

Neutral Citation Number: [2009] EWHC 2866 (QB)

Case No: 7QZ65921

**IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL
23/11/2009

B e f o r e :

HIS HONOUR JUDGE RICHARD SEYMOUR Q.C.
(sitting as a Judge of the High Court)

Between:

HDK LIMITED trading as Unique Home	Claimant
- and -	
SUNSHINE VENTURES LIMITED	
RASHMI THAKAR	Defendants
- and-	
HUSSEIN KURDIEH	Third Party

Kate Grange (instructed by Ellis Taylor law firm LLP) for the defendants
Benedict Rodgers (instructed by Layard Horsfall Ltd.) for the third party
The claimant did not appear and was not represented.
Hearing dates: 5, 6 and 7 October 2009

His Honour Judge Richard Seymour Q.C. :

Introduction

1. This action was concerned with three projects for the undertaking of building work. It was common ground by the time of the trial that the person who agreed to undertake each of the relevant projects was Mr. Hussein Kurdieh, the third party. Subsequent to the making of the agreements to undertake the projects Mr. Kurdieh transferred his building business to a limited company, the claimant, HDK Ltd. In error, when Mr. Kurdieh decided to commence proceedings against the defendants to seek to recover sums which were considered to be due for work done and materials supplied the action was commenced in the name of the claimant, rather than in Mr. Kurdieh's own name. Because it was in fact Mr. Kurdieh who had agreed to undertake the relevant work, when that was appreciated, after a Defence and Counterclaim had been served, a Part 20 claim was commenced against Mr. Kurdieh on behalf of the defendants. In the Part 20 proceedings Mr. Kurdieh not only served a Defence, but also counterclaimed sums in respect of the work originally the subject of the claims in the action. The original claim was struck out pursuant to an order made by Deputy District Judge Lynch on 27 June 2007. This trial was thus concerned with the original Part 20 claim of the defendants against Mr. Kurdieh, and his counterclaim.
2. The first defendant, Sunshine Ventures Ltd. ("*Sunshine*"), as I understand it, owns and operates a nursing home, called Merrymore Nursing Home ("*the Home*"), at 22, Barton Wood Road, Barton-on-Sea, Hampshire. Sunshine also owns a property ("*the House*") situate at 3, Gore Road, New Milton, Hampshire which it uses to provide accommodation for employees of the Home.
3. Miss Rashmi Thakar, the second defendant, is a director of Sunshine. In about November 2005 Miss Thakar purchased the residue of the term of a lease of a flat ("*the Flat*") known as Flat 1, Walton House, Walton Street, London SW3.
4. The three building projects which I have mentioned concerned, respectively, works to the Flat ("*the Flat Works*"), works to the Home ("*the Home Works*") and works to the House ("*the House Works*").
5. The claims of Sunshine in this action were for damages for non-completion of what were said to have been the Home Works and the House Works, and for damages for alleged defects in the work done. The claims of Miss Thakar were similar in nature, but related to the Flat Works. The case of each of Sunshine, in relation to the

Home Works and the House Works, and of Miss Thakar in relation to the Flat Works was that the relevant contract was terminated before completion of the material works by acceptance of a repudiation on the part of Mr. Kurdieh of the contract in question.

6. On his part Mr. Kurdieh claimed in respect of each contract what was said to be the balance due to him for works done up to the date of termination, together, in relation to the Flat Works, with alleged loss of profit on the installation of parquet and marble flooring which had been included in the relevant works, in fact by a variation to the material contract, but which had not been executed at the date of the termination.
7. One of the grounds upon which, it seems, Sunshine and Miss Thakar decided to treat the material contracts as having been repudiated by Mr. Kurdieh was alleged delay in completion of the relevant works the subject of each contract. An answer to the complaints of delay upon which reliance was placed on behalf of Mr. Kurdieh was that it was contended that it was a term of at least the contracts in respect of the Home Works and the Flat Works that interim payments on account of the cost of the works would be made at particular intervals, and the agreed payments were not made. It was said that the failure to make payments on account as allegedly agreed entitled Mr. Kurdieh to treat time as at large under the material contracts.
8. In the circumstances it was of some importance to establish what were the terms of the relevant contracts, as a preliminary to considering who, if anyone, was in breach of any of them, and, if so, in what respects.
9. Unhappily there was virtually no reliable documentation which provided evidence of what had been agreed, and between whom.
10. It is convenient to give attention at an early point in this judgment to the contractual arrangements between the parties.

The contracts

11. It was at least common ground that the contract in relation the Flat Works had been made between Miss Thakar and Mr. Kurdieh, and that that contract had been the first in time to have been made.
12. There was a difference between the parties as to whether the contracts in relation to the Home Works and the House Works had been made between Sunshine and Mr. Kurdieh, as was contended on behalf of Sunshine, or between Miss Thakar, possibly as agent

for an undisclosed principal, and Mr. Kurdieh, as was contended on behalf of Mr. Kurdieh. It was accepted on behalf of Sunshine that Miss Thakar had been the individual who had made oral contracts with Mr. Kurdieh in relation to the Home Works and the House Works, but her evidence was that she had explained specifically to Mr. Kurdieh at the time that she was in discussion about the possibility of him undertaking the Home Works that she was acting for Sunshine. She did not contend that any similar discussion about her role took place in relation to the House Works.

13. It was obviously a question of fact whether, at the time of the discussions between Miss Thakar and Mr. Kurdieh in relation to the possibility of Mr. Kurdieh undertaking the Home Works she made plain to him that she was acting not in a personal capacity, but as agent for Sunshine. The oral evidence relevant to that issue adduced before me was that of Miss Thakar and that of Mr. Kurdieh. Their evidence was the only evidence led before me relevant to the resolution of the differences between the parties as to their contractual arrangements. Before expressing my conclusions as to the reliability of the evidence of Miss Thakar, on the one hand, and that of Mr. Kurdieh, on the other, it is material to notice some of the features of the documentary material put before me which had a bearing on my assessment on the evidence of Miss Thakar and that of Mr. Kurdieh.
14. One of those features was the sources of the payments of various sums which were said by Miss Thakar to have been made to Mr. Kurdieh during the course of the Flat Works, the Home Works and the House Works. With the exception of a payment to Mr. Kurdieh of an amount of £15,000 on 20 April 2006, and, perhaps, some payments made in cash of relatively small amounts, the evidence of Miss Thakar, borne out by reference to copies of the relevant bank statements put in evidence, was that payments had been made out of an account numbered 61324527 of Sunshine maintained at a branch of HSBC Bank plc ("*HSBC*") in Golders Green, London. The payment of £15,000 which I have mentioned was made out of an account numbered 71326066 of Miss Thakar maintained at the same branch of HSBC. Miss Thakar told me, but there was no documentary evidence to support the contention, that the cash payments not specifically related, in a schedule which she produced, to bank statements of the account of Sunshine with HSBC had also been paid out of her private account. Whether that is so or not, of a total of £97,070 which she contended had been paid to Mr. Kurdieh for the Flat Works, the Home Works or the House Works, only £15,000 was positively proved to have been paid out of Miss Thakar's personal account. The cash which she said had been paid out of that account totalled only £6,150. Thus, on any view 78.21%

of the sums paid for any of the works had been paid out of the account of Sunshine, and as much as 84.55% may have been. I shall come to consider the evidence as to what prices were agreed in the respect of the Flat Works, the Home Works and the House Works and various extra works, but for present purposes it is enough to know that the original agreed contract price for the Flat Works, it was common ground by the start of the trial, was £38,000, whilst the contract price agreed for the Home Works was either £42,000 plus Value Added Tax (the position of Sunshine) or £59,950 (or possibly £54,000) plus Value Added Tax (the position of Mr. Kurdieh). A wrinkle in the position of Mr. Kurdieh was that, whilst in his witness statement made for the purposes of this action he stated in terms that the agreed price was £59,950 plus Value Added Tax, and in his counterclaims he sought Value Added Tax on the amounts which were said to be due in respect of the execution of the Flat Works, the Home Works and the House Works, I was told by Mr. Benedict Rodgers, who appeared on behalf of Mr. Kurdieh, at the commencement of the trial, that Mr. Kurdieh had not been registered for Value Added Tax at any time material to this action and that no claims for Value Added Tax were being pursued. It seems that HDK Ltd., once incorporated, was registered for Value Added Tax purposes.

15. There was a dispute between Miss Thakar and Mr. Kurdieh as to how much had been paid in respect of the Flat Works, the Home Works and the House Works. Mr. Kurdieh told me in evidence that the sums paid totalled £80,500.
16. Miss Thakar told me that she simply paid Mr. Kurdieh what he asked when he asked, and she did not know, in respect of any particular payment, whether it was supposed to relate to the Flat Works, the Home Works or the House Works. I accept that evidence. However, what it demonstrated, as was indicated by the source of the bulk of the payments made, was that she treated the money of Sunshine as hers to use for her own purposes, if she chose, and did not really distinguish between herself and Sunshine, at least in relation to building works.
17. Another unfortunate aspect of this action in evidential terms was that, as was accepted at the trial, each side had generated documents which appeared, on their respective faces, to be evidence of what had been agreed between them, but which were in fact documents not produced contemporaneously or ever given to the opposite party, at least not in the form of the document put in evidence. If one left out of account those documents, there were in fact just six documents which it was contended by one side or the

other were contemporaneous documents produced to the other side at the time of discussions preceding the making of oral agreements.

18. On Miss Thakar's side the documents were two drawings. One was a drawing ("*the Nash Drawing*") dated September 2005 produced by Trevor Nash Architecture showing the existing layout of the Flat and a proposed altered layout. However, the proposed altered layout was only a layout. The drawing contained no indication of the nature or quality of any fixtures, fittings or finishings. Moreover, it contained no information as to the intended services, whether electrical, plumbing or otherwise, in the proposed altered layout. For practical purposes, therefore, the Nash Drawing was of very limited value as indicating what the Flat Works were intended to be.

19. The other drawing ("*the Anders Roberts Drawing*") was dated July 2003, produced by Anders Roberts and Associates, and related to proposed alterations at the Home. The proposed alterations were an extension at ground and first floor levels of what, at ground floor level, were the existing lounge and dining room and were slightly recessed from the remainder of the façade of the building, to make it flush with the façade, and the construction at the other end of the building of a new bedroom at both ground and first floor levels. Notes on the drawing indicated that an existing lift was to be removed and the corridor wall of the dining room moved. There was no indication that a new lift was to be installed.

20. On Mr. Kurdieh's side two notes were produced which were said to have been presented to Miss Thakar during negotiations preceding the making of oral agreements. One was entitled "*Walton House*", and, on the sheet following those words, appeared the figures "*£36425 + 7000*". There then followed a table:-

"1st payment £10,000
2nd 3775 + 1000
3rd 3775 + 1000
4th 3775 + 1000
5th 3775 + 1000
6th 3775 + 1000
7th 3775 + 1000
8th 3775 + 1000 "

21. Mr. Kurdieh put forward the "*Walton House*" document as one which he had presented to Miss Thakar during the negotiations preceding the making of the oral contract in respect of the Flat

Works as indicating how much money he would need to be paid, and at what intervals, in order to be able to undertake the Flat Works. Mr. Kurdieh's evidence was that each of the instalments of a total of £4,775 was to be made fortnightly. If so, that seemed, if the first payment was to be made in advance, to envisage a period over which payments were made of 14 weeks. Miss Thakar was asked in cross-examination about the "Walton House" document. She seemed to accept that she had been shown it, but she contended that she had not agreed to make payments in accordance with it. She said that she had agreed to make payments as the Flat Works progressed to reflect the work which had actually been done.

22. The "Walton House" document was a puzzle. It appeared to contemplate that a total sum of £43,425 would be paid for the Flat Works, but it was common ground that the originally agreed price was £38,000. When I asked Mr. Kurdieh about that, he said that £43,425 was £38,000 plus Value Added Tax. That is not in fact correct. In 2006 the prevailing rate of Value Added Tax on building operations was 17.5%. £38,000 plus 17.5% is £44,650.
23. Moreover, the first payment which Miss Thakar made was not £10,000, but £5,000, although followed fairly swiftly by two more payments totalling £16,000. One of these two payments, of £1,000, was made the same day, Miss Thakar contended, as the payment of the £5,000. The second payment, of £15,000, was that made on 20 April 2006 which I have already mentioned. Miss Thakar did not make, or cause Sunshine to make, payments in accordance with the table in the "Walton House" document.
24. However, what was most surprising about the "Walton House" document was that Mr. Kurdieh made no reference to it whatsoever in his witness statement prepared for the purposes of the trial. What he said about the making of the contract for the Flat Works in his witness statement was:-

"13. Rashmi Thakar had various architects [sic] plans for Flat 1; I submitted 3 estimates dated 02/02/06, 26/02/06 and a final estimate 31/03/06, ("the final estimate" detailing the works and giving a price. We started in early March 2006.

14. Rashmi Thakar accepted the final quote shortly after receipt. The oral contract was made between myself and Ms Thakar in or about end March/the beginning of April 2006, and I summarise the terms of the contract.

(a) The scope of the works was as set out in the final estimate at the price stated;

(b) The build time was estimated 3 months with completion in or about July 2006, but agreed to be extended.

(c) The start time I recall was early March 2006.

(d) Payment was £10,000 on commencement with £4775 by 7 instalments spread over the contract, and a final payment of £5310 [that would make the total agreed price £48,735].

(e) Rashmi Thakar was to engage architects to obtain all necessary consents to the works, including building control consents with Landlord's consent."

25. On its face, on that account the contract was made by the oral acceptance by Miss Thakar of Mr. Kurdieh's estimate dated 31 March 2006. However, the so-called estimate dated 31 March 2006 of which a copy was put in evidence was, it was accepted, not a contemporaneous document, and neither was the so-called estimate dated 26 February 2006 of which a copy was put in evidence. Each of these so-called estimates in the form put in evidence was said by Mr. Kurdieh in cross-examination in fact to be a re-type in her own words by a lady called Bibi, who was said to have been assisting Mr. Kurdieh at an early stage of this action, of an original estimate produced by Mr. Kurdieh. Mr. Kurdieh was challenged to produce the alleged originals of estimates dated 26 February 2006 and 31 March 2006, but did not to do so.
26. Mr. Kurdieh contended that a document dated 2 February 2006 on its face addressed to Miss Thakar was a contemporaneous document and had been produced by him. He said that he had given it in February 2006 to Miss Thakar.
27. Unhappily the document dated 2 February 2006 existed in two versions, copies of both of which were put in evidence.
28. One version of the document dated 2 February 2006 was in these terms:-

"Dear Rashmi

We are pleased to submit our quotation for the followings [sic] work at the above address.

Demolition

To strip out walls and all stairs

To remove stairs and make good

To take out false ceiling

To cut out walls to take new lay out

To strip out bathrooms and kitchen

Building work

To cut out walls and fit lintels

To build up new stud work

To make good all disturbed area

To fit new doors and architrave

Painting

To prepare and make good all walls and doors

To prepare all woodwork and make good

To apply two coats of paint

Plumbing

To fit new bathrooms

To fit new pipe work to suit

Parquet

To supply and fit new under lay

To supply and fit new solid parquet

Electric's [sic]

To supply and fit electric's [sic] all through

All the above for the sum of £38000.00

All prices plus vat at 17.5%

We hope our quote meets with your kind approval. "

29. Miss Thakar denied ever receiving that document, or any similar one, from Mr. Kurdieh. Curiously, whilst relying, it seemed, upon that document as evidence of the contract for the Flat Works, Mr. Kurdieh denied that the supply of new doors was part of the original Flat Works.
30. For what it is worth, the terms of the document dated 2 February 2006 which I have quoted were far too vague to enable one to understand in any detail the nature, quality or standard of the works purportedly quoted for.
31. The second document dated 2 February 2006 was quite similar to the one which I have quoted, but not identical. It began "*Dear Mrs. Thakar*", rather than "*Dear Rashmi*". It did not include a total quoted price at the end, but prices for most of the sections into which the other document had been divided. Thus there were prices of £4,800 for demolition, £5,800 for building work, £6,500 for painting, £4,200 for plumbing, £5,300 for parquet, and £6,300 for "*Electrics*" [that is, not spelled with an intrusive apostrophe]. Those items totalled £32,900. However, the second

document dated 2 February 2006 also included alterations to the descriptions of the work in some of the sections, and additional items. The material part of the second document read as follows:-

"Building work

To build up new stud work

To make good all disturbed area

To bond and skim walls

To fit new doors and architrave £5800.00

Painting

To prepare and make good walls, ceilings

To prepare all wood work and make good

To fill all cracks rub down

To apply two coats of paint £6500.00

Plumbing

To alter pipe work

To fit new bathrooms £4200.00

Parquet

To supply and fit solid parquet £5300.00

Heating

To supply and fit new under floor heating xxxxxxxxx

Electrics

To complete re wire all through £6300.00

Tiling

To tile bathrooms and kitchen floor £2600.00

Preliminaries £2500.00

All prices plus vat

We hope our quote meets with your kind approval."

32. The total figure, including the new sections of tiling and preliminaries, but excluding heating, came to £38,000.
33. Mr. Kurdieh explained in his evidence that he had produced both versions of the document dated 2 February 2006. He told me that the second version he had produced at the request of Miss Thakar, who wished to know the individual prices for the different sections of work. The reasons for differences in the wording of the documents, and including additional sections, appeared to be that Mr. Kurdieh had made up each document from notes, which he did not produce, in a book and had interpreted, or summarised, those

notes differently in the different versions of the 2 February 2006 document.

34. The third allegedly contemporaneous document produced by Mr. Kurdieh and relied on by him was entitled "*Hampshire*". In form it was very similar to the "*Walton House*" document. The figures below the word "*Hampshire*" were "*£51700*" and "*10000*". There followed a figure of "*41700*" and then a list of "*2nd*" to "*10th*" beside each of which appeared the numbers "*4170*" and "*1000*". At the end appeared the words "*FAO Mr D Thakar*" and "*Chq*". Mr. Kurdieh told me that the document evidenced the fact that a total of £61,700 had been agreed to be paid in respect of the Home Works. He said that that figure included Value Added Tax, but was unable to tell me what the figure net of Value Added Tax was supposed to be. If £61,700 was intended to be a sum including Value Added Tax at 17.5%, the figure net of Value Added Tax amounted to £52,510.64. The latter figure was not one which Mr. Kurdieh contended had been agreed for the cost of the Home Works.
35. Miss Thakar accepted that she had seen the "*Hampshire*" document and that a copy of it had been sent to her brother, she thought in about July 2006. However, she had not agreed to its contents, she said. Again, certainly no payments were ever made by her which were in compliance with what the document seemed to contemplate, which Mr. Kurdieh told me was payment of £5,170 every two weeks for a period of 18 weeks.
36. The last document which Mr. Kurdieh contended was a contemporaneous document which had been produced by him and provided by him to Miss Thakar again, on its face related to the Home Works. It was a letter dated 28 June 2006 addressed to Merrymore Nursing Home at the Home. It was in these terms:-

"Dear Mrs. Thakar

We are pleased to submit our quotation for the following works at the above address.

Lift

To take out existing lift

To take out the two walls

To extend the walls to take the new lift

To build the walls in the laundry room &

Top bedroom

To make good all area and paint

Boiler

To drain down out system
To take out old boiler
To supply and fit new boiler
New Bedroom
To dig foundation
To fill concrete
To build new room
To fit all new electrics
To fit new shower room
Dinning [sic]/Breakfast Room
To dig foundation
To fill up concrete
To build the walls
To fit new windows and doors
Dinning [sic] Breakfast cont
To fit new steel beam
To cut walls to connect to new building
To move corridor wall to accommodate wheel chair
To strip down ceiling & walls
To supply and fit new ceiling plaster board
To bond and skim ceiling and walls
To re arrange electrics
All the above for the sum of £59,950.00
All prices plus vat at 17.5% (£10,491.25)
We hope our quote meets with your kind approval."

37. It is impossible to reconcile the date of the letter with the account of Mr. Kurdieh in his witness statement as to the making of a contract in relation to the Home Works, even though the letter was mentioned in that account. The account was:-

"22. In about March/April 2006 I entered into a contract to build an extension at Merrymore with Rashmi Thakar, acting for an undisclosed principal, the First Defendant; the terms of the contract were as follows:

(a) The scope of the contract are evidence [sic] by an estimate dated 28/06/06; this estimate detailed the works to be undertaken and the price of £59,950 plus VAT.

(b) It was initially agreed that Rashmi Thakar would pay £51,700 by 10 equal instalments of £5,170 spread over the contract period of [4] months, and an initial cash payment of £10,000 by mutual agreement by November 2006 because of her cash flow problems.

(c) The contract period was approximately 5 months.

23. I recall I commenced work at Merrymore in March/April 2006."

38. No explanation was offered by Mr. Kurdieh as to why a contract made, he asserted, in March/April 2006 was in terms evidenced by an estimate dated 28 June 2006. There was equally no explanation as to why the estimate had been produced, for Mr. Kurdieh told me that, following negotiation, the price of £59,950 was reduced to £54,000.

39. A further mystery was the date upon which the execution of the Home Works commenced. Notwithstanding the account given by Mr. Kurdieh in his witness statement, in a letter dated 23 June 2006 addressed to the Building Control Department of New Forest District Council Mr. Kurdieh wrote, so far as is presently material:-

"Ref. 061640

We are carrying out the new extention [sic] for one bedroom, the extention [sic] of dinning [sic] room/living room.

The works started on the 22/06/06 and would like the foundation to be inspected if possible on Monday the 26th of June 2006."

40. Mr. Kurdieh was asked about that letter in cross-examination. He said that the position was that he had started work at the Home by undertaking work to construct a new lift shaft, and that had been done in April 2006. The work referred to in the letter, he asserted, related to the construction of extensions to the Home, and notification to the Building Control Department did not have to be given until the foundations of the extensions were ready for inspection.

41. The documents which Mr. Kurdieh told me were in fact re-typed by Bibi, and copies of which were put in evidence, were letters dated, respectively, 26 February 2006, 17 March 2006 and 31 March 2006. It is, I think, material to set out the terms of each of these letters, for Mr. Kurdieh's evidence was that, although re-typed by Bibi in her words, each letter was in fact based on a genuine letter of the relevant date actually produced by him and given to Miss Thakar.

42. The letter dated 26 February 2006 in the form of which a copy was put in evidence read as follows:-

"We are please [sic] to submit our quotation for the following works at the above address.

i. Unique Home to remove the dividing wall between two bedrooms and make it good – thus creating a large reception room and prepare it for new radiators

ii. when this room was divided, one of the two rooms had a false panel hiding both working and redundant pipes and wires – Unique Home was to remove all

iii. Unique Home to block the existing door to the room and create a new opening but with an arch matching the large arched window

iv. between the entrance hall and the reception hall was a set of stairs in the shape of letter "A" to enable the occupier of the flat to use both entrances, and at the peak was a door and a wall parting the entrance area from the reception area – Unique Home was to remove the wall and the door

v. next to the street entrance was a large store-cupboard – Unique Home was to create a cloakroom there

vi. the 'old' reception was to be a master bedroom – Unique Home was to remove the old radiator, run new pipes.

vii. next to the 'old' reception was a small storage area – Unique Home was to create a shower room

viii. on the other side, next to the old reception was an old kitchen, full of redundant and 'working' pipes and wires running across ceiling and along the walls – Unique Home was to remove the kitchen and make it good for a second bedroom, including to run new pipes.

ix [left blank in the original]

x. inside the ancient kitchen was a large built-in larder – Unique Home was to move it out

xi. behind the larder in the reception hall was a large Victorian linen cupboard – Unique Home was to remove it

xii. Unique Home was to create en-suite for the second bedroom

xiii. at the end of the reception hall, next to the 'old' two bedrooms was an ancient bathroom, also full of pipes and wires running across ceiling and one wall – Unique Home was to move it out and make good for a kitchen

xiv. next to the 'old' bathroom was a cupboard – Unique home [sic] was to create a second cloakroom

xv. the reception hall had a false ceiling and a part of a wall was false – Unique Home was to remove all false panels, pipes, wires

xvi. Unique Home was to rewire the whole flat and re-piped gas and water

xvii. Unique Home was to remove (rip out) the old layers of carpet throughout the flat, the old tiles and lino in the kitchen and bathroom and in the entrance hall

xviii. Unique Home was to repair all the windows and make them functional

All the above for the sum of £38,000

All prices plus VAT at 17.5% (£6,650)

We hope our quote meets with you [sic] kind approval"

43. It was a striking feature of that letter that it was written in the past tense, describing what Mr. Kurdieh was to do, not what he is to do. Moreover, item ii, as it seemed to me, was a reference to something found, or said to have been found, during the course of the work. Thus in my judgment it was plain that the letter dated 26 February 2006 in the version of which a copy was put in evidence was not simply a re-typed version of a document produced in advance of the undertaking of any work in the Flat, but a document produced with the benefit of the hindsight gained from undertaking work in the Flat. Moreover, strangely, the work described in the letter dated 26 February 2006 did not include much of what was set out in the versions of the letter dated 2 February 2006 which I have already quoted.

44. The letter dated 17 March 2006 in the copy put in evidence bore some similarities to the letter dated 26 February 2006. The text was:-

"We are please [sic] to submit an amendment to our previous quotation for the following works at the above address.

I Unique Home was to remove the dividing wall between two bedrooms and make it good – thus creating a large reception room

II Unique Home to remove false panels hiding both working and redundant pipes and wires

III Unique Home was to block the existing door to the room, create a large opening in size and shape matching the large arched window

IV *between the entrance hall and the reception hall Unique Home to remove the door, wall and the set of stairs in the shape of letter "A"*

V *then because no longer there would be access to the second [sic] inside the building entrance – Unique Home to block the second entrance – thus creating an even-level floor for entrance hall with reception hall*

VI *Unique Home was to block the door to the large store-cupboard*

VII *Unique Home was to build a wall around the small storage area next to the 'old' reception*

VIII *Unique Home was to use both, the large store-cupboard (that was next to the street entrance) and the small storage area to create an en-suite for the master bedroom by making a new opening inside the 'old' reception*

IX *Unique Home to [sic] the redundant stairs (from ground floor to the first floor) and from the space, to create a cloakroom and above a large storage area with light and ventilation*

X *Unique Home was to remove the kitchen and make a space for a second bedroom*

XI *Inside the ancient kitchen where there was a large built-in larder with the space created after removing the large Victorian linen cupboard to install an en-suite for the second bedroom*

XII *Unique Home to remove the ancient bathroom and prepare for an installation a [sic] of a new fitted kitchen with all appliances*

XIII *Unique Home to create a larger ensuite where there was a cupboard next to the 'old' bathroom*

XIV *Unique Home was to remove all false panels, pipes, wires throughout the whole flat*

XV *Unique Home was to rewire the whole flat and re-piped gas and water*

XVI *Unique Home was to remove (rip out) the old layers of carpet throughout the flat, the old tiles and lino in the kitchen and bathroom and in the entrance hall*

XVII *Unique Home was to 'kill' radiators and run under-floor heating throughout the flat*

XVIII *Unique Home was to fit the whole flat with parquet-flooring*

XIX *Unique Home was to fit marble tiles at the entrance hall*

XX Unique Home was to repair or remove the old air-condition system

XXI Unique Home was to repair all the windows and make them functional

XXII Unique Home was to repair or replace all internal door

All the above amended for the sum of £52,000

All prices plus VAT at 17.5% (£9,100)

We hope our quote meets with you [sic] kind approval"

45. Finally, the letter dated 31 March 2006:-

"We are please [sic] to submit, we trust, the final quotation for the following works at the above address

We were instructed

to swap the kitchen for a bedroom (no.2) and

to swap the existing bathroom for a new kitchen,

to alter the size of the original bathroom,

to remove a pantry and replace it with an en-suite for a bedroom (no.2),

to remove the heavy iron pantry door (which was a safe door),

to remove and add walls throughout,

to move the original wall in the first room (now bedroom no. 1),

to remove and add doors (and extend the height of the door frames, as well as to create a large arch),

to throw away all the original doors,

to lower the ceiling (to accommodate dropped down-lighters) and

to install a modern air-conditioner,

to remove the original water-tank to enlarge the reception,

to remove the old coving and replace it with a modern one,

to elevate the existing floor level (to re-arrange the original water pipes to create an under-floor heating additional to new electrical under-wiring),

to remove the original stairs that were in front of the street-entrance and blocking the entrance-door from the main building (the old fire exit)

to remove a structural wall in the entrance hall,

to remove the original stairs that was coming from the flat above and to create an en-suite to a bedroom (no. 1) plus a cloakroom and closets,

to dig a hole under the original kitchen window to install an industrial safe,

to reposition the building's sewage pipes to cope with the newly created en-suites,

to create a brand new marble flooring in the reception hall (thus covering the ground-level opening to the basement)

to paint all walls with inflammatory [sic] oil paint.

All the above amended for the sum of £63,100

All prices plus VAT at 17.5% (£11,042.50)

We hope our quote meets with you [sic] kind approval"

46. As I have observed, at the trial it was common ground between Mr. Kurdieh and Miss Thakar that the price originally agreed in respect of the Flat Works was £38,000. The letters dated 17 March 2006 and 31 March 2006, quite apart from their linguistic oddities, in particular the use of the past tense, were totally inconsistent with that agreement. The letters appear to have been produced to provide a justification for Mr. Kurdieh charging particular sums to include additional work which it was common ground that Miss Thakar requested Mr. Kurdieh to undertake at the Flat after the commencement of the works initially agreed. I am satisfied that the letters dated 26 February 2006, 17 March 2006 and 31 March 2006 were all bogus documents produced with the intention of misleading the Court as to what had been agreed between Mr. Kurdieh and Miss Thakar. They were in fact deployed for that purpose in modified form, namely that Mr. Kurdieh accepted that they were not contemporaneous documents, but he contended that they reflected genuine documents which he did not produce. I am satisfied that they were in fact completely false.

47. Unfortunately Miss Thakar played the same game. She produced two specifications, one entitled "*Renovations to 1 Walton Street*" ("*the Flat Specification*"), the other entitled "*Extension to 22 Barton-wood Rd. Hampshire*" ("*the Home Specification*"). She accepted in her evidence that neither had been produced at the time negotiations were taking place between herself and Mr. Kurdieh in relation to the Flat Works or the Home Works, but she contended that what was set out in each specification reflected what had been discussed between her and Mr. Kurdieh. She did not offer any detailed explanation of when or why either of the specifications had been produced. I am satisfied that she produced each of them with a view to furnishing what appeared to be contemporaneous

documentary evidence of the works respectively the subject of the contract concerning the Flat Works and the subject of the contract concerning the Home Works.

48. In fact each of the Flat Specification and the Home Specification was in terms so vague as to be almost useless as a statement of what were, respectively, the Flat Works and the Home Works.

49. The items included in the Flat Specification were:-

"1. Structure alterations and insert of new steel beams and columns as required. Make good of walls and block up existing doorways. Removal of brick walls.

2. Supply and fit new wooden flooring.

3. Provide new electrical wiring throughout the flat with brass-plated or chrome-plated sockets. Provide and upgrade the existing heating system.

4. Fit new en-suite bathrooms.

5. Fit new closet in the hallway (WC).

6. Fit new kitchen.

7. Tiling of kitchen and bathrooms.

8. Joinery work to be carried out to include the fitting of new skirting boards and new doors.

9. Plaster ceilings and walls to be re-plastered throughout the flat.

10. Supply (?) [sic – the question mark appeared in the original Flat Specification] and fit new panelled mirrors in the hallway.

11. Debris to be removed from site. Provide site clearance."

50. The list of items included in the Home Specification was:-

"1. Side conservatory

2. Single storey side extension – to include fitment of fixtures, fittings, electrics and plumbing and to leave in a fit decorative state for residence occupancy.

3. Two storey lift shaft

4. Supply and fit new wooden flooring in the hallway, extended reception/dining room and the new en-suite bedroom.

5. *Provide new electrical wiring throughout the new extension with brass-plated or chrome-plated sockets. Provide new radiators.*
6. *Fit new en-suite bathrooms.*
7. *On first floor create new en-suite bedroom out of existing upstairs reception area.*
8. *Relocation of doors on existing upstairs room (room 24) opposite bathroom.*
9. *Fit en-suite in the room upstairs.*
10. *Fit new kitchen.*
11. *Tiling of kitchen and bathrooms.*
12. *Joinery work to be carried out to include the fitting of new skirting boards and new doors.*
13. *Plaster ceilings and walls to be re-plastered throughout the extension and the extended reception and dining room.*
14. *Insulate the garden office.*
15. *Debris to be removed from site. Provide site clearance.*
16. *At all times the work should be carried out with due regard to Health & Safety standards as necessary when operating within a Nursing Home."*

51. Whilst not bearing directly upon the question of the contractual arrangements between the parties, it is material in the context of the credibility of Miss Thakar to refer to two documents which were in fact produced in the context of the undertaking of work in the Flat after the termination of the contractual arrangements between Miss Thakar and Mr. Kurdieh. Miss Thakar told me that all of the work which she engaged Mr. James Cobbold of RLR Decoracao de Interiores Limitada to do was work necessary to remedy defects in work done by Mr. Kurdieh in the Flat. It is plain, as it seems to me, from the list of work for which Mr. Cobbold quoted, that that was not so, and that the work which he was requested to do included entirely new work. The same point arose in relation to work undertaken by Strand Property Services Ltd. ("*Strand*"). Miss Thakar had initially engaged Strand to undertake works in connection with the provision of a music system in the Flat. However, she told me, she had also requested Strand to remedy defects in electrical work done by Mr. Kurdieh, and the only additional work which she had requested of Strand was such remedial work. A copy of an e-mail written, I think, to Miss Thakar's mother, by Mr. Stephen Fox, managing director of Strand on about 6 March 2007, which was put in evidence, showed that that was not so.

52. The list of work for which Mr. Cobbold quoted, and which Miss Thakar told me he carried out for a sum of £7,650, was set out in his quotation dated 27 November 2006. The list was:-

"Living Room

1. *Finish the cornice around the boxing adjacent to the window*
2. *Prepare and paint the ceiling, cornicing and window.*

Hall

1. *Remove the old door frames and raise the door openings up to a height of approximately 2200. Plaster and make good ready for the new door frame and door (not chosen)*
2. *Finish the cupboard next to the kitchen using mdf and completing the cornice over the front*
3. *Build cupboard doors and frame in mdf above the guest loo and paint with primer*
4. *Prepare and paint the front door inside and out.*
5. *Level the floor and fix ditra matting to form a secure base for the marble floor tiles.*
6. *Prepare and paint the cornicing and cieling [sic]*

Childs [sic] Bedroom

1. *Prepare and paint the walls, ceiling and window*
2. *Build cupboard frame and doors above the bathroom*
3. *Remove bath panel tiles. Extend the bath panel and fit the mosaic tiles*
4. *Remove/replace the loo and cistern and the defective tile on the floor*
5. *Remove all the tiles on the wall behind the towel warmer and prime the substructure to accept new tiles*
6. *fit the architrave and glass door*

WC

1. *Tile the floor and walls in marble and fit the loo and basin/taps*
2. *Prepare and paint the ceiling and metal door*

Main Bedroom

1. *Prepare and paint the ceiling walls and windows*
2. *Lift the ply floor by the door and make a secure base and replace*
3. *Fix the skirting under the shower tray and seal with silicone*

4. *Prepare and paint the ceiling in the bathroom*

Kitchen

1. *Prepare and paint the ceiling and walls*
2. *Fit the extractor"*

53. Some of the items listed appear to relate to work which Mr. Kurdieh may not have finished, for example item 1 under "*Living Room*". Quite a lot of the work, in terms of numbers of items, related to painting. Those items are, perhaps, somewhat equivocal, in that it may be that Mr. Kurdieh should have done the painting, but had failed to do so, or it may be that Miss Thakar simply wanted to replace what, if anything, Mr. Kurdieh had done. The only reference to anything actually being defective was to a tile on the floor of the WC in the "*Childs Bedroom*". However, it seems plain that items 3 and 5 in that section of the list is new work, not made necessary by any deficiency in anything that Mr. Kurdieh did. However, Miss Thakar did not accept that when I asked her about them.

54. Perhaps more clear is the position in relation to Strand. In the second paragraph of the e-mail which I have mentioned Mr. Fox wrote:-

"In view of the cash flow problems the project is experiencing we are concerned about further investment. I am sorry that Rashmi feels aggrieved but she was warned that we were not able to accurately assess the state of your electricians [sic] wiring from sight and I believe she was regularly informed of the problems we exposed. In addition to the agreed work we have rewired large sections of the installation, installed new speaker cables, connected your boiler thermostats and electronic valves, put in intruder alarm and external light cables plus moved various outlet positions and installed extra ceiling lights."

55. Quite apart from the difficulties for each of Miss Thakar and Mr. Kurdieh presented by the documents to which I have so far referred, I regret to have to say that neither of them impressed me as a witness. I formed the view that each of them said in the witness box what seemed convenient at the moment of speaking to advance her or his case.

56. In the result I do not feel that I can accept the uncorroborated evidence of either Miss Thakar or Mr. Kurdieh in relation to any disputed matter.

57. My conclusions as to the terms of the contracts between them thus depend entirely upon that upon which they were agreed at the trial. Where they did not agree I do not feel able to find in favour of whichever of them was contending for a term or scope of work which the other did not accept.
58. For reasons which I shall explain, it probably does not matter very much what precisely were the Flat Works included in the agreed price of £38,000, but I do not feel able to make any exhaustive findings about the scope of what was covered by that price.
59. It was common ground at the trial that it was agreed that the Flat Works, as originally agreed, would be completed by Miss Thakar's birthday, 13 July 2006.
60. Miss Thakar accepted that she had agreed to make payments in stages in respect of the cost of the Flat Works, but she denied that she had agreed to the regular fortnightly payments for which Mr. Kurdieh contended. I do not accept that regular fortnightly payments were agreed. I have already pointed out that Mr. Kurdieh's "*Walton House*" document set out figures which were not consistent with an agreed price of £38,000.
61. I have already set out the account given by Mr. Kurdieh in his witness statement of how, when and in what terms the agreement was made in relation to the Home Works. In her witness statement made for the purposes of this action Miss Thakar gave this account:-

*"54. In April 2006, I had discussions at Merrymore and in the car whilst travelling to and from Merrymore, in my capacity as a Director of the First Defendant, with Mr. Kurdieh over proposed extension works and building works to be carried out to Merrymore. I gave Mr. Kurdieh a written specification for the works and drawing number 6662/01 [the Anders Roberts Drawing] so that he could give me a price for carrying out the works. **Pg 81 – 82 of Exhibit RT1** contains the written specification [the reference was to the Home Specification] and drawing number 6662/01 Revision C. The work that was to be carried out included:*

(i) An extension to the rear of the property to include one bedroom with disabled en suite bathroom with all electrical works complete.

(ii) An extension to the front of the property to extend the dining room and reception area. To include all electrics and

carpets. I would pay for the carpet separately on supply of receipts.

(iii) A lift shaft to be installed.

(iv) To fit a kitchen. I would provide the fittings.

(v) To put convert [sic] a double room upstairs into an en suite bathroom.

(vi) To install a wall mounted boiler in the laundry room.

(vii) To move the doorway in room 24 to the side facing the bathroom.

(viii) To install a lift shaft [sic].

55. I explained to Mr. Kurdieh that I wanted the works completed as soon as possible and in any event before August 2006 as I wanted to be able to hold a summer party for the residents and I also wanted to fix the period of time over which my residents would be inconvenienced by the builders work. Mr Kurdieh said that he would carry out the works as soon as possible within that time period for the sum of £42,000 + VAT i.e. £49,350.00. I verbally accepted this offer on behalf of the First Defendant in April 2006. I had previously obtained a quotation for the work to be carried out by Bendon & Nash Architecture Limited for £45,000."

62. Mr. Kurdieh obviously contended for a different agreed price – at trial, notwithstanding previous indications of £59,950, £54,000. I do not feel able to reach a conclusion as to what price was agreed, although I accept that it is likely that a price was in fact agreed, otherwise the execution of the Home Works would not have commenced.

63. I do not accept the evidence of Miss Thakar as to the scope of the Home Works agreed with Mr. Kurdieh. In cross-examination he accepted only that he agreed to construct a new lift shaft, to extend the façade in the area of the lounge and dining room of the Home to make it flush with the rest of the façade, and to construct an extension at the other end of the building in the vicinity of the existing fire escape. I am not satisfied that he agreed to do any more than that.

64. Mr. Kurdieh did accept in cross-examination that he had agreed that the Home Works would be finished in August 2006.

65. I reject the evidence of Miss Thakar that she made clear, in negotiating the contract with Mr. Kurdieh in relation to the Home Works, that she was acting not in a personal capacity, but on behalf of Sunshine. The making of such a point would have been

inconsistent with the evidence to which I have already referred of Miss Thakar not distinguishing, at least in financial matters, between herself and Sunshine.

66. I reject the evidence of Mr. Kurdieh that Miss Thakar or Sunshine agreed that payment for the Home Works would be made by an initial advance payment followed by equal fortnightly instalments. I find that Miss Thakar was agreeable to making payments on account dependent upon progress, as she accepted in cross-examination.

67. Miss Thakar's account in her witness statement concerning the making of an agreement with Mr. Kurdieh concerning the House Works was:-

*"73. In April 2006, Mr. Kurdieh entered into discussions with me, acting on behalf of the First Defendant, concerning proposed works to be carried out to 3 Gore Road. These were works that were required by New Forest District Council to be carried out. Details of this work is attached **at pg 117 of RT1**. This was basically some fire precaution works to the doors and door frames and other small items of work. There is no specification of works as such. The contract period agreed with Mr. Kurdieh was 3 months for the works to both Gore Road and Merrymore.*

74. In April before he started work at Merrymore, I verbally agreed, acting on behalf of the First Defendant, with Mr. Kurdieh that I would pay for the materials required and that Mr. Kurdieh's men would be allowed to live rent free at 3 Gore Road for the 3 months contract period if he carried out the works. Mr. Kurdieh verbally agreed to this as it was convenient for his men and avoided the need for them to travel to Merrymore every day."

68. In his witness statement Mr. Kurdieh said very little about the contract in respect of the House Works. All he said was:-

"25. By August 2006 the works at 3 Gore Road had become urgent, and legal action was being threatened. Rashmi Thakar requested that I undertook these works urgently, and I considered I ought to help Rashmi Thakar, despite my misgivings about the numerous delays in the payment schedules.

26. The works at 3 Gore Road were evidenced by an estimate dated 04/11/06 and an oral contract was made between Rashmi Thakar, acting as an agent for an undisclosed

principal in about August 2006. £500 was paid on account, and the balance was due on completion."

69. The alleged estimate dated 4 November 2006 was not identified or referred to at the trial. What was referred to was a schedule ("*the Council Schedule*") dated 19 May 2006 produced by New Forest District Council of the fire precautions required at the House. While the Council Schedule was detailed as to precisely what was required, those requirements can be summarised for present purposes as provision of four half hour fire resisting doors on the ground floor and four half hour fire resisting doors on the first floor, each with appropriate "*fire door*" notices; removing timber cladding from the kitchen; provision of smoke detectors; and provision of a fire blanket. I accept that those works were requested by Miss Thakar from Mr. Kurdieh. I think that it was common ground that she also requested Mr. Kurdieh to rewire the electrical circuits in the House.

70. It was common ground that Mr. Kurdieh's employees did in fact occupy the House from about April 2006 until November 2006 without any payment being made in respect of such occupation to either Miss Thakar or Sunshine. I am persuaded by that agreed fact, notwithstanding the protestations of Mr. Kurdieh to the contrary, that the agreement in relation to the House Works was that he would charge only the cost of materials and that there would be no charge for labour. I am encouraged to that view by the fact that the works comprised in the House Works were of limited extent.

Additions to the Flat Works

71. It was common ground between Miss Thakar and Mr. Kurdieh that, after the making of the contract in relation to the Flat Works, it was agreed between them that works in addition to those the subject of the original contract be undertaken by Mr. Kurdieh.

72. As I understood it, it was agreed between Miss Thakar and Mr. Kurdieh that such additions included the supply and fitting of air conditioning, the supply and fitting of under-floor heating, the supply and fitting of coving and the making of alterations to the central heating system.

73. It was agreed that the price for the fitting of the coving was £1,700, but Miss Thakar's case was that that price was to be settled by delivery by her to Mr. Kurdieh's son, Omar, of her Rover 420 SI motor car, registration number P949 BVE. Mr. Kurdieh denied that there had been any such agreement. He said that any agreement in relation to the motor car was a matter for Miss Thakar and his son. Mr. Omar Kurdieh was called to give evidence on behalf of his

father. His version of events was that he had agreed to take Miss Thakar's car, but that at the material time it was not in a driveable condition. Consequently, he told me, what had been understood was that he would take the car away and, once he had had it repaired, further discussions would take place. However, he said, no such further discussions ever had taken place. The facts that Mr. Omar Kurdieh had taken Miss Thakar's car and had never paid anything for it, or discussed paying anything for it, persuade me that Miss Thakar was correct in asserting that it was agreed between her and Mr. Kurdieh that the price of the coving would be settled by delivery of the car to Mr. Omar Kurdieh.

74. No price was agreed contemporaneously in respect of the air conditioning, but by the time of the trial it was agreed that a reasonable price for the air conditioning, if properly installed, was £3,700.

75. Miss Thakar contended that the alterations to the central heating system, which seemed to comprise the removal of three radiators, were included in the cost of the under-floor heating. Her evidence was that she had agreed with Mr. Kurdieh a price of £1,800 for the under-floor heating. Mr. Kurdieh did not accept that. I do not accept the evidence of Miss Thakar on this point.

76. It was common ground between Miss Thakar and Mr. Kurdieh that the agreed price of £38,000 for the Flat Works originally included an element in respect of the provision of new flooring in the Flat, but that it was agreed that in place of what was originally contemplated, Mr. Kurdieh would supply and fit parquet flooring in some parts of the Flat and marble flooring in other parts, with Miss Thakar paying the extra-over cost of the new flooring. Miss Thakar's case was that she would pay the additional cost of the materials to be used, against invoices demonstrating what the cost had been. In fact the parquet flooring and marble flooring never were supplied by Mr. Kurdieh. The sum allowed for flooring in the original agreed £38,000 did not clearly emerge, but Mr. Kurdieh contended in cross-examination that the sum in question was £5,000.

77. Mr. Kurdieh contended that Miss Thakar had requested during the course of the Flat Works that he provide new drainage to the Flat, and that he had done so. Miss Thakar denied requesting any new drainage and denied that any new drainage had been provided. I am not satisfied that any new drainage was requested or provided.

Additions to the Home Works

78. Mr. Kurdieh contended that he had been requested to undertake extra works at the Home during the execution of the Home Works. He said that there had been an overflow from a water tank which had brought down a ceiling in the Home and caused other damage. He said that he had been requested by Miss Thakar to repair the damage, and to submit an invoice so she could make a claim on an insurance policy. No copy of any such invoice was put in evidence. Miss Thakar denied that Mr. Kurdieh had undertaken the work he claimed. I am not satisfied that he did.

79. Mr. Kurdieh also claimed that he had undertaken some unspecified additional work in the living/dining area of the Home. There was no evidence as to what this work was supposed to have been, or when, where and how the undertaking of this work had been requested. I am not satisfied that Mr. Kurdieh was ever requested to, or did, undertake whatever work was supposed to be referred to in his counterclaim, where it was simply listed at paragraph 45 as "*Living/Dining Room Work £3,700.00*".

The termination of the contracts

80. It was common ground between the parties that the contracts between Miss Thakar/Sunshine and Mr. Kurdieh in relation to the Flat Works and the Home Works were terminated before the Flat Works, as varied, and the Home Works were completed. Mr. Kurdieh contended that the House Works had been completed by the dates of termination of the other contracts. I am not sure that Miss Thakar or Sunshine accepted that, but by the end of the trial there was no claim by Miss Thakar or Sunshine for damages allegedly founded upon any incomplete or defective works in the House.

81. It was, I think, accepted by the end of the trial, and certainly I find, that the dates for completion of the Flat Works and the Home Works had been waived. The addition of works to the originally agreed Flat Works undoubtedly extended the time necessary for completion of the Flat Works as varied. Miss Thakar's own schedule of payments demonstrated that payments continued to be made until the end of October 2006, and I think that that is only consistent with Miss Thakar and Sunshine treating the various contracts as continuing in force, notwithstanding that completion had not been achieved by the originally agreed dates.

82. A theme of Mr. Kurdieh in his evidence, also adopted by Mr. Rodgers in his submissions, was that delay to completion of the various works was caused by the failure of Miss Thakar/Sunshine to pay the money necessary to enable Mr. Kurdieh to carry on with the works. I have already found that there was no agreement on the

part of Miss Thakar to make regular payments in respect of the Flat Works and no agreement in relation to the Home Works for any such payments to be made. However, had I reached a different conclusion, I should still have found that failure on the part of Miss Thakar or Sunshine to make regular payments did not have the effect that Mr. Kurdieh was entitled to take as long as he liked to complete the agreed works. A failure, or at least a persistent failure, to make agreed regular payments would seem to amount to repudiatory breach of a contract containing provision for such payments. On ordinary principles, in the event of a repudiatory breach, the innocent party has the option to treat the contract as at an end. However, if he does not do so, but affirms the contract, the contract continues with all its terms effective, including any term as to date for completion of work, or rate of progress to be achieved.

83. Miss Thakar, however, did become concerned about the progress and standard of the work which Mr. Kurdieh was undertaking. She consulted a friend, Sir Colin Campbell, who was, at the material time, Vice-Chancellor of the University of Nottingham. Sir Colin made contact with Mr. Kurdieh. That contact prompted a short exchange of correspondence.

84. Mr. Kurdieh commenced the exchange with a facsimile transmission to Sir Colin dated 25 September 2006. He wrote:-

"This fax to highlight the points we discussed Saturday.

The one problem that keeps occurring on this job the finance of the job always we are short of funds.

We have to go eight weeks without payment now the problem is occurring and this has to be sort [sic] out ASAP.

All outstanding matter [sic] are solved with the architect and the music man.

All what we are waiting for the arrival [sic] of the finance.

To date all materials have been ordered for the job but my boys have not been paid for the second week in a row and go without wages and that is putting strain on us.

If you can sort out the finance issues now this will speed up the progress of work with no more arguments or delays.

Rashmi from day one I promised to treat her as a sister and I did but one of her serious problem [sic] she change her mind so easy or it take [sic] so long to make decision.

It was my pleasure to meet you on Saturday and I hope through you we can push things forward as we require about fifteen thousand pounds urgently to make things happen."

85. After consulting Miss Thakar Sir Colin replied in a facsimile transmission dated 26 September 2006:-

"Thank you for your fax. I have spoken to Mrs. Thakar and we do not feel it is worth rehearsing misunderstandings in the past. The priority is to complete the work to the requisite standard as soon as possible.

I understand you have now agreed with Mrs. Thakar that you will complete the parquet and marble flooring and bathrooms and she will transfer to you £10,000 immediately. The outstanding monies will be settled on satisfactory completion of all the works."

86. Sir Colin's final involvement in the matter was when he wrote a letter dated 30 September 2006 to Mr. Kurdieh:-

"Further to my fax of Monday 25th September 06, I understand you have had further discussions with Miss Thakar. May I suggest the best way forward is as set out in my fax. Please complete the outstanding works as a matter of urgency. Miss Thakar is now resident in Walton House and her daughter returned this weekend and to find it in hospitable [sic] and in dirty conditions.

The £10,000 has been arranged and outstanding payments on Walton House will be made as soon as work is finished to an acceptable standard. Please do now complete the work as we agreed."

87. Miss Kate Grange, who appeared on behalf of Miss Thakar and Sunshine, submitted that the effect of the facsimile transmission of Sir Colin dated 26 September 2006 urging Mr. Kurdieh *"to complete the work to the requisite standard as soon as possible"* and the letter dated 30 September 2006 asking Mr. Kurdieh to *"complete the outstanding works as a matter of urgency"*, was to make time of the essence in relation to completion, I think of both the Flat Works and the Home Works. Miss Grange contended that these communications satisfied the requirements considered in *Charles Rickards Ltd. v. Oppenheim* [1950] 1 KB 616 as necessary to be met to make time of the essence under a contract the original completion date fixed under which has passed. Miss Grange said that all that was necessary was for a notice to be given and for a reasonable period to pass before the innocent party sought to rely on the giving of the notice by terminating the contract.

88. In my judgment the submissions of Miss Grange fail to address the necessary ingredients of a notice making time of the essence. Plainly it is not enough just to write to the party in default

without giving any particular indication of what the communication is supposed to be about or what consequences may follow depending upon what happens after receipt of the communication. The context in which a notice making time of the essence could be given was explained by Denning LJ in *Charles Rickards Ltd. v. Oppenheim*, supra, at pages 622 to 623:-

"If this had been originally a contract without any stipulation as to time and, therefore, with only the implication of reasonable time, it may be that the plaintiffs could have said that they had fulfilled the contract; but in my opinion the case is very different when there was an initial contract, making time of the essence of the contract: "within six or at the most, seven months". I agree that that initial time was waived by reason of the requests that the defendant made after March, 1948, for delivery; and that, if delivery had been tendered in compliance with those requests, the defendant could not have refused to accept the coach-body. Suppose, for instance, that delivery had been tendered in April, May, or June 1948: the defendant would have had no answer. It would be true that the plaintiffs could not aver and prove they were ready and willing to deliver in accordance with the original contract. They would have had, in effect, to rely on the waiver almost as a cause of action. At one time there would have been theoretical difficulties about their doing that. It would have been said that there was no consideration; or, if the contract was for the sale of goods, that there was nothing in writing to support the variation. ... If the defendant, as he did, led the plaintiffs to believe that he would not insist on the stipulation as to time, and that, if they carried out the work, he would accept it, and they did it, he could not afterwards set up the stipulation as to the time against them. Whether it be called waiver or forbearance on his part, or an agreed variation or substituted performance, does not matter. It is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations. He made, in effect, a promise not to insist on his strict legal rights. That promise was intended to be acted on, and was in fact acted on. He cannot afterwards go back on it. ...

So, if the matter had stopped there, the plaintiffs could have said, notwithstanding that more than seven months had elapsed, that the defendant was bound to accept; but the matter did not stop there, because delivery was not given in compliance with the requests of the defendant. Time and time again the defendant pressed for delivery, time and time again he was assured he would have early delivery; but he never got satisfaction; and eventually at the end of June he gave

notice saying that, unless the car were delivered by July 25, 1948, he would not accept it."

89. The context is, in summary, that the party seeking to give the notice has, by his conduct, waived the right to rely on a stipulation as to time contained in the original contract, and so is no longer entitled to rely on such stipulation. In those circumstances, as it seems to me, a notice making time of the essence must, at very least, spell out the consequences for which the party giving the notice will contend in the event that the notice is not complied with. In other words, it must clearly convey that, unless the notice is complied with, the party giving the notice will treat the contract between the parties as at an end. I incline to the view that a notice making time of the essence must also be clear as to the time by which compliance is required. That is to say, a date must be specified as the date by which the recipient is to do what the notice requires. It is true that, if a date is specified, it must be a date sufficiently in the future at the date the notice is given to amount to giving the recipient of the notice a reasonable time for compliance. However, that does not mean, as I understood Miss Grange to be submitting, that it was not necessary for a notice making time of the essence to specify a date for compliance at all.
90. As a matter of construction of Sir Colin's facsimile transmission dated 26 September 2006 and his letter dated 30 September 2006 it is plain, in my view, that neither was in fact a notice seeking to make time of the essence in relation to completion of anything. Each was simply in the nature of an appeal to the good nature of Mr. Kurdieh to finish as soon as possible or as a matter of urgency. Neither contained any indication that Miss Thakar would treat the contract as at an end if Mr. Kurdieh did not respond by appropriate action.
91. While it is, perhaps, a minor matter, I think that it is obvious from the contents of each of Sir Colin's communications upon which Miss Grange relied that it was addressing only the position in relation to the Flat Works, and not the position in relation to the Home Works or the House Works. Thus, even if either of these communications fell to be treated as a notice making time of the essence, it was only making time of the essence under the contract concerning the Flat Works.
92. The evidence of the bank statements of Sunshine to which I have referred indicated that Sunshine did transfer the sum of £10,000 to Mr. Kurdieh on 28 September 2006. In her witness statement Miss Thakar explained at paragraph 37 the circumstances in which she came to cause Sunshine to make that payment, and what the payment was supposed to be for:-

"I was extremely reluctant to pay any more money but I wanted the job completed as soon as possible. I felt as if I had little choice but to pay further money. Mr. Kurdieh wrote to my friend Sir Colin Campbell on 25 September 2006 to set out why the money was needed. ... Sir Colin showed me the letter and either later that day or the following day I spoke to Mr. Kurdieh and agreed with him that I would pay a further £15,000 to him to complete all outstanding works at the flat in accordance with the specification and our discussions. Of that £15,000, £10,000 was to be paid immediately to enable Mr. Kurdieh to order the parquet and 20mm Calcutta marble flooring and to lay them both, and for completion of the bathrooms. £5,000 was to be paid when the entire works to the Flat was complete. He agreed. Sir Colin then wrote to Mr. Kurdieh on 26 September 2006 to confirm that agreement. Consequently, and in accordance with that agreement, on 28th September I paid an additional £10,000 by bank transfer to Mr. Kurdieh ..."

93. Miss Grange submitted that there was an express agreement between Miss Thakar and Mr. Kurdieh that the £10,000 paid on 28 September 2006 would be used to pay deposits on supplies of parquet flooring and on supplies of marble, and only for those purposes. However, that was not what Miss Thakar said in paragraph 37 of her witness statement. There she said that the £10,000 was supposed to enable Mr. Kurdieh to order the parquet and the marble, to lay them (so implicitly the £10,000 was to cover the entire cost of the supply, and not simply to cover some payment on account), and to complete the bathrooms in the Flat. In fact, on the evidence put before me, £10,000 was unlikely to be enough to cover all these items. An invoice dated 29 September 2009 raised by Parchettificio Forest di Naibo Michelangelo & C. S.N.C. ("*Parchettificio*") addressed to Mr. Kurdieh of which a copy was put in evidence showed that the cost of the supply and fixing of the parquet flooring amounted to something over €12,000, at that time about £4,900. There was some evidence, hotly disputed on behalf of Miss Thakar as to its authenticity, that the cost of the marble was something in excess of £4,000.

94. In the light of the evidence of Miss Thakar herself in paragraph 37 of her witness statement, the terms of the facsimile transmission dated 26 September 2006 and the letter dated 30 September 2006, each written by Sir Colin Campbell, which I have quoted, I reject the submission of Miss Grange that there was an agreement between Miss Thakar and Mr. Kurdieh that the £10,000 transferred on 28 September 2006 was to be used only to pay deposits on supplies of parquet flooring and on supplies of marble.

The evidence suggests to me that the sum of £10,000 was in fact paid to Mr. Kurdieh generally on account of what was due to him.

95. On the advice of a neighbour Miss Thakar consulted a Mr. Neil Peakall, who carried on business at the time through a company called Neil Peakall Ltd. The nature of the business of the company was described on its letter-head as "*Legal & Business Affairs*". Sir Colin Campbell, who was called to give evidence on behalf of Miss Thakar and Sunshine, told me that he understood that Mr. Peakall was a legal executive.
96. Mr. Peakall does not appear to have considered, or to have advised Miss Thakar or Sunshine about, the decision of the Court of Appeal in *Charles Rickards Ltd. v. Oppenheim* or giving a notice making time of the essence in relation to completion of the Flat Works, as varied, or the Home Works. What he did do, no doubt on the instructions of Miss Thakar, but following his advice to her that he should, was send to Mr. Kurdieh a letter dated 24 November 2006 in the following terms:-

"RE: Ms Rashmi Thakar

NOTICE OF TERMINATION – WALTON HOUSE, SW3

We have been instructed by our client Ms Rashmi Thakar to formally terminate your contract for building works at the above site on the following grounds:

- 1. Abandonment of the works.*
- 2. Failure to supply receipted VAT invoices for monies paid to you.*
- 3. Failure to provide authentic receipts for specific deposits to Italian suppliers to the full value as given to you by Ms Thakar in good faith in respect of parquet flooring and marble.*
- 4. Misinformation as to the completion of electrical works.*
- 5. Poor quality workmanship and general damage.*
- 6. Failure to advise client of, and then obtain necessary local building consents.*

All tools and equipment you wish to be removed from the site should be collected forthwith under supervision. Please contact us to make the necessary arrangements.

In the meantime, all Ms Thakar's rights remain expressly reserved."

97. Miss Grange relied on that letter as a proper termination of the contract in relation to the Flat Works, as varied. Mr. Rodgers

submitted that in fact that letter amounted to a repudiation of the contract.

98. The evidence was that Mr. Kurdieh had not abandoned the Flat Works, in the sense of leaving the site, but he had not been doing much work in the period immediately prior to 24 November 2006. Certainly the evidence, which on this point did not seem to be in dispute, did not indicate to me that Mr. Kurdieh was evincing an intention no longer to be bound to complete the Flat Works, as varied. He was simply taking his time about it.
99. The other matters listed in the letter dated 24 November 2006 struck me either as not involving breach of contractual terms at all, or as involving alleged breaches which were not repudiatory.
100. The matters listed at 2, 3 and 4 did not seem to me to amount to allegations of breaches of contract at all. Miss Grange submitted that they were all breaches of an implied term that Mr. Kurdieh would act towards Miss Thakar with good faith and fidelity. Such a term is often implied in a contract of employment, but I see no justification for implying it in a straightforward commercial contract between a client and a builder.
101. Miss Grange suggested that the complaint set out at 3 in Mr. Peakall's letter amounted to an allegation of dishonesty on the part of Mr. Kurdieh in relation to the use of the £10,000 provided on 28 September 2006, but that was not how it was put. What seemed to be contended for was some obligation to provide receipts. Certainly Mr. Peakall did not in terms contend that Mr. Kurdieh had misused the money he had been given. If he had made that assertion, then, in the light of my findings as to the circumstances in which the £10,000 came to be transferred, he would have been wrong to have done so.
102. Undoubtedly there were implied terms, if not express terms, of the contract in relation to the Flat Works that Mr. Kurdieh would undertake the agreed works in a good and workmanlike manner, that he would supply good and proper materials, and that the Flat, when works were completed, would be reasonably fit for human habitation – see *Hancock v. B.W. Brazier (Anerley) Ltd.* [1966] 2 All ER 901. However, that does not mean that there was any contractual obligation, prior to completion, to avoid any defects in the work done. After the termination, Miss Thakar told me, she went round the Flat with a camera and photographed everything which she considered to be defective in work done by Mr. Kurdieh. She adduced copies of the photographs in evidence. Whilst there were, indeed, defects shown in some of the photographs, all of them seemed to me to be minor matters which could be remedied

relatively easily. There were complaints about other matters, not readily capable of being photographed, such as the air conditioning and the under-floor heating. A joint expert instructed in this action, Mr. Matthew Molloy, engaged an expert, Mr. Adam Prince, to look at the air conditioning and the under-floor heating, and Mr. Prince did consider that there were defects in these areas. I shall return to the detail of the defects which Mr. Prince considered existed, but again the remedying of the defects found seemed to be relatively straightforward. Overall, therefore, the extent of the defects identified did not seem to me to justify the conclusion that Mr. Kurdieh had evinced an intention no longer to be bound by the contract in relation to the Flat Works as varied.

103. It was impossible to understand the import of Mr. Peakall's sixth ground for termination, as there was no evidence that any necessary building consent had not been obtained.

104. Miss Grange reminded me of the judgment of Hale LJ in *Rice v. Great Yarmouth Borough Council* [2000] APP L.R. 06/30 on the question whether it could be inferred from an accumulation of minor breaches of contract that the party in breach did not intend to perform its obligations under the contract in the future. I do not doubt that, in an appropriate case, such an inference is appropriate. However, I do not consider that Mr. Kurdieh had manifested an intention no longer to be bound by the contract in relation to the Flat Works, as varied.

105. In the result, therefore, I accept the submission of Mr. Rodgers that the sending of the letter dated 24 November 2006 by Mr. Peakall amounted to a repudiation of the contract in relation to the Flat Works, as varied. Mr. Kurdieh accepted that variation by ceasing work and leaving the Flat.

106. Miss Thakar did not attempt to justify termination of the contract in relation to the Home Works. She simply wrote a letter dated 25 November 2006 to Mr. Kurdieh which was in these terms:-

"After intense consideration of the matter involving the works done in Walton House and in Merrymore Nursing Home, I decided that the best way forward would be to cut my losses and part with you as a friend.

It has been an experience of a life time and the end result is very disappointing, however, I do not believe for a moment, that it was your intention to cause me a grief but it was unfortunate for both of us that Walton House was a complex refurbishment and your expertise did no [sic] match it.

I would like you to recognise that it is not possible for me to continue, or actually part, living in my property having the work uncompleted. I am sure that you acknowledge that I need to find and engage another firm that comprises of an electrician, Plummer [sic]; corgi registered engineers, painters, plasterer, and other specialist [sic] in order to both, redo the work that your firm has done or complete the work that has not been done.

I would like to end this episode and I would like to meet up with you to receive your approval of me engaging another firm who can put my flat into and [sic] order, so that I can start to enjoy living in my home.

I look forward to hearing from you.

Please call me on my mobil [sic]."

107. In her oral evidence Miss Thakar told me that the reasons she had terminated the contract in relation to the Home Works were her concerns about the incomplete works and about the impact of those works on the residents in the Home. That may be so. However, the real issue is whether Miss Thakar or Sunshine was entitled to determine the contract, and no sensible legal justification for termination was advanced.

Payments made to Mr. Kurdieh

108. It cannot be said that the position in relation to payments made to Mr. Kurdieh is very satisfactory. I have already mentioned the schedule of payments allegedly made adduced in evidence by Miss Thakar. As I have noted, the schedule to a considerable extent, but not entirely, contained cross-references to bank statements. What could be derived from the relevant bank statements was limited because where a payment was said to have been made by cheque or by withdrawal of cash the note in the relevant bank statement was simply of the number of the cheque or of the fact of the withdrawal of cash. However, the name of Unique Homes, the trading style of Mr. Kurdieh, appeared on statements in relation to payments totalling £40,000 out of the £97,070 which Miss Thakar contended had been paid.

109. Mr. Kurdieh in his oral evidence told me that the total sum which he had been paid was £80,500. He produced no records, of bank statements, account books or otherwise, to support his figure. In the Third Party's Defence and Counterclaim it was pleaded that Miss Thakar had paid a total of £45,520 on account of all three projects, and Sunshine had paid a total of £34,780 in relation to the

Home Works. An amount of £500 was said to have been paid in relation to the House Works. These figures total £80,800.

110. I am prepared to accept, albeit with some reluctance, that those payments or cash withdrawals identified in bank statements of which copies had been put in evidence by Miss Thakar which she attributed to payments to Mr. Kurdieh were in fact made to him. In the schedule produced by Miss Thakar sums totalling £6,150 were said to have been paid in cash, but were not cross-referenced to withdrawals from a bank. Consequently I am not satisfied that those payments were in fact made, but I find that sums totalling £90,920 were paid to Mr. Kurdieh.

Defects in the work of Mr. Kurdieh and alleged incomplete work

111. For the reasons which I shall explain, it seems to me that I am concerned with defects in the work undertaken by Mr. Kurdieh simply in the context of assessing the value of what he had completed by the time the relevant contracts were completed, as obviously it would have been necessary for him to incur some cost in order to rectify defects had the contracts not been terminated. Again, it is necessary to consider what work Mr. Kurdieh had agreed to undertake, but had not undertaken, in order to address the question of the value of his work.

112. The evidence as to the alleged defects in the Flat Works as varied fell into two categories, those of which there was direct evidence, in the form of photographs or expert evidence, and those in relation to which Miss Thakar told me that she had had the defects repaired without photographing them and prior to any inspection by an expert. The non-electrical items which were said to have been repaired it was alleged had been repaired by Mr. Cobbold, whilst the electrical repairs were alleged to have been undertaken by Strand.

113. Miss Thakar's position was that everything which Mr. Cobbold did was necessary in order to rectify defects in, or to complete, work which Mr. Kurdieh had agreed to undertake as part of the Flat Works as varied. As I have explained, I do not accept that. I have already set out the list of work for which Mr. Cobbold quoted. In that list the only item the description of which was suggestive of incomplete work was the finishing of the cornice in the living room. The only reference to a defect was to a defective tile in the child's bedroom. Some items, which I have identified earlier in this judgment, were plainly new work. The remainder of the items were equivocal, with it being entirely unclear whether the necessity for the work was that Mr. Kurdieh had not done something he should

have done, or whether it represented some fresh desire – for example to change a paint scheme – on the part of Miss Thakar. As I do not feel able to accept the evidence of Miss Thakar on contested matters in the absence of some corroboration, I do not feel able to find that any of the work Mr. Cobbold did, beyond finishing the cornice in the living room, was left incomplete by Mr. Kurdieh, or that any of the work which Mr. Cobbold did was necessary to repair defective work, other than to replace a tile in the child's bedroom. The extent or value of these items is impossible to assess on the evidence.

114. Mr. Kurdieh accepted in cross-examination that, at the date of termination of the contract in relation to the Flat Works, as varied, the electrical second fix work which he had agreed to undertake was incomplete. Notwithstanding that, as I understood it, completion of the electrical work and repairs to alleged defects in the electrical installation in the Flat undertaken by Mr. Kurdieh were in fact undertaken, with other work, by Strand, there was put in evidence a quotation dated 17 November 2006 addressed to Miss Thakar from a company called Webster Thomas Electrical Ltd. ("*Webster Thomas*") which began in this way:-

"Re:- Completion of existing electrical installation – 1 Walton Street, London

Further to our recent meeting please see my quotation detailed below to finish the incomplete electrical works based upon the existing electrical installation being in a satisfactory condition and fully compliant with current IEE wiring regulations BS7671."

115. What followed in the quotation was a detailed list of mostly second fix – that is to say fixing of equipment to installed wiring – work. I accept that quotation as good evidence of the extent to which the electrical work undertaken by Mr. Kurdieh was left unfinished when the contract in relation to the Flat Works, as varied, was determined. Webster Thomas submitted a price of £7,080.92 plus Value Added Tax for the necessary work. Mr. Molloy commented on that quotation in his report prepared for the purposes of this action:-

"My view is that the amount quoted by Webster Thomas represents a reasonable sum to undertake the work scheduled as a new electrician. I would expect the price to be higher than would have been charged by Mr. Kurdieh by virtue of the fact that the scope of works is smaller and that it will involve taking over from another electrician. I would expect the price

to include a premium of between 10% and 15% to reflect this."

116. Plainly Mr. Kurdieh would not have charged Value Added Tax had he completed the electrical installation. On Mr. Molloy's approach the charge Mr. Kurdieh would have made for completing the installation would have been of the order of £6,018.78 - £6,372.83. I am inclined to round that range to £6,250 and to find that that is the sum which Mr. Kurdieh would have charged.

117. Mr. Prince prepared a report dated 30 July 2009 on the air conditioning and under-floor heating in the Flat. The core of that report was:-

"Air Conditioning

The split type air conditioning system installed at 1 Walton House is a Fujitsu 4 way blow 'cooling only' cassette, model numbers (indoor) AUY25FUAR and (outdoor) AOY25FNAKL.

The indoor unit is located in the living room toward a large arch way connecting a wide hall way. The living room dimensions are approximately 5.5m x 7m with a ceiling height of approximately 3.5m.

Assuming the system was designed to suite [sic] the space, its approximate 7kW output would appear to have been sized to treat both the living room and part of the hall way. Whilst this is not good practice it is a common strategy for low or rude specification installations. The main factor preventing this strategy for [sic] working as intended in this instance is the barrier formed by the wall at the top of the arch being within 400mm of the indoor unit which will cause a curtain of chilled air to both drop down vertically and deflect back/re-circulate causing short cycling of the system. During normal operation the effect would be that there would be a cold spot at the arch way, the energy consumption would be unnecessarily high and the hallway relatively lacking in air conditioning.

The designated fuse within the fuse board in the hallway cupboard was found to be tripped and therefore the system was non operational. The fuse was found to be 20A, however the recommended fuse size for this model is 36A. This incompatibility would cause the fuse to trip as soon as the indoor unit called to the outdoor unit for cooling. This was tested by resetting the fuse and activating the system via the wired remote controller in the hallway. The indoor unit ran for a very short period and then the circuit breaker tripped.

The outdoor unit is located in an unventilated wooden enclosure in the front courtyard. It should be noted that this system receives its main power supply directly to the condensing unit from the main board and [sic] this power supply should have a local means of isolation by the condenser for both emergency and maintenance. This isolator was not present and did not look to have ever been present. The condenser was not fixed down by any means and poses a risk to the fracturing of the connecting refrigerant pipe work. This poses a health and safety risk of refrigerant burns.

If the system was operational the lack of air circulating over the condenser coil would cause the system to fail and shut down after a short period of inefficient operation.

Ms Rashmi Thakar was present during the survey and advised that the outdoor unit had initially been located closer to the front door and that the electrical wiring was unsafe, and that she had an independent air conditioning contractor make safe and move the condenser to its current location, however we could not detect any physical evidence of the unit being anywhere other than where it is now and Ms Thakar did not have any documents supporting this at the time.

Overall the installation is unsatisfactory and compromises both Building Regulations and CIBSE guidelines.

Remedial action is required to fully assess the operational status of the Fujitsu equipment and the minimum works would be the fitting of a correctly sized fuse to the main fuse board, installation of a local weatherproof isolator to the outdoor unit and a full wiring termination check. The wooden enclosure will need to be removed to test the operational capacity of the system and if the box is to be reinstated then adequate ventilation should be designed into it.

The total cost for these works would be in the region of £500-£700.

Should the system require further repair these repairs could range from £100-£300.

Should the system require replacement a new model will be required due to this model being discontinued. The value of the existing system (excluding power, connecting pipe work and labour) was £970 (2005).

The cost of a comparable unit today is £1200 + vat.

Installation costs including ancillaries would be approximately £1000 + vat.

Enabling works, disposal of old equipment and refrigerant and decorations would be between £1500 and £2800 dependant on the standard of decorations

An approximate total would be £4000.

Under Floor Heating

The underfloor heating systems heat generation is provided by a communal system and as such we were unable to access nor were we able to activate the system to carry our[sic] any testing. It is assumed that the system is in 'summer mode' and therefore dormant.

We were able [to] inspect a high level cupboard in which the incoming hot water service feeds the circulation pumps to each under floor heating circuit. This cupboard is no more than a crawl space above the Bed 2 ensuite and is not readily accessible.

The Grundfos pumps appear to be of various ages and Ms Thakar advised that at least two had been replaced due to either failure or poor operation of their circuits.

The electrical termination blocks and junction boxes have not been mounted properly or at all and there was a mixture of both old and new cables used to wire into the pumps. The wiring did not appear to be to a reasonable standard and is in our opinion unsafe.

The pipe work is a rude assembly of various makes of fittings both in copper, brass and plastic. This is not adequately fixed to any structure and there is evidence of past failure of the pipe connections causing flooding and water damage to the bathroom.

Remedial action required would be to strip out the rude manifold assembly and wiring and to replace old for new with a wall mounted manifold and with electrical labelled isolators located close to the access door.

The approximate cost for these essential works is £1800 + Vat."

118. Whilst expressed in somewhat technical language, it seems to me that the effect of the report of Mr. Prince was that not a great deal was required to deal with the air conditioning – basically fitting the correct size of fuse in the fuse board, supply and fixing of an isolator to the condenser, screwing down the condenser, and checking the wiring. Mr. Prince considered, and I accept, that these matters could be dealt with for a cost of £500 - £700. The basic problem with the underfloor heating seemed to be the manifold

assembly and associated wiring, which could be remedied for a cost of £1,800 plus Value Added Tax. I accept that also.

119. Miss Thakar contended that Mr. Kurdieh had agreed, as part of the Flat Works, to replace five doors, and that he had not done so. His evidence was that he had not originally agreed to replace the doors, but that during the course of the Flat Works he did agree to supply some doors. As I understood it, he contended that he had done so. On behalf of Miss Thakar it was asserted that the doors had not been supplied. I do not accept that. Not only did I not accept the evidence of Miss Thakar which was disputed unless there was corroborative evidence of some sort, but one might have expected that the absence of doors would have made occupation of the Flat difficult. The only evidence of the acquisition of doors by Miss Thakar which was put before me was an invoice from a company called S & B Construction Ltd. dated March 2007 for *"Three wooden doors to bed rooms and kitchen. Two glass doors to bathrooms"* at a total cost of £3000, £600 per door on average. It seems to me unlikely that Miss Thakar, who returned to occupation of the Flat in the summer of 2006, on the evidence, would have waited months to obtain doors, if there were no doors for the bedrooms and bathrooms in the Flat.

120. It was common ground that Mr. Kurdieh, by variation to the contract in relation to the Flat Works, did agree to supply and fit parquet and marble flooring, and that in the event he did not do so.

121. Miss Thakar contended that there were a number of items included in the Home Works which Mr. Kurdieh had agreed to undertake, but which he did not do. As I have explained, I have not been able to reach any conclusion on the evidence as to what exactly the Home Works comprised. There were two items about which Miss Thakar complained which I think were plainly not included in the Home Works, namely the refitting of the fire escape and the construction of an access ramp to a rear door. Miss Thakar's case seemed to be that because, in order to construct an extension to the Home, it was necessary to remove a fire escape and an access ramp to a rear door, it was obvious that they would need to be replaced, and therefore such replacement must have been included in the contract in relation to the Home Works. That analysis is, in my judgment, fallacious. What was included in the Home Works by contract was only what was agreed to be included. I am not satisfied that any of the works which Miss Thakar contended had been included in the Home Works but had not been done by Mr. Kurdieh had in fact been part of the contract works.

122. The position in relation to alleged defective works at the Home was rather more straightforward than that in respect of

alleged defective works in the Flat. The alleged defects had not been remedied, and so Mr. Molloy, and a building surveyor, Mr. Jonathan Cope, who assisted him, were able to inspect the matters complained of. There seem to have been 48 of them. It is not necessary for the purposes of this judgment to set out the alleged defects and my conclusions in relation to each, because I accept the conclusions of Mr. Molloy and Mr. Cope set out in Mr. Molloy's report. Mr. Molloy valued the cost of repair of the items which he and Mr. Cope considered to be defects at a total of £5,447 plus Value Added Tax. For many alleged defects, in particular in relation to electrical and mechanical works, Mr. Molloy commented that he was not able to establish the validity of the complaint from his inspection. In such cases I am not satisfied on the evidence that there was a defect.

The claims in this action

123. By the conclusion of the trial the claims of Miss Thakar or Sunshine in this action were for damages in respect of the alleged costs of completing work which was said to be included in the work which Mr. Kurdieh agreed to undertake as part of the Flat Works, as varied, or the Home Works, for damages in respect of the alleged costs of remedying defects in those works, for damages for delay in completing the House Works, for damages in respect of alleged storage costs and for damages in respect of the fees paid by Miss Thakar to Mr. Peakall. The claim for damages for delay in completing the House Works took the form of a claim for what was said to be a reasonable sum for the use of the House by Mr. Kurdieh's workmen after the expiry of what was contended as a reasonable period for them to occupy the House to complete the House Works and the Home Works.

124. The claims of Mr. Kurdieh by the end of the trial were for what was contended to be the balance of the sums due to him for the Flat Works, as varied, the Home Works (as varied, as contended by him), and the House Works. The pleaded claim for loss of profit on the parquet flooring and marble works included in the Flat Works by variation, but not undertaken by the date of the termination of the contract for the Flat Works, was, I think, effectively abandoned for want of evidence of what the profit would have been or how it would have been calculated. At all events, as I find, there was no evidence of what such a profit would have been or how it would have been calculated. From the invoice dated 29 September 2006 sent by Parchettificio to Mr. Kurdieh it seems that it had been contemplated that the suppliers would furnish labour to lay the flooring, so it was unclear, if Mr. Kurdieh was to make a profit on

the supply and fixing of the floor, what form that profit was to take or how it was to be achieved.

125. It follows from my conclusions that Miss Thakar wrongfully repudiated the contract in relation to the Flat Works, as varied, and that she or Sunshine wrongfully repudiated the contract in relation to the Home Works, that she and it are not able, in law to complain about the fact that particular works were incomplete or defective at the date of termination. If the contracts had not been brought to an end Mr. Kurdieh would have been bound to have completed all the works for which he had contracted, and to a proper standard. He has been relieved of those obligations by the wrongful determination of the relevant contracts. Whilst, at one time, the view was taken in some quarters that the obligation of a building contractor was to perform his work perfectly in relation to each aspect of it the first time the work was done, the better view for many years has been that it is only at completion that the work has to be completed to a proper standard. The client under a building contract is not at liberty to complain prior to alleged completion of all of the works that some part of it is defective. It is well-established that "*snagging*", as it is called, is the final stage of a building project before completion, and that it is at that stage that minor disconformities are remedied. Thus, as it seems to me, wrongful determination of the contracts in relation to the Flat Works, as varied, and the Home Works, provided a complete answer to the claims against Mr. Kurdieh in respect of incomplete or allegedly defective work.

126. While it was not a point which had been pleaded, Mr. Rodgers in his closing submissions contended that Miss Thakar and/or Sunshine had failed to mitigate their alleged loss in any event by not affording Mr. Kurdieh the opportunity to remedy alleged defects. I accept that submission.

127. The claim of Miss Thakar/Sunshine for damages in respect of the extended period of occupation of the House by the workmen of Mr. Kurdieh failed on the ground that, as I have explained, the originally agreed period for completion of the Home Works was waived. The workmen thus did not remain for an excessive period. Moreover, there was in fact no proper evidence of loss. At the end of the trial the sum claimed under this head was £1,500, said to represent three months' loss. Loss was thus claimed at £500 per month. Extracts from newspapers which were put in evidence indicated that houses in the Lymington/New Milton area of Hampshire at the material time were let at rents of the order of £85 to £95 per week. However, the House was not let out on the open market in the ordinary way. It was occupied by employees of

Sunshine working in the Home. I was told that those occupiers did pay rent, but there was no evidence of the amounts. There was no evidence as to any employee who might otherwise have occupied a room in the House having to obtain other accommodation, or of Miss Thakar or Sunshine incurring expense in providing alternative accommodation.

128. The storage costs incurred by Miss Thakar seemed, from two invoices dated, respectively 17 January 2007 and 28 February 2007 issued by Stephen Morris Shipping Ltd. which were put in evidence, to relate to storage of items between 30 November 2006 and, at the latest, 8 March 2007. There was no evidence as to what circumstances caused those costs to be incurred and it was not obvious, for example from evidence of work being undertaken in the Flat, why costs were incurred. The claim for storage costs was simply not proven.

129. There was, I think, no justification for the claim for the fees paid to Mr. Peakall. It may well be that it might have been appropriate for Miss Thakar to have sought legal advice, as Sir Colin Campbell seems to have advised, in about September 2006. Had she done so, perhaps the costs of obtaining advice could have been recovered as costs of this action, had she succeeded in her claims. As it is, Mr. Peakall was not a solicitor, and the advice which he seems to have given to Miss Thakar appears to have been quite wrong.

130. As I have explained, the claims of Mr. Kurdieh which were live by the end of the trial depended on the proposition that he had had a contractual entitlement to payment of a sum or sums in addition to the sums which he had already been paid in respect of the work which he had done. It was for him to prove this further entitlement. In my judgment he failed to do so.

131. I have found that he had been paid a total of £90,920. The agreed price for the Flat Works originally included in the contract for those works was £38,000. A reasonable price for the addition of air conditioning was agreed to be £3,700, but I have found that the air conditioning equipment supplied and fitted by Mr. Kurdieh was defective and that a cost of £500 - £700 would have had to have been incurred to remedy the defects. Mr. Molloy assessed the value of the underfloor heating supplied and fitted as part of the Flat Works as varied at £1,800. I accept that assessment. However, Mr. Prince calculated the cost of remedying defects in that installation at £1,800 plus Value Added Tax. I accept that assessment also. The consequence is that Mr. Kurdieh was not entitled to payment for the supply and fitting of the underfloor heating because the cost of making it properly operational was equal to the value of it properly

completed. For the reasons which I have explained, Mr. Kurdieh was not entitled to claim extra payment for supplying and fitting coving. I am satisfied that he undertook alterations to the central heating in the Flat, because Miss Thakar seemed to accept that. Her difference with Mr. Kurdieh seemed simply to be whether the cost of such alterations were agreed to be included in what she said was an agreed price of £1,800 for the underfloor heating. I did not accept her evidence on that point. Mr. Molloy valued the alterations to the central heating at £1,800. I do not accept that Mr. Kurdieh provided any new drainage in the Flat. On the evidence which I accept of the Webster Thomas quotation, adjusted in accordance with the observations of Mr. Molloy, at the date of termination of the contract in relation to the Flat Works, as varied, there was outstanding electrical work in the Flat to the value of £6,250. In the result, I find that the sum to which Mr. Kurdieh was properly entitled in respect of the Flat Works, as varied, as at 24 November 2006 was £36,650, calculated as £38,000, the agreed price, plus £3,100 (£3,700 less £600, the average of £500 - £700) in respect of the supply and installation of the air conditioning equipment, plus £1,800 for alterations to the central heating, less £6,250 for incomplete electrical work.

132. I have not been able to reach any conclusions as to what works were comprised in the Home Works or what price was agreed for those works. Mr. Molloy in his report considered that the value of the Home Works, properly completed, was in the range £41,000 to £54,000, depending upon what exactly was comprised within the Home Works. However, Mr. Molloy also found defects in the work done to a value of £5,447.

133. Mr. Molloy valued the House Works at £4,300, on the basis that Mr. Kurdieh was not providing labour free of charge. Mr. Molloy did not seek to value the materials only. However, at paragraph 2.5.3 of his report he did say that a typical split between labour and material was 40:60. If one applied that split to the assessment of £4,300, the material only element amounted to £2,580.

134. On the figures which I have mentioned in the preceding paragraphs it is a long way from obvious that Mr. Kurdieh must be entitled to some further payment for the Flat Works, as varied, the Home Works and the House Works. If one takes the sum to which Mr. Kurdieh was, in my view entitled as at 24 November 2006 in respect of the execution of the Flat Works, as varied, £36,650, and, for illustrative purposes only, adds the highest of Mr. Molloy's valuations of the Home Works, £54,000, deducts the assessment of Mr. Molloy of the cost of repairing defects in the Home Works, £5,447, then adds 60% as the material element of the assessment

of Mr. Molloy of the value of the House Works of £4,300, the arithmetical result is £82,623. That is only a little more than Mr. Kurdieh accepted he had been paid, and just over £8,000 less than I have found he was paid.

Conclusions

135. In the result, for the reasons which I have explained, the claims of Miss Thakar and Sunshine against Mr. Kurdieh all fail, and the claims of Mr. Kurdieh against Miss Thakar and Sunshine fail.