CITATION:	*Olympic Pool Consultants Pty Ltd v Emily Young and Trent Mongan* [2004] NTMC 092
PARTIES:	Olympic Pool Consultants Pty Ltd v Emily Young (aka Mongan) & Trent Mongan
TITLE OF COURT:	Local Court
JURISDICTION:	Darwin
FILE NO(s):	20209274
DELIVERED ON:	21 December 2004
DELIVERED AT:	DARWIN
HEARING DATE(s):	12, 13 October 2004
DECISION OF:	D LOADMAN, SM

CATCHWORDS: Contract – Alleged Breach – consequences of failure to complete all works – counterclaim for defective and or faulty workmanship.

REPRESENTATION:

Counsel:

Plaintiff:	Bill Piper
Defendant:	Vanessa Maley

Solicitors:

Plaintiff:	Mr Bill Piper
Defendant:	Withnall Maley

Judgment category classification:	B
Judgment ID number:	[2004] NTMC 092
Number of paragraphs:	51

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20209274

BETWEEN:

Olympic Pool Consultants Pty Ltd T/As Darwin Swim Pool Sales and Service (ACN 009 596 552)
Plaintiff

AND:

Emily Young (aka Mongan)
1st Defendant

Trent Mongan
2nd Defendant

DECISION

(Delivered 21 December 2004)

Mr David LOADMAN SM:

ISSUES BETWEEN THE PARTIES

1. Summarising the Plaintiff's statement of claim, it is to the effect that on 20 October 2001 there was a contract with the Defendants to construct a swimming pool at 18 Calvert Street, Tiwi, a suburb of Darwin.

2. The particulars assert that such contract was partly in writing, partly oral and partly to be implied. The writing is said to be constituted by an agreement dated 20 October 2001, to be read with a document headed "schedule A – installation and instructions". Oral constitution is alleged to comprise a conversation between Brian Smith, the site supervisor of the Plaintiff and the first and second named Defendants on about 23 October

2001. The implication of the usual terms were to be implied "in order to give the agreement business efficacy".

3. The contract price was said to be $20,500.00 and there was a staged progress of payments at stipulated intervals, which is not relevant for the purposes of this decision.

4. The Plaintiff company asserts that, works were performed to practical completion, save that the sand filtration system was not fitted, the latter said to be pursuant to the instructions of the first named Defendant.

5. Breaches of progress payments are alleged, and again such breaches are not recited for reason of a lack of relevance.

6. The Plaintiff further claims payment for extra work, which payment is derived, it is asserted, from the contract and comprises claims for a) cleaning up of existing rubbish on site $180.00; b) changing the position of the filtration position - $338.80; c) changing the shape of the pool - $1,155.00; d) jack hammering hard formation to maintain correct shape of pool - $297.00 and e) extra required to sloping nature of the block - $265.65.

7. A quantum meruit is the alternative claim to the claim for extras.

8. Loss and damage are then claimed in the pleading in the sum of $8,500.00. On 18 November, by oral intimation of Mr Piper to the Court in the process of the ventilation of the matter, "expectation, loss" in the sum of $5,000.00 was in fact to be the basis of the Plaintiff's claim for damages and the basis of the claim as pleaded was abandoned.

9. It is then pleaded that on 20 December 2001, the second Defendant ordered the manager of the Plaintiff ("Smith") to leave 18 Calvert Street and not return. Further, that the second Defendant arranged for Peter Mauceri, a sub-contractor to the Plaintiff, "to independently complete the construction

of the swimming pool", in which task he is alleged to have assisted Mauceri and paid him.

10. Finally, there is a repudiation of contract pleaded, said to arise out of the alleged instruction to leave the site and other matters referred to. The pleading does not in the usual terms then assert the repudiation is accepted and the contract rescinded, but alleges that the actions of the second respondent complained of constituted a breach of contract.

11. The Defendants assert in the amended defence that there was an agreement between them and the Plaintiff, which was entire, comprehensive and conclusive and in writing alone. They assert that it was an implied term of the agreement that the pool would be of good quality "for its purpose and constructed in accordance with Australian Standards".

12. The contract price of $20,500.00 is admitted and leaving aside issues of pedantry, they deny the work was of merchantable quality, assert same was not fit for the specified purpose or was not completed to the point of and including practical completion.

13. They allege payments of $15,500.00 in all, the last payment being a payment of $3,500.00 to one Peter Mauceri.

14. They deny that the extras claimed were items of work requested by them or that the Plaintiff is otherwise entitled and further deny, in any event, that the work claimed was performed.

15. To the claim in the alternative of a quantum meruit, the response is that the "tax invoice issued by the Plaintiff are not reasonable" (sic).

16. They deny performance of the agreement and assert as a result of non-completion that no further monies are due to the Plaintiff, that any breach by them occurred, or that any loss or damage was suffered by the Plaintiff.

17. In paragraphs 11 and 12 of the amended defence, there are matters which in substantial terms do not accord with the evidence which ultimately was led. For that reason, although there is an incongruity in logical terms, the law in relation to the matter is that where the evidence reflects a particular state of affairs and the parties conduct the case on that basis, contrary pleading is not pedantically to determine the outcome. Positively, they deny any separate contract with Peter Mauceri for completion of the works as alleged, although it is admitted, that the second Defendant paid to him the sum of $3,500.00.

18. The breaches alleged, on the part of the Plaintiff by the Defendants are as follows:

    (a) The swimming pool was not level and varied up to 40 millimetres in height;

    (b) Water leakage as a result of the plaintiff's failure to seal the inlet nozzle;

    (c) Failure to silicone seal the pool lights giving rise to further leakage;

    (d) Failure to cap off steel fibres which protrude through the pebble finish of the walls and floor;

    (e) Sloping of the walls of the pool exceeding 13 degrees as required by Guide to Swimming Pool Safety, Australian Standard 2818;

    (f) Rust stains over the pebble finish;

    (g) Failure to tile the pool in a reasonable manner such that the clay tiles are lifting;

    (h) Chipped tiles;

    (i) Poor pebble finish leaving exposed concrete;

(j) Bumps along the concrete wall surface being poor workmanship.

On that basis, the Defendants deny the Plaintiff has any entitlement.

19. The Defendants then mount a counter claim asserting an agreement "to excavate 18 Calvert Street, Tiwi as required to install a reinforced concrete with dray mix (sic) (clearly this should be a reference to steel fibre reinforcement with a brand name Dramix) 5 metres x 9 metres x 2.1 metres with a waterfall foundation, lights and brick top pool" ("the pool"). They plead implied terms to the effect the pool would be completed and installed within a reasonable timeframe, would be structurally sound, that the work would be performed to a standard of reasonable quality and fitness for its purpose and that the pool would be installed and constructed in accordance with the Australian Standards.

20. There is alleged a breach of contract, the breaches comprised being as set out in paragraph 18 above.

21. As a consequence of the alleged breach, a claim for various methods of rectification is asserted and quantified.

22. There seems to be some attempt to invoke negligence as a cause of action, in that a duty of care is alleged to have reposed in the Plaintiff in constructing the pool. As a consequence of the alleged breach of the duty of care, breaches of which are the same as alleged in paragraph 18 above, the same damages are claimed as for the alleged breaches.

23. The defence to the counter claim in substantive terms joins issue with matters in the counter claim positively asserting that there was no term to construct in accordance with the Australian Standards, or that any of the alleged breaches occurred. No doubt in purported pursuit of embracing the Latin word "sicunde" (the abbreviation of which is normally utilised to indicate that an incorrect usage of grammar or spelling is engaged because that was the way in which the expression by another occurred), the notice of

defence in referring to paragraph 7 and 4 of the counter claim employs the interesting recitation "(sick)". Presumably there is no intention to refer to illness of any description by such an exercise.

24. In setting out the Court's decision in this matter, it is proposed to deal with the decision in two segments.

WHAT THE CONTRACT COMPRISED AND WHETHER THE SECOND DEFENDANT TERMINATED AND THEREBY REPUDIATED THE CONTRACT WITH THE PLAINTIFF AND ENGAGED AS AN INDEPENDENT CONTRACTOR PETER MAUCERI TO COMPLETE THE CONTRACT.

25. The Court finds that the contract comprised firstly a written agreement being exhibit P1 in the proceeding, executed by and on behalf of the Plaintiff and executed by the first Defendant alone, on 20 October 2001. Although not attached to the written agreement executed on that day, that the contract further comprised the sketch, which on the evidence was made part of the above referred agreement by mutual accord between the first Defendant and the Plaintiff's representative, Mr Smith. Further, that by virtue of section 74 of the Trade Practices Act (CWTH) the pool was required to be constructed and completed in a proper and workmanlike manner. The Court finds there was no express or implied term embracing the need to comply with Australian Standards, which for the purposes of this decision are irrelevant.

26. The Plaintiff company obviously employs Brian Rigby-Smith ("Smith"), but at relevant times also employed Desley Smith, who (TR54) (a reference to page 54 of the Transcript, the same method of recitation will be employed elsewhere in this decision).

> "what is her role for the Company?---She looks after the day - today invoicing and bits and pieces."

27. Smith is the sole director of the Plaintiff (TR54). The shell (of the pool) was "sprayed" on 26 August 2001.

28. Mr Smith would have it that shortly after this, the first Defendant left Darwin and that he was waiting for her advices as to when to return to complete the construction of the pool. Without detailing her evidence, it is contrary to that position and I accept her evidence and reject the evidence of Smith in that regard. The second Defendant gave evidence that he arrived in Darwin and for the first time saw the pool construction at 18 Calvert Street, towards the end of November and that some time later, Peter Mauceri and his assistant, Jason, arrived on site shortly after followed by Smith and a plumber, I accept that evidence.

29. On 14 December 2001, undoubtedly Brian Smith left the site at which the pool was being constructed. I reject his version of what occurred, but in any event, make the point that had it been so, that was not consonant with dismissal of the Plaintiff from the site. In the event, I prefer the version of events which is the subject of the evidence by the second Defendant verified in effect by Peter Mauceri.

30. I find that the conversations which the second Defendant said he had with Desley Smith on the telephone of Peter Mauceri in fact occurred. Further that Desley Smith was at all material times, an actual or ostensible agent of the Plaintiff and had the authority of the Plaintiff to enter into the arrangement which I find she did with the second Defendant.

31. That, to recapitulate the matter, was an arrangement that Peter Mauceri and his assistant would carry out the work which they had been contracted to carry out on behalf of the Plaintiff, by Brian Smith. Upon completion of that work, payment of the sum of $3,500.00 to Peter Mauceri would be tantamount to a further progress payment on the contract entered into between the Plaintiff and the first Defendant on 26 October 2001.

32. The role of the plumber, who initially attended on site in company of Brian Smith, is less clear, but in the event I accept the evidence of the second Defendant that he personally dug all the trenches and laid the concrete pad required for the installation of the filtration system in the position where the filtration plant was to be resited.

33. The more vexed question is to construe the state of the contractual relationship between the parties at the time that Mauceri left the site in late December of 2001. Mrs Maley contends that I should find, from the discussions which took place between Desley Smith and the second Defendant on the telephone, or discussions which took place on site in January 2002, that there was an arrangement whereby the original contract was terminated.

34. Mr Piper asserts that to make such a finding would be against all commonsense. He correctly points out that at that time, there was still owing on the original contract the sum of $5,000.00 and no substantial contractual work to be performed. Of course, there was the obligation reposing in the Plaintiff to complete unfinished work and / or remedy defective work, but as will become apparent later, in terms of scale in relation to the original contract, it was of minimal proportions.

35. There is nothing overt which would enable the Court to conclude that there was any express, or implied agreement, to terminate the contract at this time on the basis that the Plaintiff would waive payment of the sum of $5,000.00. Neither does this Court find that the first or second Defendant released the Plaintiff from any contractual obligations which still survived at that time.

36. More positively then, it is this Court's finding that shortly after 14 December 2001 after the discussion by the said 2nd Defendant with Desley Smith on the telephone and/or after a later discussion with her on site, the contractual relationship between the parties was (a) that the Plaintiff, subject to performance, was owed the sum of $5,000.00 and (b) the

Defendant was entitled to have all works completed, defective works remedied and proper maintenance carried out.

THE QUANTUM OF PLAINTIFF'S CLAIM

37. During the course of evidence, the Plaintiffs claim for damages set out in the amended statement of claim, essentially amounting to loss of profit was abandoned and the Plaintiff notified as previously set out that what it was seeking by way of an award from this Court was an award in respect of "expectation damages". In relation to the amount of expectation damages, the Plaintiff through Mr Piper gave notice that it limited such a claim to the sum of $5,000.00

38. It is unarguable that the state of the evidence in relation to performance under the contract is less than satisfactory. That does not however relieve this Court from the obligation of awarding and computing damages, if any, which ought to be awarded to the Plaintiff. It is only if there is absolutely no evidence at all which will enable this Court to come to such a finding, that such a course should be adopted.

39. Bearing in mind that unequivocally on any basis there was $5,000.00 owing to the Plaintiff, being the balance of the contract money as found by this Court, the Court has no hesitation in saying that it accepts as a valid measure of damages, the Plaintiff's entitlement to expectation damages. The Court further accepts that the starting point for the quantum of such damages should be the sum of $5,000.00.

40. I find that the following deductions are to be made from any notional entitlement of the Plaintiff:-

    (a) The value of the sand filter never delivered by the Plaintiff to the site, or to either of the Defendants, and never the subject of a demand by the Plaintiff addressed to the Defendants, or either of them, to accept delivery. The Court finds that this is a deduction to

be made from any notional entitlement to the Plaintiff. The problem is there is again a conflict of evidence as to the value. Exhibit P10 has an unvouched amount of $893.00 as allegedly representing the value of the sand filter. The evidence of the 2nd Defendant was to the effect that for the sand filter, the U-tube and the salt chlorinator, he paid Maurie's Pool Shop the sum of $2,800.00. The Court has no invoice or any other voucher indicative of what price is to be attributed to each one of these chattels. There is no science attached to the Court's conclusion as to the amount to be ascribed to the article, it is entirely arbitrary. Doing the best it can, the Court finds that the amount to be deducted is $1,300.00.

(b) Next is the acid washing which would have apparently had the result that any protruding Dramix fibres were dissolved, although the Court cannot really see why such occurrence would have necessarily precluded the formation of oxidisation at the tip of such fibres. Quantification is again difficult, if not impossible. The Court allows an arbitrary amount of $300.00.

(c) An amount of $500.00 is allowed by the Court, in respect of the necessary work to be carried out to relocate the filtration plant to its intended location from under the lounge room window, it being in this Court's finding bad practice to so locate a filtration plant, regardless of there not having been any express agreement in relation to its location. Philosophies of good and proper workmanship would dictate that such a location was improper and not in accordance with good practice. Again quantification is arbitrary.

Although the arithmetic is obvious, the amount to be deducted from the $5,000.00 in relation to these items, is the sum of $2,100.00.

THE EXTRAS

41. In addition to the contract price of $20,500.00 in total, the Plaintiff asserts an entitlement to extras pursuant to Clause 9 of the written contract. In respect of each of those claims and the fact of the claim, the decision of this Court for the reasons stated is as follows:

(a) **Cleaning up of existing rubbish on site.** The claim for removal of debris from the site. This claim is rejected as invalid. The Court prefers the evidence of the first Defendant as to the circumstances, under which undoubtedly there was material removed from the site, but it is not the case that it was removed in accordance with the version testified to by Brian Smith

(b) **Changing the position of the filtration position.** As the Court has found, no work was done by or on behalf of the Plaintiff at all in this regard. The Court's finding is that the 2nd Defendant did it all and consequently there is no basis upon which any claim for extras can be mounted.

(c) **Changing the shape of the pool.** The dimensions of the intended pool are not shown on the diagram which is attached to Exhibit P1, which in any event is a drawing appended to the signed contract some days after actual signature of the initial contract document. The dimensions of the pool are however clearly stated in Clause 4B of the contract. Relevantly, at the end of the pool at which the steps were to be constructed the dimension entailed a pool width of approximately 5 metres. There is no dispute that the current width of the pool at that point is now approximately 5 metres, but that was brought about in the Court's finding, by the insistence of the first Defendant that the pool should in fact be such width, when she discovered on measuring it was 4.5 metres in fact. It matters then not at all in this Court's perception as to whether the excavation

occurred on the side of the steps or on the opposite side, where rocks apparently needed to be dealt with. It is a matter in this Court's finding entirely the obligation of the Plaintiff pursuant to the contract and is not a recoverable extra, pursuant to the said Clause referred to above, or at all.

(d) **Jack hammering hard formation to maintain correct shape of the pool.** Claim for this being an extra is rejected, the pool had to conform to the dimensions set out in the contract, the fact that had to be done after the initial excavation is a matter for the Plaintiff and is not validly charged as an extra. This is the Court's ruling despite the contents of condition 9 of the contract, which insofar as any relevance of same can be gleaned, apparently according to Mr Smith's evidence is derived as a right "because of rock or unforeseen obstructions". There is no evidence that the substance removed because the pool was not constructed according to the contract with, was either unforeseen or rock and the claim for extras is denied.

(e) **Extra required to sloping nature of the block.** To contend, as Mr Smith does, on the Plaintiff's behalf that the Defendants should pay an extra in order to ensure the pool structure was supported by surrounding earth, as opposed to having the deep end of the pool completely exposed is risible. It could never have been perceived that there would not necessarily have to be earthworks to cater for this contingency and that extra is denied.

THE COUNTER CLAIM FOR DAMAGES

42. Despite the undoubted expertise, not to mention the expense occasioned by the commissioning of the expert report of John W Scott ("Scott") and the quantity surveyor's assessment by Charles H. Wright ("Wright") respectively Exhibits D1 and D2 in the proceedings, there is a contrary

report and evidence by Medhat Gabriel ("Gabriel"), an expert commissioned on behalf of the Plaintiff.

43. It must be borne in mind that the contract documents, do not deal with many criteria. The levels and other specific aspects of the construction are simply not the subject of detailed plans and measurements such as one might expect, as opposed to plans and specifications normally brought into being by an architect or qualified draftsman.

44. There is nothing which would enable this Court to find, for instance, that it was a term of the contract, that there should be no deviation whatsoever from the absolutely level plane in any aspect of the pool construction.

45. The evidence of Scott in relation to those matters is what the Defendants would have it give rise to counter claim. He of course adopted his report in evidence (Exhibit D1). Not every aspect of his oral evidence is going to be set out.

    (a) He said that the features of photograph number 7 attached to D1, was not "birdshit", that having been either a serious or jocular reference to this issue by Mauceri. Instead he said it was exposed concrete because surface pebbles had fallen away and the concrete was exposed. He also said that the features apparent from photographs 8 and 9 were due to the way the work was done. He said that in photograph 9, the appearance of discolouration was generated by ("fines") which had come away from the wall, he thought this was brought about by using too strong a wash, but interestingly concluded by saying, "I can't say that was the fault of the tradesperson."

    (b) In cross examination he conceded that the complaint about the 13 degree slope of the wall was unjustified, in any event, given the exception created in the Australian Standards.

(c) He expressed the view that 40 millimetres was not a level to which any construction work should settle and conceded that in any event, the coping ended up on the level plane.

(d) He conceded that in relation to chipped tiles "there may be more than one but in fact very few".

(e) The "bumps" in photograph 10, he said amounted to a few in number and were "a little unsightly". He also said that he could not say whether these matters were within tolerance or not.

(f) Although he alleged that the reinforcing fibres should have been fibre-glass, he conceded an acid wash would have resolved the problem of protruding DRAMIX fibres in fact.

(e) In relation to the inlet nozzle, he said that the attempt to repair "may be the source of the leak" and "I saw no evidence of a leak" which makes that aspect of his evidence of little value on any objective basis.

46. The next issue concerns faulty workmanship, matters which are the subject of paragraph 13 of the amended Defence and paragraph 3 of the counterclaim being part of the of same pleading, and the Court will endeavour to deal with those in the order that they are pleaded:-

(a) The swimming pool was not level and varied up to 40 millimetres in height;

In this regard Scott, in his report, states relevantly "our level survey bore out the fact that the pool was not level and varied up to 40 millimetres in height." That is one and a half inches in imperial measurements with which the Court is much more familiar in concept. Bearing in the mind the dimensions of this pool entail a pool which, was by design, 9 metres long and 5 metres wide, this is

what lawyers call de minimis. Mr Gabriel at page 4 of his report (item 5(e)) relevantly says "this degree of unevenness is not, in my opinion, indicative of poor workmanship as regards to the construction of the shell itself. There will always be minor variances on completion of the shell. It is at the time of laying the coping or paving which comprises the coping, that the appropriate levelling ought to take place.

Following completion of the coping, a swimming pool will then be at its final height." In any event, it is not anything more than an example of pedantry. This kind of height variation would not be discernible to the naked eye and this Court is not going to compensate the Defendants in relation to that aspect of their claim.

(b) Water leakage as a result of the plaintiff's failure to seal the inlet nozzle;

Mr Gabriel makes no relevant comment about the issue of leaks, save that they cannot relate to the structural integrity of the pool. The inevitable conclusion is that there is a leak, as I accept the evidence of the Defendants in this regard, and that the only probably cause of the leak relates to the inlet nozzles as observed by Scott in the report of Scott Wilson Irwin Johnston Pty Ltd ("Scott report"). On that basis, and indeed in relation to all remedial work, the only valid compensation to the Defendants is derived from proposal one of the report of QS Services ("Wright's report"). That entails a repair cost of $675.00. The Court has some difficulty because of course Exhibit D2 is concerned with two discrete aspects of perceived defective workmanship, being the penultimate and ultimate bullet points on page 2. Dissecting those costs, the Court allows the sum of $460.00 in relation to this aspect of the matter.

(c) Failure to silicone seal the pool lights giving rise to further leakage;

As previously set out, both in Scott and Wright's report being Exhibit D1 and D2 respectively, the Court accepts this is an aspect of defective workmanship in relation to which the Defendants are entitled to be compensated, having regard to the arithmetic in relation to item (b) above the allowable amount is $275.00.

(d) Failure to cap off steel fibres which protrude through the pebble finish of the walls and floor;

There are dramix fibres in the shell. The Plaintiff did not do what should have been done, either by Mauceri or subsequent to his leaving by anyone on behalf of the Plaintiff. It should have been acid washed, and such would have both removed them and it seems prevented any rusting. In the event, Gabriel refers to them as "rather small discolorations on the surface of the shell. They were very few in number, I believe two or three at the most, at the time of my inspection." In the circumstances no amount is allowed for this item.

(e) Sloping of the walls of the pool exceeding 13 degrees as required by Guide to Swimming Pool Safety, Australian Standard 2818;

There is no inclusion in this contract of the Australian Standards and consequently Scott's comments in that regard were of no assistance. I accept Mr Gabriel's evidence that it is a small part of the pool wall in any event which exceeds 13 degrees and the rest, although not needing to be so, is in conformity in any event with the Australian Standards.

(f) Rust stains over the pebble finish;

The same remarks are made in relation to (d) above and are of application here.

(g) Failure to tile the pool in a reasonable manner such that the clay tiles are lifting;

This item is dealt with in Scott's report at the first bullet point on page 2. It is not dealt with in Gabriel's report, although at TR125. Gabriel says at the end of the first paragraph "I mean, it's not a structural matter, but you have to do it properly otherwise you will have a problem". He was referring to expansion joints. Mr Piper did not cross-examine Scott on the issue and there is inadequate evidence to indicate how many pavers have "started to lift". Obviously where no lifting has occurred, if expansion joints are cut presumably the problem will be solved, but in the absence of sufficient evidence and doing the best possible in the circumstances, the Court will make an arbitrary allowance of $500.00 to relay those pavers that have lifted and now to cut Expansion Joints. The Court refutes entirely the need to proceed in accordance with paragraph 3 of proposal one of Wright's report. That requires every single paver to be removed and there is no justification for same demonstrated.

(h) Chipped tiles;

Gabriel, in his report at paragraph 5(f)(i), refers to observing one single tile that was chipped. It is photo 6 to Scott's report. Again the evidence is unsatisfactory and the Court will allow $100.00 on the basis that some remedial work must be undertaken or maybe.

(i) Poor pebble finish leaving exposed concrete;

This seems to be dealt with, together with other discrete matters, on page 3 of Scott's report at the first bullet point.

Mr Gabriel did not deal with the matter in his report, nor did he do so in his evidence. Scott, in his evidence, could not say that the lack of chemicals, appropriate chemicals that is, when the pool was filled might be the cause of the trouble there. Objectively this is a minor complaint and does not need reparation, it is not structural and appears only to be in minimal locations. It is within tolerance in this Court's finding and does not warrant any reparation, and certainly does not warrant reparation as advocated in Wright's report of $2,562.00.

(j) Bumps along the concrete wall surface being poor workmanship.

In his oral evidence, Scott referred to these bumps as being demonstrated in photo 10, there are "a few bumps there", it was "a little unsightly" although he did assert the photo's did not highlight the problem sufficiently. He refers to that item at page 3 of the last bullet point before the heading Conclusion. Gabriel does not mention it in his report. There is no costing of such remedial work as maybe necessary by Wright. Gabriel was not cross examined on the issue and no orders are made in that regard.

47. The total of the above computes to a total allowance for faulty workmanship of $1,275.00.

48. Having regard to the amount of $2,100.00 as set out in paragraph 40 of the decision, the total amount to be set off against the expectation damages of $5,000.00 is therefore the sum of $3,375.00.

49. To resort to formality:-

(a) There will be judgement in favour of the Plaintiff against the Defendants jointly and severely the one paying the other to be absolved in the sum of $5,000.00.

(b) There will be judgement on the counter claim in favour of the Defendants against the Plaintiff, in the sum of $3,375.00.

50. Clearly set off operates in relation to those amounts.

51. I will hear the parties in relation to issues of costs at a time and date to be fixed.

Dated 21st day of December 2004

DAVID LOADMAN
STIPENDIARY MAGISTRATE