises as to what the consequences of that would be.

161. Having accepted the plaintiffs' version of events, the Jurats take the view that it was reasonable for the plaintiffs, when relations failed and they were not getting the matters dealt with that were badly needed to remedy the position, to take the step which they did, which required moving the shed from its second position and erecting the fence along the straight line C - D as shown on the plan, which was what was actually ultimately done. Was it reasonable for the plaintiffs to expect to re-erect the shed in the third position including the base works and to claim the costs of doing so? The plaintiffs submit that it was, because, in practice, if this had been done in the first place they would have had the shed in a position within their property where they should have had it with only the expense of erecting it once, and they had already incurred the expense of erecting it once ie erecting it originally. The plaintiffs are not claiming in respect of that but they submit that it is a reasonable consequence that the matter should be put right, strictly in accordance with the contract, (bearing in mind that the defendants had not even erected the fence in the dog-leg position which had been mutually agreed, at all, let alone properly to their satisfaction) without their incurring greater expenditure on the shed. It was only reasonable that the matter should be sorted out, once and for all, in this way.

162. The Jurats have ultimately come to the conclusion that they should accept this proposition. They do regard the costs of removing the shed from position two, taking it up and re-erecting it in position three as being properly attributable to consequential costs of the defendants' failure to erect the fence, initially in the first place in due time, and subsequently to erect it properly in accordance with the agreement that was reached about the interim placement position, and which, if implemented might have resolved that aspect, but which the defendants then did not implement. The find that these later costs all flow from the original failure to erect the fence as provided by the contract. In consequence, they are minded to award this item.

163. This was, though, was once again an item which the Jurats were of the view that they felt some misgivings about the actual costs. They felt that the combined costs of the fencing and the removal of the shed, bearing in mind that it was only an eight foot by six foot shed, were seemed rather high. However, on consideration of the fact that the cost of demolition and the cost of re-erection can very often be significant, they have come to the view that it is not outside a possible reasonable band. They consider that at the end of the day the real issue is whether, having had to pay this amount of money, it could be said that the Hardmans had done so in a situation where it was unreasonable for them to do so, because it was so obviously excessive, and so unreasonable that they cannot fairly be laid at the door of the defendants, as the breakers of the relevant obligations of the contract. The Jurats are not so

satisfied. They are, in fact, satisfied that this was a reasonable response, and that the costs incurred should be regarded as reasonable. They will therefore award item 25 in the sum of £1,752 as well.

164. The ultimate conclusion in this case is therefore as follows. There will be, in effect, judgment for the plaintiffs in the sum, which I have not worked out yet, but which is £41,021.28 less £850. It seems to me that in that situation the appropriate course is that the sums that stand at present in the retention account held by Mourant Ozannes of £24,500 should be released to the plaintiffs in part satisfaction of that amount. The remainder will form a judgment against the defendants.

165. Issues may arise, although I am not sure I am concerned with this, as to any interest that may have been earned on the £24,500 whilst sitting in Mourant Ozannes' account. My preliminary view is that that should be paid to the plaintiffs separately from the £24,500 as capital but that is a matter that the plaintiffs would have to decide as between themselves and Mourant Ozannes and I therefore am making no ruling about that because Mourant Ozannes plainly are not present at the moment. It may be that precious little interest was actually earned but, in any event, it does not seem to me that the interest would properly go to satisfaction of the judgment since the plaintiffs have been kept out of that money during the period which it was held.

166. In those circumstances that is the judgment which I will give and the order that will be made and the parties will be expected please to formulate an appropriate form of order and I now await any further submissions.

Lt Bailiff Hazel Marshall QC

24th September 2015

