

JERSEY / JUDGMENT

Hamon v Webster [2002]

JRC 138 (19 July 2002)

[2002] JRC 138

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judgment

the deputy bailiff: 1. This case concerns a dispute between the Plaintiff and the Defendant, who are neighbours, over work that the Plaintiff agreed to do for the Defendant in return for a lease of the Defendant's property for a limited period and payment of £12,000 towards the materials. In his pleadings the Plaintiff claims specific performance of the agreement, failing which damages for breach by the Defendant. The Defendant counter-claims damages against the Plaintiff for the cost of employing an alternative contractor to finish the work and the loss of rental caused by the Plaintiff's failure to finish the work on time. The factual background 2. Although there is dispute between the parties as to exactly what was agreed, much of what occurred is not disputed. We propose in this first part of the judgement to set out factual background comprising essentially those aspects which are not in dispute. 3. The Plaintiff, Mr Hamon, is the owner of a property called Oakleigh, Mont Millais, St Helier. At the time of the agreement in question he was the tenant of the property, having moved in in late 1997. He has since acquired the property. The Defendant Mr Webster has been the owner of the adjoining property, Ellerslie, for approximately 25 years. 4. In 1998 Ellerslie was in a very poor state of repair. Mr Hamon is a builder by occupation and in January 1998, following discussion between the parties as neighbours, it was agreed that Mr Hamon would carry out some structural work at Ellerslie for Mr Webster by demolishing the rear wall (which was bulging in a worrying fashion), putting in new foundations and then rebuilding the wall over the new foundations. A rate of £12 per hour was agreed. The work began in about February 1998 and it was understood by all parties that Mr Hamon would be carrying out this work in his spare time. 5. Not long afterwards, Mr Webster asked Mr Hamon if he would be interested in buying Ellerslie. A price of £85,000 was agreed for Ellerslie in its then state; i.e. in the event of a sale Mr Webster would not be expected to pay for the work which Mr Hamon was undertaking. However, Mr Webster was in the course of getting divorced and, for one reason or another, the sale never came to pass. Mr Webster states that he was advised by his lawyers not to proceed as Mr Hamon was looking for a 100% mortgage; Mr Hamon, on the other hand, felt that Mr Webster had strung him along and had used his lawyers as an excuse. 6. Be that as it may, as a result of the delay in the production of the sale agreement, Mr Hamon in due course produced an invoice for the work done which appears to be dated 12th October 1998. This was discussed and agreed between the parties although Mr Webster did not pay over the agreed

sum until March 1999. 7. Mr Webster continued to discuss with Mr Hamon the works required to be done to Ellerslie. Mr Webster employed other contractors to do certain works but they did not turn out to be very satisfactory. 8. In due course, in July 1999, an agreement was reached between Mr Webster and Mr Hamon whereby Mr Hamon would undertake the necessary work which would enable Ellerslie to be let. The Agreement was reduced to writing. It is dated 17th July 1999 and in its written form provides as follows:- "Agreement in principle re Ellerslie, Mont Millais between George Hamon (GH) and Martin Webster (MW) made on Saturday th July 1998. It is agreed that GH will undertake all building and redecoration works to put Ellerslie back into a very good decorative state (including attic conversion) and erection of a conservatory in the rear yard (depending on Planning permission), replacement bathroom, rewiring, re-plumbing (as required and ready for central heating installation). The work will be completed over the next four months, and on completion of the above to the satisfaction of all parties MW will grant GH or his appointee:- 3 Year Lease (Standard States) at Rental £175 per week - Year 1 Rental £175 per week - Year 2 Rental £200 per week - Year 3 (Year 2 plus inflation). It is further agreed that the first year's rental will be waived by MW in consideration of GH undertaking and completing the above work, and that MW will pay £12,000 towards materials required. It is further envisaged that the lease will be renewed after Year 3 at inflation / market value, and it is noted MW has no intention of selling the property. (All bills up to this date are the responsibility of MW). £6,000 to be paid on account now (and invoices to be supplied to back up repairs). £6,000 in 8 weeks time providing work is on schedule (as agreed by both GH and MW). (The second £6,000 is for conservatory, £3,000, and rear backyard works of £1,000)." The Agreement was signed by both parties. Furthermore the words "in principle" in the heading to the agreement were crossed out in manuscript with the deletion being initialled by both parties. 9. Mr Webster gave Mr Hamon two cheques towards the sum of £6,000, one being paid in on 26th July and the second on 3rd August 1999. 10. It is clear that work did not proceed as fast as Mr Webster envisaged. On 18th October he wrote to Mr Hamon seeking to persuade him to accelerate the rate of progress. The letter was prompted by the fact that States was about to start work on the development of the old Post Office site opposite Ellerslie and surveyors for the States wished to carry out a schedule of condition in relation to Ellerslie. The relevant part of Mr Webster's letter of 18th October reads as follows:- "We agreed for 4 months for you to complete the renovation works to Ellerslie, which I think from memory takes you to about the middle of November. I know this now is quite close and from speaking to you last night you still have other priorities. However, to date I have kept my end of the bargain as to money and granting of leases and rent free periods etc, so can Ellerslie be moved up your priority list to enable you to keep your side of the deal? It is obviously critical that the work is completed before they start work on the [Post Office] (and also to state the obvious the sooner Ellerslie is complete the sooner you start getting rent money etc). I know you're busy working, however very little has been done on Ellerslie in the last six weeks and I think your idea of only working say three days/week on carpets etc is a good one as at this rate it will take several more months" 11. The work was not finished by November 1999 and indeed it is clear that it was nowhere near completion. There were a number of discussions between the parties with Mr Webster pressing for completion and Mr Hamon requesting payment of the balance of the £12,000. In January 2000 Mr Webster paid a further £3,000 towards the £12,000

(making a total of £9,000 paid by this stage). 12. On 3rd March 2000, following a telephone conversation, Mr Webster wrote to Mr Hamon as follows:- "Further to our telephone conversation on Saturday, I thought it might be useful to have a note of your comments; The conservatory will be finished quite definitely in March. The ground floor will effectively be finished in March. I will let you just get on with it during March and you have promised that I will be impressed at the progress by the end of March. I still don't understand your logic for the delays since if it was completed on time you would already have been collecting rent for 5 months which means £5,000 so far which could have gone to you has not gone into your pocket. As I have said many times I am just keen to see the time scales we agree be kept to so that you can benefit and I can see the work completed. Just for the avoidance of any doubt, any extras to our contract must be agreed in writing in advance and to date there are no extras. Could you also let me have details of whose name you want the lease put into. Finally, as mentioned before I may have another building contract in the pipeline (replacement roof at our new office) however any agreed deadline would have to be met for this and I shall talk to you about it at the end of the month. Any problems please phone me otherwise I expect to pleasantly surprised at the end of the month. It would seem from a post script that the letter was not in fact sent to Mr Hamon until on or after 17th March. 13. The work was not finished in March as referred to in the letter. On 14th April Mr Webster wrote again to Mr Hamon. The letter set out in some detail the current status of the work on Ellerslie but we do not think it necessary to set out that part of the letter. It went on to say:- "It was particularly disappointing to find that after your promises at the beginning of March that you provided I kept out of the way, then by the end of March the conservatory and the ground floor would be complete" and further I would be impressed by the progress. Sadly this was not the case with no work being done on the ground floor and the conservatory still incomplete (although this had previously been promised to be finished by the end of February The reasons you give for the delays are due to you earning such good money at Carpet/ Floor laying e.g. the Voisin's contract, where you can earn up to £900 per week. Obviously you have not wanted to work on Ellerslie when this would mean losing (sic) a month's income. If however you had done the work on Ellerslie in September 1999 you would have lost say £3,500 in wages however, you would have been able to collect rent from October 1999 to May 2000 at say £1,000 per month giving you 8 months x £1000 = £8,000. By not completing the work much earlier (as agreed) it would appear that it has cost you a lot of money in lost rent. I am assuming that you will complete all the work (save the attic) by no later than 31 st May 2000 which is the date - after not completing the work last year - that you have guaranteed the work will be finished by. Providing the work is complete by at the latest 31 st May 2000, you will still have several months rent free to enable you to earn some money for your labour, however, the work must be completed by then." The letter therefore records Mr Hamon as having assured Mr Webster that the work would be finished by 31st May. 14. Mr Webster wrote again on 10th May to reiterate the new agreed finishing date of 31st May. The relevant part of the letter reads as follows:- "Although I know you are not keen on letters, I thought it would be useful to keep track of where we are; You have unfortunately been again delayed in starting the work on Ellerslie but have now confirmed that you are taking 2 weeks holiday from Wednesday week 17 th May 2000 and that you will be working flat out on Ellerslie during this period to enable you to complete the work by the end of May 2000 which is the date

you have all along guaranteed the work will be completed by (and hence the day you will move in). You have also said that this weekend you will "clear out" a lot of the rubbish in Ellerslie ready to begin on Wednesday. You will also need to advise me whose name the lease is to go in". The letter went on to repeat the current state of the play on the repairs. The list was essentially identical to that in the previous letter. 15. The work was not finished on 31st May. On 7th June Mr Webster wrote again. He summarised the major outstanding items (which were almost identical to the work which had been outstanding and listed in the April and May letters). The relevant part of the letter read as follows:- "You will recall that the above project you always maintained would be completely finished by the end of May 2000, however, although you have had the last 3 weeks off work, Ellerslie remains completely uninhabitable and far from finished, as promised,. This is despite my many chasers to which you have always responded "Don't panic - everything will be finished by the end of May" (when you said you would be moving in). What has been achieved in the last 3 weeks is mainly re-fixing ceiling boards in the various rooms. Although a lot of rubbish has been removed from Ellerslie, the house still contains lots of unnecessary items which are impeding progress. I am now extremely concerned since every date that you have given me for completion has proved to be "hot air" and even the "absolute guarantee" of having the work finished by 31 st May 2000 has (despite all my reminders and chasers) has (sic)been missed by a mile. In 6 weeks time (July 17th) it will be 1 year from the date we agreed terms for the work on Ellerslie and that agreement stated that the work was to be completed in 4 months (not 1 year!). I now must have absolute confirmation that the work will be complete in the next 6 weeks. To date I have been extremely tolerant providing funds "upfront". In the year since we agreed terms, I have seen other builders start building houses from a hole in the ground to the finished product!" 16. Again the deadline came and went without the work having being completed. Mr Webster wrote again on 13th July when he said as follows:- "Further to our brief chat yesterday, I thought it would be useful to confirm the amount outstanding is now £2,000 of the original £12,000 i.e., you have now been paid £10,000. The post-dated cheque given for £1,000 has been given on the basis of your assurance that the front bedroom and bathroom will be cleared and ready for plastering by Monday 24 th July. I will give you a further cheque for a further £1,000 on the basis that downstairs will be ready by say 14 th August (3 weeks later), and the cheque will be given on this basis. The final cheque of £1,000 will then be given to you to enable you to at this stage.(sic) This will ensure a) the work gets done and

- b) you receive payment. The payment of the additional £1,000 meant that Mr Hamon had now received £10,000 out of the £12,000 payable for materials. 17. No further works of any substance were done as a result of this letter and Mr Webster then consulted Advocate Livingstone of Messrs Viberts. Advocate Livingstone wrote to Mr Hamon on 29th August stating that Mr Hamon was in breach of contract by not completing the works and that Mr Webster would be entitled to treat the contract as being at an end and have an alternative contractor complete the work. However, he offered Mr Hamon a further six weeks to finish the work. 18. On 4th September Mr Hamon wrote a long letter to Advocate Livingstone which appears to have been received on 13th September. It explained the background in some detail and set out what Mr Hamon had done. It stated that Mr Webster had not

provided all of the agreed funds and that he had told Mr Webster in January or February 2000 that nothing else would be done until he received more money. The letter contained the following paragraph on page 3:- "I have been working seven days a week recently, also having two children to look after. Mr Webster knows this as I have told him, god know how many times, and he finally agreed with me the one year and four months rent free is the time I have to do the work. If I received any rent from the house in between it is a bonus for me, no loss to Mr Webster." 19. He concluded the letter as follows:- "I am still going to finish the work on the conditions I receive the rest of the £12,000. £200 for the work I have done on the roof and skylights. £30 for a child's bike Mr Webster had from me about a year ago and hasn't paid for it yet. £56 for taking out and refitting windows. £37.50 previous bill from D. J. Hartigan and Associates. £875 towards the cost of removing chimney stacks and re-lining walls. I think this is very fair and I want until the end of December instead of the end of November to finish the job, without Mr Webster coming round harassing me in between. Then Mr Livingstone you have a promise from me the job will be finished, then Mr Webster can rent the house to whom ever he want. One last thing, if I worked weekends from August until the end of November that would be about 35 days. How on earth could anyone renovate a house and build an extension come conservatory in that time?" 20. On 4 th October Advocate Livingstone replied accepting Mr Hamon's proposal. The relevant part of the letter said this:- "He is prepared to accept your offer to complete the work by 31 December and I enclose my client's cheque for £3,198.50 being payment for the matters listed four paragraphs from the end of your letter..... Given my client's agreement to the terms set out in your letter, my client will make no claim for rental to 31 December 2000, and my client will not, in the interim, visit you or contact you prior to 1 January 2001. However, if the works are not satisfactory completed, then you will be considered to be in breach of contract, and proceeding will be issued to recover the cost of the professional builder who would be engaged to complete the contract works, together with lost rental from 17 th November to the conclusion of those works, and all legal costs." 21. On 18 th October Advocate Livingstone wrote a follow up letter seeking a reply from Mr Hamon confirming that there was an agreement between the parties. Mr Hamon replied on 24 th October expressing surprise that a further letter from him was required but confirming by necessary implication that the terms of the exchange of correspondence to which we have referred was agreed, subject to the fact that he might need a further two weeks beyond 31 December 2000 in order to complete the works. 22. On 21 st November Advocate Livingstone informed Mr Hamon that he and Mr Webster would inspect the site on 3 rd January to see if the work was complete. A visit duly took place on that date from which it was clear that the work was not yet finished. Mr Hamon referred to his previous request for two extra weeks and confirmed that the works would be finished by then. Advocate Livingstone agreed to the extension and stated that a further visit would be made on 15 th January. 23. A further visit took place on that date from which it was again clear that the work was still not finished (although much had been done in those two weeks). Advocate Livingstone wrote on 16 th January confirming that Mr Webster would now engage another contractor to finish the work, that Mr Webster was no longer under any obligation to grant Mr Hamon a lease or a

rent free period and that he would be looking to Mr Hamon to reimburse the costs of engaging an alternative contractor to finish the work. Mr Hamon remained on site and on 17th January Advocate Livingstone wrote to say that the locks would be changed to prevent Mr Hamon and his workmen from going on site. This was duly done and the workmen employed by Mr Hamon who were on site at the time were asked to leave. 24. Mr Webster then obtained two quotations for completion of the work, one from a Mr Campbell and the other from Christopher James Products Limited. He accepted Mr Campbell's estimate. Mr Campbell duly completed the work and rendered an invoice in the sum of £7,319.72 The Plaintiff's Case 25. Mr Hamon gave evidence in support of his claim. The basis of his claim is that the written agreement of 17th July 1999 did not reflect what the parties had actually agreed. 26. He told us of the agreement in 1998 for the work on the wall at the back of the property. It is clear that he was somewhat distrustful of Mr Webster and felt that Mr Webster had used his lawyers and the divorce as an excuse not to proceed with the proposed sale of Ellerslie. Indeed his level of distrust was such that he secretly taped a meeting held between him and Mr Webster in order to discuss payment for the work done to the wall in 1998. 27. He told us that after he had finished his work, Mr Webster employed another contractor to begin the works to the main house but this was apparently not very satisfactory. For example the skylights inserted in the attic were wrongly positioned. At some stage Mr Webster asked Mr Hamon whether he would be interested in undertaking the works of refurbishment to Ellerslie. Mr Hamon apparently explained to Mr Webster how he had recently undertaken work for his brother which had taken him some six months working, as he put it, night and day. He said that he told Mr Webster that, comparing the two jobs, there was four months work involved in the refurbishment of Ellerslie assuming he were to work on the same basis as he had at his brothers, i.e. working flat out seven days a week. He said that he could not do that in respect of Ellerslie. He was working part time as a self employed floor layer for Voisins. At the time of the making of the agreement in 1999 he was working three, occasionally four days a week for Voisins. 28. Mr Hamon explained that he told Mr Webster that he would be willing to undertake the refurbishment on the following basis:- (a) A payment of £12,000 in respect of materials; and (b) a four month period followed by a three year lease of which the first year would be rent free, the second at a rental of £175 per week and the third year at a rental of £200 per week. 29. He told us that he did not envisage that the work could actually be done in four months as he was not able to work flat out in the way that he had for his brother. This was because he was working for Voisin's as a flooring contractor. He therefore envisaged that he would, in effect, have some sixteen months in order to carry out the work. Clearly, if he could finish the work earlier, he would benefit by being able to rent out the property. Any such rent would be profit in his hands because he would not be paying any rent to Mr Webster. He explained that he considered the rental figures of £175 per week and £200 per week to be below what could be obtained on the open market and that in years 2 and 3 he would be able to make a profit, by sub-letting, of approximately £5,000 per annum. 30. He stated that Mr Webster agreed these terms and subsequently came round on the 17th July to Mr Hamon's house with a written agreement intended to reflect what had been discussed. According to Mr Hamon he pointed out that

the agreement was defective and did not reflect what had been agreed; in particular it did not include provision for the first year to be rent free. Mr Hamon pointed this out to Mr Webster and said that the agreement would have to be amended before he would sign it. Mr Webster agreed to do this. 31. In his order of justice Mr Hamon had alleged that he also pointed out to Mr Webster that this first draft of the agreement was incorrect in that it referred to the work being done within four months. It was not that easy to follow Mr Hamon's oral evidence but we have to say that we did not understand him specifically to repeat this assertion when giving evidence. 32. About a week later Mr Webster returned with an amended version of the agreement. This was in the form which we have set out in paragraph 7 above. Mr Hamon said that he had pointed out that the agreement was still wrong. First it was wrong in stating that the work was to be done in four months; secondly it was wrong in providing that the £12,000 would be paid in instalments whereas Mr Hamon had stipulated that £12,000 was to be paid in full immediately; and thirdly it was wrong in having the words "in principle" in the heading. 33. According to Mr Hamon, Mr Webster assured him that both of them knew what they had agreed and that the written document was a gentleman's agreement. It did not mean anything. What had been agreed was known to them both and they were both gentlemen. Mr Hamon stated, that in reliance on this, he signed the agreement even though it did not reflect what had been agreed, in that it provided that the work was to be done within four months and that the £12,000 was to be paid by instalments. He did however, insist that the words "in principle" be deleted from the agreement and the deletion was initialled by both parties. 34. £6,000 was paid very shortly (in two instalments of £3,000) and Mr Hamon duly began work. He stated that it soon became clear that some extra work would have to be done because the chimney stacks were coming away from the main walls. According to Mr Hamon, Mr Webster began to pressurise him from quite an early stage to get on and finish the work. He stated in evidence that it would have been impossible in any event to have completed the works within four months given that he was working part time for Voisins. In fact the Voisins work increased and he found himself working full time for Voisins toward the end of 1999 and has continued to do so since then. Accordingly he could only work on Ellerslie in his spare time and during holidays. 35. He said that difficulties arose in relation to the balance of £6,000 which was still owed from the £12,000. He kept asking Mr Webster for the money but it was not forthcoming. Eventually a further £3,000 was paid in January 2000. He accepted that he had received all the letters which the Court has referred to earlier in this judgement. However, apart from the letter of 3rd March 2000, he did not read any of them. He had never dealt with matters in writing throughout his career. He had told Mr Webster not to bother to write to him and that he would not read any further letters. This was confirmed by, for example, the opening words of the letter of 17th April when Mr Webster started "although I know you are not keen on letters....." 36. Mr Webster kept pressing him to complete the work but he did not understand why this was so. So far as he, Mr Hamon, was concerned, he would be the only loser if he took a long time to complete the works. So far as Mr Webster was concerned, it did not really matter when the work was done. Mr Hamon expected to finish the works before the end of the rent free year in November 2000 but, even if he did not, it

would not matter to Mr Webster because Mr Hamon would then have to start paying Mr Webster the agreed rental of £175 per week. So far as he was concerned, it had never been agreed that he would finish the work by a specific date (other than before the expiry of the lease) and it was really up to him at what speed he undertook the work. He was the only one who would suffer any financial consequences if he was slow. 37. He agreed that not much work was done in the first half of 2000. This was partly because he had hurt his back in the early part of the year but also because Mr Webster had not paid him the remaining balance (£3,000) of the £12,000. 38. In July Mr Webster said that he was going to speak to his lawyer. He said this two or three times. A further £1,000 was paid but that still left £2,000 outstanding. Mr Hamon received the letter from Advocate Livingstone dated 29 th August. He subsequently got together all his papers in order to draft a reply. He said he did this in the early hours of the morning at about 2.30am. He was by now very annoyed with Mr Webster and also very tired when he was writing the letter. He had not anticipated that it would be relied upon in any court case. When it was put to him that he appeared to be giving up his right to rent Ellerslie for 2 years after the rent free period by stating "then Mr Livingstone you have a promise from me the job will be finished then Mr Webster can rent the house to whomever he want", he said that he did not really know if he had meant to do that. He was tired and had not thought that the letter would be used in Court. 39. He did accept that he had committed himself in the letter of 4 th September to finish the work by 31 st December provided that Mr Webster paid the balance of the £2,000 plus the other sums stipulated in his letter. He further accepted that his proposal was agreed to by Advocate Livingstone on behalf of Mr Webster in his letter of 4 th October. He said that the reason he subsequently asked for a further two weeks to 15 th January was that there had been a delay of approximately that period between his sending his letter (13 th September) and receiving the stipulated funds (4 th October) from Advocate Livingstone. He had not done any work in that period because he did not know whether his proposal had been accepted. 40. He accepted that he had not in fact finished the work by 31 st December. He said that he brought in colleagues to help him complete the works by th January. He accepted that, by the time his men were thrown off the site, on 24 th January, he had still not finished the work. However, he asserted that there was only about three days work left, being one and a half days on the outside of the property and one and a half days in relation to the inside. 41. His case was that he had a lease from Mr Webster and accordingly Mr Webster was not entitled to terminate that lease without going to Court. Mr Webster was therefore in the wrong in changing the locks on 24th January 2001. Mr Hamon should have been allowed to finish the work and continue in occupation because he was so close to finishing. Mr Webster was not entitled to treat the contract as being at an end, and neither was he entitled to call in an alternative contractor to finish the work. 42. Mr Hamon therefore demanded specific performance of the lease, failing which damages. When the Court pointed out that, even on the plaintiff's case, damages appeared to be an adequate remedy (so that specific performance was not an appropriate remedy) and that Ellerslie had been leased to a third party and could not therefore be the subject of an order for specific performance, Advocate Clarke did not press the claim for specific performance and concentrated on the claim for

damages. These were calculated as being the difference between the rental which he would have paid during the second and third years and the rental which he would have received by sub letting. He calculated the difference as being a total of £10,202.40. 43. In support, Mr Hamon called his son George Hamon ("George"). George stated that he had been present during the discussion in relation to the agreement. In his evidence in chief we understood him to be saying that he was present at the time when the agreement was actually signed but, in cross examination, he stated that he had also been present on the first occasion when the first draft of the agreement had been discussed. He referred on that occasion to his father having pointed out that the rent free year had been missed out. He did not state that any other defect in the agreement had been mentioned by his father on that occasion. He went on to say that, on the second occasion, his father had stated that the agreement was wrong in stating that there were four months to do the work. He said that Mr Webster had said words to the effect that both he and Mr Hamon knew what they meant and that it did not matter that the agreement did not reflect this and that there was no need for Mr Webster to change the agreement. 44. He went on to say that his father had shown him the letters from Mr Webster dated 3rd March and 14th April 2000. He did not recall seeing the letter of 14th May but thought that his father had shown him the letters of 7th June and 13th July. 45. Mr Hamon also called Mr James Megaw to give evidence. Mr Megaw is a second cousin of the Plaintiff and an experienced self employed decorator who had retired. He was asked by Mr Hamon to help decorate Ellerslie. Mr Megaw was on the site until 24th January 2001 when the locks were changed and he was asked to leave. He had been on site for about ten working days before then. He stated that there was very little decorating work still to be done by the time he was thrown off the site. 46. Mr Andrew Daley is an experienced electrician. He has known Mr Hamon for some ten years. He was asked to do the electrical work at Ellerslie on behalf of Mr Hamon. He saw the property soon after Mr Hamon began work. It was in a very poor state. Although he was an electrician and not a builder, he had considerable experience and in his opinion one person working alone would need some fourteen to fifteen months in order to complete the refurbishment programme. So far as he was concerned, the electrical work had all been completed by mid January although his employee had not tested the boiler. 47. Finally Mr Hamon called Mr Thomas Buckley. Mr Buckley has 37 years experience as a plasterer and building contractor. He saw the job fairly early on and in his judgement the work involved would have taken two to three men some six months. He would have been very surprised if Mr Hamon had said that he could do the work in four months on his own. He was asked to undertake the plastering work by Mr Hamon who is his cousin and whom he has known all his life. He worked in December and for about a further ten days or so in January 2001. He had finished all the required plastering inside although there was still about one and a half days plastering work left to do in relation to the conservatory. This was not yet ready for his attention and he was awaiting a call from Mr Hamon asking him to return to undertake this work at the time when Mr Hamon's contract was terminated. There had been a lot of rain and this had delayed the work. The Defendant's Case 48. Mr Webster did not dissent to any material degree with the Plaintiff's version of events concerning the work in 1998 to the wall, although he said that he was

advised by his lawyers that, in view of his divorce, he should not sell Ellerslie to Mr Hamon if it involved leaving the purchase price outstanding by way of mortgage. He said that he had no idea that the meeting concerning payment was being secretly taped by Mr Hamon. However he had no explanation as to why it had taken him some five months (from October 1998 to March 1999) to pay Mr Hamon the agreed sum for these works. 49. He said that the agreement of July 1999 was as set out in the written document. It was Mr Hamon who had stipulated the various figures and in particular it was he who had said that the work would take four months. It was as a result of what he had said that the figure of four months was inserted in the agreement. Mr Webster accepted that when he produced the first draft of the agreement he had omitted to include the fact that the first year of the lease was to be rent free. Mr Hamon had refused to sign the agreement in that form and Mr Webster had agreed to take it away and amend it. No criticism was made at that stage about the reference to the work being done within four months or the fact that the £12,000 was to be payable in instalments. 50. When he produced the second draft, the only comment made by Mr Hamon was in relation to the fact that the agreement was headed "in principle". It was agreed that this reference was erroneous and would be deleted in manuscript and initialled. This is what took place. There was no discussion concerning the agreement being a "gentleman's agreement" or the parties knowing what they really meant despite the written document. On the contrary, said Mr Webster, bearing in mind the overall value of the works, he felt that the agreement should be in writing. 51. He said that he soon became concerned at the rate of progress. After some eight weeks had elapsed, it was clear that nothing like half the work had been done. He raised his concerns on a number of occasions. It was, he said, difficult to get a straight answer out of Mr Hamon but he accepted that on various occasions Mr Hamon told him not to worry because the delay was simply using up Mr Hamon's rent free period. He wrote the letter of 18 th October 1999 because he was concerned at the lack of progress. 52. He did not terminate the agreement when the work was not finished within the four month period because his main concern was to get the work done. He considered that Mr Hamon would still do this in due course. He wrote the letter of 3 rd March in order to try and push matters along. As the correspondence showed, Mr Hamon had given various estimated completion dates, none of which were met. So far as Mr Webster was concerned, he considered that, in view of Mr Hamon's failure to complete the work within the four month period, he was not obliged to lease him the property. But he would have been happy to have granted the lease from November 2000 at £175 per week provided the work had been finished by then. The reason that he referred in the correspondence to the question of in whose name the lease should be taken was to try and act as a carrot to encourage Mr Hamon to get on with things. 53. Essentially no real work was undertaken by Mr Hamon in the first half of 2000, several promised dates having been missed. Eventually he consulted Advocate Livingstone and this resulted in the letter from Advocate Livingstone of 29 th August. When Mr Hamon wrote back on 11 th September promising to complete the work by 31 st December, he was very pleased. He was willing to forego the rental between November and 31 December and to pay the additional funds required if that would have the effect of ensuring that the work was completed by the end of the year. For the same reason

he subsequently agreed to extend the period by a further two weeks to 15 th January. 54. However the works were not finished by 31 December, nor by 15 January 2001. So far as he was concerned there was still a fair amount of work to be done. Mr Hamon having failed to complete the work, he felt that he was entitled to terminate the contract as agreed. On the advice of his advocate he obtained two alternative estimates; one from Mr Campbell in the sum of £6,000 plus materials and one from Christopher James Products of £7,000 inclusive of materials. He felt that the latter estimate was only approximate and chose Mr Campbell in the belief that he would be cheaper in the end. He accepted Mr Campbell's estimate on 6 th February. 55. It was put to him by the Court that, provided the work was finished by November 2002 (i.e. the end of the three year period) it did not matter to Mr Webster when the work was completed. He would receive two years rental from Mr Hamon and a refurbished property at the end of the rental period. Mr Webster replied that it was of an importance to him as to when the work was done. In the first place it had been agreed that the work would be done much earlier. Secondly he felt that the work might never be finished once Mr Hamon had to start to pay rent. Thirdly he was not sure that Mr Hamon would necessarily be able to afford the rental if he was not in a position to sub-let the premises because the work remained unfinished. He was concerned that he might, after much delay, be left with an unfinished property, rental owing to him and lost rental for the period of delay. 56. In short Mr Webster considered Mr Hamon had been given every opportunity to finish the work. It had been agreed in correspondence that, if Mr Hamon did not finish the work by 15 th January, Mr Webster would be entitled to terminate the contract and call in an alternative contractor. The work was not finished by that date and Mr Webster was therefore entitled to act in accordance with what had been agreed. The Court's findings 57. We have had the opportunity of seeing and hearing both Mr Hamon and Mr Webster give evidence as well as the other witnesses. We have been able to form our assessment of them. Having done so we have concluded that the agreement reached between the parties was as set out in the written document dated 17 th July. We base our decision upon our assessment of the witnesses evidence generally but we have also taken account of the following matters: (i) It is agreed by all parties that Mr Hamon was not prepared to sign the first draft of the agreement because it omitted the reference to a rent free year. He sent it back for amendment. This seems quite inconsistent with his evidence that he was happy to sign the second draft (relying upon Mr Webster's assurance that it was only a gentleman's agreement and that the parties knew what had really been agreed) despite knowing that it was erroneous in a least two important respects, namely that the work was to be completed within four months and the £12,000 was not all payable immediately. (ii) It was also inconsistent with the fact that, in relation to the agreed error in the second draft (namely the reference to it being an "in principle" agreement) the agreement was amended in manuscript and initialled. If Mr Hamon insisted upon amending such a comparatively minor error, we find it impossible to believe that he would not have insisted on amending the two major errors which he contends existed in the second draft. (iii) Mr Hamon was distrustful of Mr Webster to such an extent that he had secretly taped their discussion concerning payment for the 1998 works. This is quite inconsistent with his being willing to

sign a written agreement which he knew to be wrong in two critical respects merely because Mr Webster assured him that the two parties knew what the agreement between them really was. (iv) If the agreement was, as Mr Hamon says, that he was in effect given sixteen months to complete the work, why was there any reference to four months at all in the agreement? It was a period of no significance. It is agreed by all parties that the four months was referred to in their discussion and that this figure came originally from Mr Hamon. On Mr Webster's version, the figure was significant because it was the period which Mr Hamon said the work would take. On Mr Hamon's version there was no reason for there to be any reference to four months in the agreement. (v) Mr Hamon asserted in evidence that he did not read any of Mr Webster's letters in 2000 apart from the first one in March. He was contradicted on this aspect by his son who said that he had been shown a number of the letters by his father. (vi) Mr Clarke relied upon the evidence of Mr Buckley and Mr Daley in support of the contention that Mr Hamon could not have agreed to undertake the work within four months because he well knew that this was an impossible task. The work was always going to take much longer. The difficulty with this argument is that, even on his own admission, Mr Hamon said that there was four months of work assuming that he worked flat out seven days a week. This is inconsistent with Mr Buckley (who referred to six months work for two to three men) and to Mr Daley (who referred to fourteen to fifteen months work for one person). Furthermore neither of them were builders although they were experience in their respective trades. We do not find their evidence to be of material assistance to Mr Hamon on this point. (vii) Mr Clarke also relied upon the evidence of Mr Hamon's son George. However we are satisfied that George was only partially involved in the conversation. He happened to be in the vicinity. Furthermore, when giving evidence in chief, he seemed to indicate that he was only present at the meeting when the second draft was signed whereas, in cross examination, he asserted that he was also present at a discussion of the first draft. This apparent change of tack did not give us confidence in his evidence. In addition we find it hard to accept his evidence that he has not discussed the matter to any material extent with his father. It is clear to us that his father feels very strongly about this matter and it is highly unlikely that he would not have communicated those feelings to his son. We do not think that George has told lies but we think that he has come to believe the version of events which he has heard from his father on many occasions since the events in question. 58. However, we do not accept that the agreement was reached on 17 th July. It seems to be accepted by both parties that that was the date when the first draft was discussed. The date was not changed when the second draft was prepared. The exact date upon which the second draft was signed is not known. The general view is that there seems to have been about a week between the two meetings. The best evidence we have is that the first instalment of the £12,000 was paid into Mr Hamon's account on 26 th July. We conclude that the agreement was reached on that date. It is clear that the intention of the parties was that the four month period would run from the reaching of the agreement. It follows that the work should have been completed by 26 th November. That is the date that the rent free year would have started and the succeeding years would have also commenced on that date with the lease finally ending on 25 th November 2002. Accordingly we propose to treat all references in the correspondence

etc. to 17 th November as being a reference to 26 th November. 59. However, the above findings do not determine the matter. Although the agreement initially required the work to be completed within four months if the leases were to be granted, it is quite clear that Mr Webster did not treat the agreement as being at an end when that deadline was missed, as he paid a further £3,000 towards materials in January 2000 and a further £1,000 in July. Furthermore, the correspondence which took place between March and July 2000, made it clear that, once the works were completed, Mr Hamon would be willing to grant a lease for the balance of the period. Thus, for example, in the letter of 14 th April 2000, Mr Webster wrote:- "Providing the work is complete by at the latest 31 st May 2000, you will still have several months rent free to enable you to earn some money for your labour; however, the work must be completed by then." Furthermore whenever he referred to work still to be done he stated in relation to the loft that "it will make an excellent area for whatever you want to use it for." 60. Mr Webster stated in evidence that, although he would have been willing to grant a lease in this way, he did not believe that he was under any obligation to do so. But we can only proceed on the basis of what was said and done by the parties. In our judgement Mr Webster made it clear both expressly and by necessary implication that he had waived the requirement that the work should be finished within the four month period. Mr Hamon was entitled to assume that, on completion of the work, he would receive a lease for whatever period was left of the three year period which had commenced on (as we find it) th November 1999. Had matters rested there, Mr Webster might have had some difficulty in justifying his decision to terminate the contract in January 2001. 61. But matters did not rest there. In September and October 2000, Mr Hamon exchanged correspondence with Advocate Livingstone. We set out that correspondence earlier and do not repeat it. We are in no doubt that it constituted a variation of the agreement. In exchange for payment not only of the remaining £2,000 (of the original £12,000) but also the other sums stipulated by Mr Hamon in his letter of 4 th September, and for Mr Webster foregoing rental for any period prior to 1 st January 2001, it was agreed that Mr Hamon would finish the work by 31 st December 2000 (subsequently varied to 15 th January 2001). Furthermore it was agreed that, if he did not finish the work by that date, Mr Webster would be entitled to terminate the contract, call in an alternative contractor and look to Mr Hamon for the costs of such a contractor and for the loss of rental from the original date upon which rent should have been paid (stated in the correspondence to be 17 th November but, on the basis of our findings, 26 th November). 62. Mr Hamon did not complete the work by 15 th January. Was Mr Hamon therefore entitled to terminate the contract on the basis of the exchange of correspondence referred to above? Mr Clarke says no. First he argues that Mr Hamon by then had a lease of Ellerslie and that a lease can only be terminated by order of the Court, which has a discretion as to whether to treat a particular breach as justifying cancellation of the lease (see *Fort Regent Development Committee v Regency Suite Discotheque Limited*

(1990) JLR 321). However we do not consider that a lease ever came into existence. Indeed neither Mr Hamon nor Mr Webster seems to have thought that this was the case because no application for the consent of the Housing Committee under the Housing (Jersey)

Regulations 1970 was ever sought. In our judgement the original agreement of July 1999 was an agreement that a lease would in due course be granted; but because the works were delayed no lease was actually ever granted. The agreement was varied and time was treated as running. Thus, as indicated in paragraph 59 above, once the work was completed, the lease actually granted would have been for a correspondingly shorter period, depending upon when the work was finished. It is arguable that, by his letter of 4th September Mr Hamon gave up altogether his right to lease the property upon completion of the work by saying:- "Then Mr Livingstone you have a promise from me the job will be finished, then Mr Webster can rent the house to whom ever he want." But we would be reluctant to find that Mr Hamon had given up an asset of real value on the strength of such an unspecific and ambiguous phrase. Assuming therefore that Mr Hamon was still entitled to a lease, that lease would not take effect until the completion of the works. Had they been completed on 15th January, the lease would have commenced on that date at a rental of £175 per week. It would have increased to £200 per week on the 26th November 2001 review date and would have terminated in November 2002. The agreement as varied therefore remained an agreement to enter into a lease upon completion of the work. Fort Regent Development Committee is therefore of no application. 63. Secondly, Mr Clarke argued that the breach of contract in failing to complete the works by 15th January was not sufficiently serious to justify Mr Webster terminating the contract. The refurbishment was nearly complete and only required a few more days work. This raises the question of when a party to a contract is entitled under Jersey Law to terminate the contract on the grounds of a breach by the other party. The Law on termination of a contract 64. Under English law the position is clear. An innocent party may terminate a contract without recourse to the court where the party in default has committed a breach of sufficient gravity. The normal phrase used is that the breach must go to the 'root of the contract.' For lesser breaches the innocent party is not entitled to terminate the contract; he may look only to a remedy in damages. 65. The parties may, however, specifically agree in the contract that a lesser breach will entitle the innocent party to terminate the contract. A classic example of this is an express provision in the contract as to the time by which performance is to be completed. Although it is ultimately a matter for interpretation having regard to all the circumstance of the case, the courts have generally been inclined to hold that a failure to perform by the date specified in the contract does not go to the root of the contract so as to enable the innocent party to terminate the contract. However, the parties may agree in the contract that time is of the essence, thereby conferring upon the innocent party a right to terminate the contract in the event of failure to perform by the specified date. 66. Under French Law - a convenient summary taken from Nicholas, French Law of Contract , first edition 1982, page 236 is to be found in the case of *Beghins Shoes Limited v Avancement Limited*

(1994) JLR15 at 19 - the position is very different. In general the innocent party may not terminate the contract in the event of a breach by the other party, no matter how serious. It is only the court which may do so on the application of the innocent party and the court

has a discretion. It will consider whether, in all the circumstance, the breach is sufficiently serious to justify the court in terminating the contract. There is an exception to this rule where the parties expressly provide for termination in the contract. However, the French courts apply a restrictive interpretation to such provisions and, in the absence of an express and categorical formulation, will presume that the parties intended no more than to refer to the ability of the innocent party to seek termination by applying to the court.

67. Apart from in relation to leases (where special rules are clearly applicable) we have not been referred to any Jersey case which has adopted the French approach. There are however two cases which suggests that the English approach is to be preferred in this jurisdiction. In *New Guarantee Trust Finance Limited v Birbeck*

(1977) JJ 71, the court held that a fundamental breach going to the root of the contract entitled the innocent party to terminate the contract (see pp77 and 83). Similarly, in *Hanby v Moss*

(1966) JJ 625, whilst finding on the facts that the innocent party had acted prematurely in purporting to terminate the contract, the court made it clear that an innocent party did have the right to terminate a contract when the other party was in breach of a fundamental condition. When time was of the essence, breach of the timescale would entitle the innocent party to terminate the agreement (see p629). 68. As the court pointed out in *Rossborough (Insurance Brokers) Limited v Boon*

(2001) JLR416, the French approach appears to have little to commend it. In paragraph 21 the Court said this:- "To insist that, however serious the breach by the other party, the party to a contract cannot treat the contract as being at an end and so that he is relieved of his obligation to continue to perform his side of the bargain, but has to go to court to seek a discretionary decision as to whether the contract should in fact be ended, would seem to be very undesirable. It would mean that the innocent party would not know where he stood until a decision by the court some months or even years later. We must emphasise that we have not heard any argument on this matter but our initial reaction is that we would be reluctant to find that the law of Jersey was to such effect unless there were binding precedent to say so. The court should develop the law of contract in accordance with the requirements of a modern society insofar as it is open for it to do so. The French approach would appear to leave all the parties in a state of complete uncertainty....." 69. It is true that the parties appear to be free under French law to agree that a lesser breach will give rise to a right of termination, but it is clear that the French courts will interpret such a provision very restrictively. We see no advantage in this. On the contrary, it would appear to be contrary to the maxim "*la convention fait la loi des parties*". We see no reason why the Court should seek to fetter the freedom of the parties to agree what they wish in this respect. 70. Far from being referred to any binding precedent requiring us to adopt the principles of French law in this respect, the cases of *New Guarantee Trust* and *Hanby*, referred to above, suggest that Jersey law is the same as English law in this area. We should only depart from those authorities if satisfied that they are plainly wrong. Far from that being the case we are in no doubt that they are right and

that they reflect the requirements of a modern commercial community. We hold therefore that, save in respect of leases (where an application to the court is necessary), an innocent party may terminate a contract where the breach is one which goes to the root of the contract or where the contract itself specifically provides that he will have a right to terminate the contract in respect of the breach in question. The innocent party need not have recourse to the court. 71. We would emphasise that such an approach does not mean that the innocent party is completely free of judicial control. The party in breach may always challenge the right of the innocent party to have terminated the contract on the grounds that the breach was not sufficiently serious or did not fall within the category specified in the contract. If the court agrees, it will hold that the innocent party was not in fact entitled to terminate the contract as he thought he was. It will then go on to make such consequential order as to damages etc as may be appropriate. But this will be the exception. In most cases it will be clear whether the breach is sufficiently serious or whether it falls within the specific terms of the agreement and the law as we have held it to be will allow the parties to take decisions (if necessary with the benefit of legal advice) and plan their lives accordingly. Recourse to the Court should not be the exception and will arise only where the party in breach contends that the right to terminate did not exist. 72. Applying the law as we have held it to be to the facts of this case, we hold that, in the absence of a specific provision in the contract, the failure by Mr Hamon to complete the work by 15 th January 2001 would not have entitled Mr Webster to terminate the contract because, having regard to the general nature of the contract and the available period of three years, it was not sufficiently serious to be described as a breach going to the root of the contract. 73. But there was a specific provision. The exchange of correspondence to which we have referred earlier in paragraphs 18-21 clearly made time of the essence. It was specifically agreed that if Mr Hamon did not complete the work by 31 st December (later extended to 15 th January) Mr Webster would be entitled to terminate the contract, call in an alternative contractor and claim rent from the original commencement date. 'La convention fait la loi des parties'. Mr Hamon breached this term of the agreement. He did not finish the work by 15 th January. Mr Webster was therefore entitled to terminate the contract as agreed. It follows that Mr Hamon's claim fails. The counter-claim 74. We turn next to consider Mr Webster's counter-claim. Following completion of the work, Ellerslie was in due course let for three years from 23 rd May 2001. The rent for the first year was the monthly sum of £1,213.34 (i.e. £14,560.08 p.a.). Mr Webster claims as follows in his counter claim:- (i) £7,459.51 in respect of 187 days of lost rental on the grounds that he should have been able to let the property at £14,560 per annum from 17 th November 2000. (ii) £7,319.22 in respect of Mr Campbell's invoice for completing the agreed works. (iii) £49.70 paid to a locksmith to change the locks on Ellerslie in January 2001. (iv) £160 to dismantle the scaffolding. (v) £904 in respect of monies wrongly paid to Mr Hamon in respect of a drainage connection. The total counter-claim is therefore £15,892.43 (i) The rental claim 75. As we have already said, Ellerslie was let from rd May 2001 at the rate of £1,213.34 per month. Under the terms of the lease the rent is to be increased in accordance with the increase in the Cost of Living Index. The increase in the index from

March 2001 to March 2002 is 4.0%. The rental from 23 rd May 2002 is therefore £1,261.87 per month (i.e. £15,142.44 per annum). Mr Webster drew our attention to the fact that this figure was achievable partly because he had managed to persuade the Housing Committee to allow the property to be rented to (j) category tenants as well as (a-h) tenants. 76. The Court has held that the commencement date for the rent free period under the agreement was 26 th November 1999. The commencement date for rental of £175 per week would therefore have been 26 th November 2000. If the agreement had gone according to plan, Mr Webster would have received £9,100 in the year to 25 th November 2001 and £10,400 in the year to 25 th November 2002 (i.e. £19,500 in total). In the events which have happened, following Mr Hamon's breach of contract, Mr Webster will receive £14,560.08 in the period to 22 nd May 2002 and £7,695.69 for the six month and three days to 25 th November 2002. The latter figure is calculated by taking one half of the revised annual rental and adding to it three days worth calculated by dividing the revised annual rental figure by 365. He will therefore receive a total figure by way of rental to 25 th November 2002 of £22,255.77 (compared with £19,500 that he would have received if Mr Hamon had complied with the agreement). It follows that, far from there being a loss for which Mr Webster is entitled to claim, he is better off in this respect because of Mr Hamon's failure to comply with the contract. The fact - if it be the case

- that the rental was higher because of the re-categorisation of the property is immaterial. Mr Webster is only entitled to claim for a loss. There is no loss. No claim therefore lies in respect of loss of rental. (ii) Completion of the works 77. Mr Campbell presented an invoice in the total sum of £7,319.22 which was paid by Mr Webster. He therefore claims that sum from Mr Hamon. We have heard detailed evidence from a number of witnesses on each item listed in Mr Campbell's invoice. In general Mr Hamon contends that there was not as much work to do on the property as Mr Campbell suggests; alternatively that some matters undertaken by Mr Campbell did not fall to be done under the original agreement. We have had the opportunity of seeing all of the witnesses on this aspect. We do not propose to lengthen what is already a long judgement by going through each item in detail and rehearsing all of the parties' contentions. Suffice it to say that, in general, we found Mr Campbell to be a satisfactory witness who was giving honest and straightforward evidence as to what he found and what he considered it necessary to do. Save in respect of the matters which follow, we find his invoice to be reasonable. However there are certain exceptions which we list as follows:- (i) As to the sum of £75 for skimming the utility room, we accept Mr Hamon's evidence that it was not implicit in the agreement that this room would be plastered. (ii) As to the sum of £300 for reinstating the kitchen units, Mr Hamon considered that 4 hours would be sufficient for this work whereas the sum charged by Mr Campbell represents approximately 16 hours at his rate. In our judgement £150 (or 8 hours) would have been reasonable and that is the sum which we allow. (iii) As to the sum of £75 in respect of securing the floor of the landing, we consider 4 hours to be excessive and allow only 2 hours i.e. £37.50 (iv) As to the sum of £295 for external roof works, we accept Mr Hamon's evidence that this did not fall within the contract. (v) As to the sum of £950 in

respect of the attic and the sum of £93.75 under "extras" in relation to the attic, we accept Mr Hamon's evidence that it was not agreed that the attic should be plastered. It was not possible under the existing planning permission for the attic to be used for habitation; it could only be used a store room or something similar. This did not require plastering. We accept, as did Mr Hamon, that there was some minor work to be done to complete the skirting boards. Mr Hamon estimated that this would involve half an hour's work but we allow 1 hour i.e. £18.75. We disallow the remainder of these two figures. (vi) As to the sum of £100 under "extras" in relation to the new kitchen units, we accept Mr Hamon's evidence that the agreement did not envisage the installation of new units but only the re-instatement of existing units. We therefore disallow the work under this heading together with the sum of £207.25 from the materials purchased from Normans Limited in respect of four new units. (vii) As to the sum of £200 under "extras" in respect of drainage, we accept Mr Hamon's evidence that this did not fall within the agreement. The parties agreed that the materials listed at the foot of the invoice in the aggregate sum of £174.24 all related to drainage. We therefore also disallow the cost of these materials. 78. The disallowed sums referred to under the preceding paragraph come to £2,263.99. This sum has to be deducted from the total invoice of £7,319.22 leaving the sum of £5,055.23 as prima facie recoverable from Mr Hamon. (iii) Changing the locks 79. We agree that, in view of Mr Hamon's failure to leave the site, it was reasonable for Mr Webster to change the locks and we therefore allow the sum of £49.70 by way of counter-claim. (iv) Scaffolding 80. Had Mr Hamon completed the contract, he would have had to pay for dismantling scaffolding within the agreement. The sum of £160 is therefore recoverable. (v) Drainage 81. Each of the title deeds of the two properties contains the following provision:- "QUE lesdits propriétaires d'icelles maisons et leurs hoirs ou ayant droit souffriront a travers leurs propriétés respectives tous et tels égouts comme peuvent être actuellement établis sur leurs dites propriétés, le tout à fin d'héritage" There were originally drainage pipes going from Ellerslie to the main road via the front of Oakleigh. For many years these pipes have been broken and have leaked. Mr Webster contends that they have leaked because the ground of Oakleigh has subsided. Mr Hamon contends that the ground of Oakleigh has only subsided because the pipes were not maintained and have been leaking. Neither side called any expert evidence in support. Both parties were agreed that new drainage pipes had to be laid and that this should be done via the back of Oakleigh rather than the front. Mr Hamon refused to let Mr Campbell onto Oakleigh in order to undertake these works but said that he would undertake the necessary connection on his property. By then the parties were of course not on good terms and the agreement was reduced to writing on 22 nd April 2001 as follows:- "Agreement between G Hamon and M Webster - 22/4/01 It is agreed that Mr G Hamon will connect temporary drains (4") connections at rear of Ellerslie through Oakleigh's rear yard to main drains on Mont Millais Hill (to be completed by Wednesday evening 25/04/01) - as per invoice No 41 5/3/01 £654 Plus permanent connections (once replacement foundations are in place at Oakleigh) £250 £904..... i.e. £904 represents the full price to be paid by Mr Webster for full replacement drains to be connected from under his conservatory to the road including manhole covers etc". 82. Mr Webster duly paid the sum of £904. The temporary connection

has been undertaken but the permanent connection has not yet been installed. Advocate Livingstone, on behalf of Mr Webster, asserts that Mr Webster only signed the agreement under duress because Mr Hamon would not let Mr Campbell onto his property in order to make the connection which had to be done. Furthermore he argues that Mr Webster should not bear the costs of the new drainage pipes because the subsisting pipes only needed to be replaced because of the subsidence of the ground on Oakleigh. 83. The deeds say nothing about the cost of laying and maintaining the drainage pipes across Oakleigh. In the absence of such a provision, there is no obligation on the owner of Oakleigh to pay for the installation and upkeep of pipes which are for the sole benefit of Ellerslie. Clearly if, through negligence or deliberately, the owner of Oakleigh causes damage to the drainage pipes on his land which serve Ellerslie, he will be responsible for repairing or re-instating them. But Mr Webster has failed to produce any satisfactory evidence that that is the position here. It follows that he is responsible for the cost of laying new pipes across Oakleigh intended to convey waste etc from Ellerslie to the main drains. Accordingly we see no reason to set aside the agreement between the parties of 22 nd April. Mr Webster is therefore not entitled to claim back the sum of £904 but Mr Hamon is still obliged to provide the permanent connection. Summary 84. It follows from the above that, subject to the question of rental, we allow £5,264.93 in respect of the counter-claim (i.e. £5,055.23 + £49.70 + £160.00). However, we have to look at Mr Webster's overall position. If the agreement had been duly performed by Mr Hamon, Mr Webster would have had a refurbished property together with £19,500 in rent. In fact, in the events which have happened, he is to receive £22,255.77 in rent but he has incurred expenses of £5,264.93 in completing the refurbishment of the property, which he would not have incurred had Mr Hamon completed the contract. He will therefore only receive net income over the period of £16,990.78 (£22,255.77 - £5,264.99). It follows that, as a result of Mr Hamon's breach of contract, Mr Webster is £2,509.22 (£19,500 - £16,990.78) worse off than he would have been if Mr Hamon had not broken the agreement. That is the total amount of his loss and that is therefore the sum for which he is entitled to judgement on his counter-claim. 85. We therefore dismiss the plaintiff's claim and give judgment on the counter-claim in the sum of £2,509.22. 86. We cannot leave this case without expressing our concern that it was litigated over three days. On the first morning the Court indicated that, even on the papers, it appeared that both claims were somewhat optimistic. Thus the claim of the defendant to loss of rental appeared unsustainable on the facts because he had leased out the property at a higher figure and the plaintiff's claim for specific performance appeared unarguable because damages was an adequate remedy. The Court indicated that the amounts truly at issue between the parties appeared to be somewhat less than appeared from their respective claims. The Court adjourned in order to give the parties time to see if they could settle matters. It is a matter of regret that advantage was not taken of this opportunity. Three days of evidence and submissions has merely established that the amounts at stake were indeed modest with the result that costs will no doubt have escalated out of all proportion to what was really at issue. Authorities. *Fort Regent Development Committee v Regency Suite Discotheque Limited*

(1990) JLR 321 . Beghins Shoes Limited v Avancement Limited (1994) JLR15. Nicholas: French Law of Contract, (1 st Ed'n: 1982): page 236. New Guarantee Trust Finance Limited v Birbeck

(1977) JJ 71. Hanby v Moss

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