

CITATION: *Linnell & Linnell v Sweeten* [2006] NTMC 087

PARTIES: MARY LINNELL

and

CAMERON OWEN LINNELL

v

RAYMOND SWEETEN

TITLE OF COURT: Local Court

JURISDICTION: Small Claims

FILE NO(s): 20427333

DELIVERED ON: 14 November 2006 by posting to the parties

DELIVERED AT: Darwin

HEARING DATE(s): 9 August 2005, 9 November 2005, 20 February 2006, 24 April 2006, 7 July 2006

JUDGMENT OF: Mr V M Luppino SM

CATCHWORDS:

REPRESENTATION:

Counsel:

Plaintiff: In Person
Defendant: Ms Leahy & Mr Lewis

Solicitors:

Plaintiff: In Person
Defendant: Elizabeth Leahy

Judgment category classification: C

Judgment ID number: [2006] NTMC 087

Number of paragraphs: 74

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

No. 20427333

BETWEEN:

**MARY LINNELL
CAMERON OWEN LINNELL**

Plaintiffs

AND

RAYMOND SWEETEN

Defendant

REASONS FOR DECISION

(Delivered 14 November 2006)

Mr V M LUPPINO SM:

1. This small claim proceeded before me over a number of non-consecutive hearing days spanning a period of 11 months. The amounts of the claim and counterclaim are modest, however it is clear that both parties feel strongly about the matter. Each party has invested considerable resources in the matter, particularly the defendant who has incurred legal and expert witness fees. Both parties have also incurred indirect costs in the form of lost productivity as a result of extended absences from their respective businesses. The direct and indirect costs incurred by each of the parties far exceeds the amount they respectively claim. Given the importance which the parties place on the matter, and given that I have had to refresh my memory of the evidence as the hearing days were so far apart, I am taking the opportunity to provide written reasons.

2. The action relates primarily to the provision of jewellery display cabinets by the plaintiffs to the defendant. The plaintiffs' claim is for the sum of \$3,646.00 essentially being the balance of the contracted price due for work performed under two discrete agreements. The amount in dispute relates solely to the agreement relating to the jewellery display cabinets. The defendant's counterclaim arises out of the same agreement concerning the jewellery display cabinets. The defendant alleges that the work has not been completed in accordance with the agreement and he claims the sum of \$2,853.00 as the cost to complete the cabinets in accordance with the agreement and to repair some damage to a cabinet caused by one of the plaintiffs. Although the rules of this court no longer make a distinction between a counterclaim and a set-off, the defendant's claim is strictly a set-off as it does not deny the plaintiffs' claim. It merely seeks a credit against any enforcement of that claim. Rule 8.04 of the Small Claims Rules recognises this by allowing a defendant who has a claim for damages against a plaintiff to rely on that claim as a defence to the whole or part of a plaintiff's claim.
3. Although there is some documentary evidence, essentially the evidence of the terms of the agreement is verbal. There is considerable disagreement between the respective parties as to the precise terms agreed.
4. The evidence called consisted of the testimony of both plaintiffs and of the defendant. The plaintiffs additionally called an employee Adem Mohamet. The defendant called Mr Keith Moylan to give evidence regarding some relevant surveillance footage and Ms Eve Ackermann who is his companion and a shop assistant at his jewellery store.
5. The evidence of the plaintiffs' is that Cameron Linnell, the second named plaintiff, attended at the defendant's jewellery store in early to mid February 2004. He was told by the defendant that he was shifting to larger premises and required additional display cabinets. Cameron Linnell said that the

defendant showed him his existing cabinets and said to him words to the effect of “..*I want cabinets like these exactly the same size, I understand you won't get them exactly the same because I had ordered them ones fifteen years ago...*”. He said there followed discussion as to where the cabinets might be sourced from and he indicated that he would make enquiries and provide a quote.

6. He said that the defendant wanted seven cabinets. The existing cabinets had a locking sliding door and were made of gold coloured aluminium frame. Locks were required to be supplied but nothing specific was discussed at the time. Similarly, other than the defendant showing him, and referring to the existing cabinets, no specifics were discussed about the type or quality of the frame or glass.
7. The plaintiffs then contacted a company called Octanorm which apparently supplied the existing cabinets. They were provided with brochures and prices and with that they provided a brochure and quote to the defendant on 25 February 2004. Both the brochure and the quote were put in evidence as Exhibits 1 and 2 respectively. The plaintiffs said that the defendant then came to their premises within a day or so and all three discussed the matter further. The plaintiffs said that the defendant wanted seven cabinets and wanted to pay in the form of a contra deal. The plaintiffs declined a contra deal and say that the defendant agreed to the payment of the full price. Accordingly they placed an order with Octanorm for the seven cabinets. The order was reduced to six soon after at the request of the defendant.
8. In any event, after obtaining the defendant's approval to the use of a triangular frame in lieu of the rounded frame used on the existing cabinets, the plaintiffs assembled the cabinets. The defendant then inspected the finished product. They claim that he pointed out that the glass was only 4mm and not laminated. The plaintiffs said that the defendant required 6mm

and “preferred” laminated glass as it had security advantages. Apparently only 4mm glass would fit the new frames.

9. Despite the plaintiffs having given a quote to the defendant based on the price given them by the supplier, the plaintiffs agreed to upgrade the thickness of the glass to 6mm at no extra cost. This required the supply and installation of an adaptor to accommodate the thicker glass. I question why, if their version of the evidence is correct, they were so prepared to incur this further additional cost. In all the extra cost involved in that regard was some \$420.00.
10. Apparently approximately one week later the variations referred to in the preceding paragraph were affected and the defendant was again called in to approve the changes. The plaintiffs claim that the defendant then pointed out the absence of lighting. That he commented about the absence of lighting should not have been surprising given that the cabinets shown to Cameron Linnell at the initial meeting had lights in them. Apparently Octanorm only provides lighting as an optional extra. The plaintiffs said that the matter was further discussed and they agreed to provide lights, again at no extra cost and “...to keep the customer happy”. As with the variation of the glass, I find this to be a rather curious concession unless the plaintiffs acknowledged that it formed part of the original arrangement. The total additional cost for the lighting was of the order of \$800.00 for the materials alone as well as the cost of labour for installation.
11. The plaintiffs claim that after the lights were sourced and installed they again called the defendant seeking his approval. They say that this was in the first week of April 2004. They say that the defendant gave his approval to install the cabinets and said that he was happy and satisfied. Arrangements were then made for the cabinets to be fitted and this occurred on the 6th or 7th of April 2004. Cameron Linnell says that he went to the defendant’s store on the following day to see if the defendant approved. He

claims that the defendant was rapt and excited and liked the finished product.

12. The plaintiffs said that the defendant changed the order to five cabinets in lieu of the six previously agreed upon. They claim this occurred during the second last inspection. Curiously the plaintiffs agreed to the variation despite the fact that they had ordered and assembled six units. Again they said it was to keep the customer happy. They estimated that agreeing to the variation cost them in the order of \$935.00 in addition to the extras of the glass, the adaptor frame and the lights. I note that at this point the total additional expense to the plaintiffs is of the order of \$1,650.00.
13. Cameron Linnell then said that on that Friday he gave the defendant the invoice, for \$8,636.00, and it was arranged that he would return on a day the following week to obtain payment.
14. The evidence of the respective plaintiffs on the matters that followed was a little imprecise. The net effect however is that the plaintiffs claim that when they both attended on 13 April 2004 to obtain payment, the defendant offered payment in the form of a cheque for \$5,000.00 and diamonds to the value of the balance. They say however that he required the invoice to be adjusted showing that \$5,000.00 was the full amount of the invoice and that it was fully paid. This is highly suggestive of an intended taxation impropriety. The plaintiffs claim that they accepted the cheque and told him that they were not interested in a contra deal. Despite that, they claim that they went back to their office and prepared an invoice for \$5,000.00 and marked it as paid in full as the defendant had requested. They said however that they had a change of heart, re-did the invoice for the full amount, credited the \$5,000.00 paid and showed the balance owing of \$3,646.00. That invoice was put in evidence as Exhibit 3. The plaintiffs claim that it was delivered to the defendant approximately 15 April 2004 by both plaintiffs. The plaintiffs claim that at that time the defendant again

attempted to set off the balance owing with jewellery. Although the defendant did not pay them on the day, the plaintiffs claim that he indicated he would pay the balance.

15. The plaintiffs claim that from then on the defendant started picking issues with the cabinets. Initially the defendant complained that the glass tops could be lifted off. The plaintiffs claim that this was discussed at one of the defendant's initial inspections and that they then offered to wet glaze the tops to prevent them being able to be lifted off. Although they say that the defendant declined that offer, they claim the defendant again specifically pointed this out. Thereafter, various correspondence in the nature of letters of demand and responses thereto passed between the parties. Those documents were put in evidence (Exhibits 4-9).
16. Exhibit 9 was a letter from the defendant to the plaintiffs dated 16 October 2004. Mary Linnell claimed that on receipt of that letter she considered what she could do to satisfy the defendant. She said that she and Adem Mohamet went together to the defendant's premises. She says that they again discussed wet glazing the glass tops. She said that this time the defendant required this to be done and she agreed to do so at no extra cost. This is curious given that the plaintiffs claim that the defendant previously declined that.
17. The next issue the defendant had was in relation to locks. Mary Linnell said that she agreed to replace the locks with a Cowdroy track and locking system, again at no extra cost. The cost of this variation alone was approximately \$1,500.00 plus GST. I note that the total value of concessions made by the plaintiffs to this point is of the order of \$3,100.00 plus GST. This reinforces my previous comment that it is more indicative that the terms of the agreement were as the defendant alleges.
18. Mary Linnell went on to say that she then went back to her office and typed a letter outlining the further agreement. The next day, in company with

Adem Mohamet, she attended at the defendant's shop and gave him the letter and he signed it. The letter was put in evidence as Exhibit 10. As the evidence unfolded it transpired that she in fact faxed that letter to the defendant the day before she attended at his shop. She conceded that the defendant then made some amendments in handwriting on the faxed copy and it was that amended version which the defendant signed. The copy with the defendant's amendments was put in evidence was Exhibit 10A.

19. The plaintiffs said that they then began ordering the materials they needed. Pending the arrival of the materials Adem Mohammed completed the wet glaze. When the replacement tracks arrived arrangements were made for the installation on 24 November 2004. On that date Adem Mohamet attended at the defendant's shop to install the tracks and locking system. Mary Linnell said that she was telephoned by Adem after he had completed one cabinet to say that the defendant had informed him that he did not like the colour of the replacement track. She said that she then directed Adem to pack his things and leave the premises and she then immediately drove to the defendant's premises to assist Adem to pack. Why that was necessary is not clear. As it turns out, she did more than simply assisting Adem.
20. What occurred on her arrival there is a significant area of dispute between the parties. It is the subject of video surveillance and the evidence of Mr Moylan on that point was very seriously challenged by the plaintiffs given that it did not support the plaintiffs' version. Mary Linnell's version is that she went there and spoke to Adem. She said that he started to pack his items (query why he waited for her to arrive if she had already given him that instruction as she claimed) and then there was a very heated discussion with the defendant. She said that she tried to stay focused on Adem and was intent only on speaking with Adem. She then said that she reached around behind the cabinets and asked Adem to help her lift one of the cabinets off its stand. She clearly had no right to do this. She thought she was entitled to remove the cabinet due to a retention of title provision which was

apparently put on the invoice. However it was not on the quote and it had not previously been discussed with the defendant. I pointed out to her that it therefore did not form part of the contract and that accordingly she had no right to possession of the disputed goods. In any event, what she said occurred is that when the defendant saw her start to remove a cabinet, he ran in, walked around her, pushed Adem away, then grabbed her around the midriff and tried to push her out the door. She said that Adem stood up to square up to the defendant and she spoke to Adem to settle him down and reinforce to him the need to calmly get out of the premises.

21. That concluded the evidence in chief of both plaintiffs and cross examination commenced. The matter adjourned part heard during the cross examination of the plaintiffs. On resumption of the matter on 9 November 2005 the plaintiffs indicated that there was a matter which they wished to clarify. I gave the plaintiffs leave to reopen their case. The plaintiffs then said that before the plaintiffs went to the defendant's premises on 8th April 2004, that the defendant asked for an invoice with a number of things itemised. Mary Linnell said she typed the invoice as requested and she and Cameron Linnell went to the defendant's premises on 8 April to present that invoice. The plaintiffs claim that the defendant then wrote on that document "Paid \$5000.00 including GST. Ball in jewellery.". Presumably "Ball" is an abbreviation for "balance". They say that the defendant then handed over the cheque for \$5,000.00 in part payment and demanded that they take the balance in jewellery. The invoice referred to was produced and became Exhibit 13. That concluded the further evidence in chief of the plaintiffs.
22. In cross examination it was put to the plaintiffs that at the initial meeting between Cameron Linnell and the defendant, the defendant showed them his existing cabinets and said that he wanted the new cabinets to match exactly. It occurs to me that this would be quite logical and expected as the defendant was still to use his existing cabinets. He would want additional cabinets to match as much as possible. Cameron Linnell said however that

the defendant only stipulated the same size, colour and style as he reiterated that the defendant knew that he could not get an exact match as they were fifteen years old.

23. It was also put to Cameron Linnell that the defendant specified gold anodising and he agreed. He disagreed however that 6mm laminated glass was stipulated. Again, I would have thought that it was very likely that the defendant would stipulate this for security reasons. The defendant had a suitable security system and I can see that both for aesthetic purposes and for security reasons he would want the cabinets to match the existing cabinets.
24. Likewise it was put to Cameron Linnell that the defendant specified lighting exactly as per the cabinet that he was shown and the same locking system as the existing cabinets. Cameron Linnell refuted this. Again it occurs to me that it is indeed likely that the defendant would do so. Moreover the subsequent agreement by the plaintiffs to do exactly all of the foregoing at no extra cost is highly suggestive that that was in fact what had been agreed.
25. As to the attendance when part payment was made, it was put to the plaintiffs, and refuted by them, that the defendant said that he did not want to pay in full until the work as ordered was done. It was also put, and also refuted, that the problems to be addressed were shoe rails, tracks, locks, keying alike and the fixing of the glass top. This coincidentally is precisely the “extra” work which the plaintiffs ultimately agreed to do.
26. Mary Linnell was cross examined as to the events of the 24th of November 2004. She agreed that she made up to three attempts to remove a cabinet. She agreed that the glass broke in that cabinet in the process. She confirmed that she alleges that the defendant actually grabbed her. The surveillance material was then played and she was asked to indicate where that was indicated on the video. She was unable to point to anywhere on the surveillance where the defendant is shown grabbing her as she claims. Her

explanation is that the entire video has not been produced and what has been produced has been edited. That allegation and the subsequent evidence from Mr Moylan was to prove highly relevant in terms of assessment of credibility.

27. The only other witness called by the plaintiffs was Adem Mahomet. In evidence in chief he confirmed that he and Mary Linnell went to the defendant's jewellery shop to look at the cabinets. He confirmed there was a discussion between Mary Linnell and the defendant but said that he only heard bits and pieces of that and could not precisely recall all of the details. He said there was some discussion about fixing the cabinets. He said that the joints had come apart. No-one else has mentioned this. There was also a discussion about resealing the lids and installing new tracks and glass doors. He said that he returned the next day when he removed the glass tops, retightened the frames and wet glazed the glass tops. He said he went back on the 24th of November 2004 to change the tracks. He said that after he completed the first cabinet the defendant said that it was "*not right*" and he didn't like it. He rang Mary Linnell for instructions and she told him to pack up and leave. He said that he started packing and then met Mary Linnell at the shop. He said that after Mary Linnell arrived they tried to remove one of the cabinets but the defendant prevented that. Specifically he said that the defendant grabbed Mary Linnell around her waist and hip area and tried to spin her out of the way. He said that Mary Linnell then yelled out and complained about being manhandled and did so some four to five times.
28. He said that he had been standing behind the cabinet and the defendant came there and pushed him back by pushing him at the shoulders. He said that he stepped back. He said that there was another occasion when the defendant pushed him that day. He said that he and Mary Linnell had tried to get the cabinet again. He thought that the defendant had pushed Mary Linnell away

again and then tried to push him away again. He said that he got up and squared up to him and was told to stand down by Mary Linnell.

29. He said that Eve Ackerman then tried to lock the door but that Mary Linnell stood in the doorway. He said that the defendant tried to push Mary Linnell out and then the police arrived.
30. In cross examination he was asked whether, on the 24th November 2004, the defendant had said to him that the tracks were the wrong colour. He agreed that the defendant had said that. He also agreed that he told the defendant that he was sorry that the wrong colour had been ordered and that when he ordered the tracks he didn't realise that it had to be gold. In re-examination it became apparent that he himself had ordered the replacement tracks. He had not been instructed by the plaintiffs to purchase a particular colour. That of course is irrelevant. It matters not at all that the error was made by the plaintiffs or the plaintiffs' employee. He said that he actually rang around to see what colours were available and learnt that gold was hard to get. Moreover, he said that he had seen the defendant's cabinets and ordered silver frames despite that he saw that the defendant's cabinets had gold coloured framework. All that seems to establish that it was well known that the stipulated colour was to be gold. This supports the defendant's version on this point. It would seem that he was quite entitled to reject the rectification works.
31. That concluded the evidence for the plaintiffs. The evidence for the defendant commenced with Mr Andrew Moylan. His involvement in the matter stems from his work with the defendant in relation to the provision of surveillance equipment at both the old and new premises of the defendant. He said that at the defendant's request he made a copy of a recording of part of 24 November 2004. The defendant nominated the starting and finishing point by the defendant. He said that he recorded the specified portion onto a number of disks and recorded some 90 minutes of continuous footage. He

said that he encountered some difficulties in the process and ultimately had to break the recording of the nominated portion down into six disks of 15 minutes each.

32. He also gave evidence that the system is protected by encryption and during the course of playback he pointed out where the encryption indication appeared. He said that any tampering with the disks would result in corruption of the copy such that it would not play. The disks were played. Each was a part recording of events on 24 November 2004. The first covered the period from 8:27am to 8:45am. This showed Adem Mahomet entering the store, dropping off some gear and then going out again. The second covered the period from 8:45am until 9:00am. The third covered the period from 9:00am until 9.15am and showed Adem on a mobile phone. Adem was then seen removing his tools. Mary Linnell is then seen to arrive and starts to attempt to take the cabinet. One of the shop assistants (it later transpired to be Ms Ackerman) attempts to lock the door but Mary Linnell gets in her way to stop her.
33. The fourth disk covered the period from 9:15am until 9:30am. The defendant is seen trying lock Mary Linnell out but she refuses to move. The defendant then goes over behind the counter where Adem is squatting and appears to stand over him. At this point Mary Linnell tells Adem to “*stand down*”. Mary Linnell then tries to open the second of the double doors and the defendant comes and locks it again. Mary Linnell and Adem are again seen attempting to remove the cabinet and the defendant comes in and tells Adem to get away. Mary Linnell is seen twice more to attempt to remove the cabinet and the defendant stops her. She starts yelling that she has been assaulted. However, up until this point there has been nothing at all like the grab at the waist area that both she and Adem Mahomet described in their evidence.

34. She is then seen dialling a number. She is heard to give the defendant's name, presumably to the police and adds "*..you will know the name I'm sure...*". At this point the defendant also becomes uncomplimentary describing the plaintiff as an "*...excuse for a woman*". Next Cameron Linnell is seen to arrive and to speak to Mary Linnell. She is heard to tell Cameron Linnell that the defendant assaulted her and as he starts to react she also tells him to "stand down". He then goes outside. Subsequently two police officers are seen to attend. Mary Linnell speaks to them and tells them that the defendant assaulted her employee in front of a camera. She makes no mention of an assault upon her.
35. The fifth disk covered the period from 9:30am and 9:45am and it is mostly audio. Mary Linnell is in a discussion with the police officers. After the defendant is heard to say that he is not happy with the silver colour, she indicates that she will rectify that but claims she needs to take the items away to do so. That would appear to be a ruse on her part in an attempt to take possession of the cabinets. This becomes obvious later as the sixth disk, which covers the period from 9:45am to 9:56am, has Mary Linnell refusing to do any more work.
36. Mr Moylan was cross examined at the start of the third hearing day on 20 February 2006. Cross examination was directed to suggesting either that Mr Moylan was incompetent, dishonest or unqualified or a combination of each. Mr Moylan conceded that he had no formal qualifications but the experience he described is significant in itself.
37. In relation to the suggestion that he had deliberately deleted a portion of the recording, he confirmed that tampering with the recording would break the encryption code. He said however that the encryption occurs at the point of recording on to the hard drive. As a copy from the hard drive is made the encryption carries over on to the copy. He said it is impossible to make a

copy, edit it or tamper with it in any way and then resave it. He said that not even the manufacturer of the equipment would be able to do that.

38. This line of cross examination derived from an apparent encryption failure on one attempted copy that he made. He was able to say that the encryption error occurred somewhere in the last six percent of the disc which represented 54 seconds of recording time. The point however is that in any event the corrupted part does not fall within the section of the recording which shows the relevant events occurring on 24 November 2004 having regard to the sequence of events as described by all witnesses. The recording on the disks which evidences the significant conduct on that day is continuous. That is clear from simply viewing the recording. Any suggestion that a discrete part has been tampered with is untenable. Moreover I thought Mr Moylan was an impressive witness. His evidence was well explained and although challenged by questions only, his evidence was not challenged by any contradictory expert evidence. There is no basis to reject his evidence. I accept his evidence and this in turn establishes to my satisfaction that the alleged assault by the defendant on Mary Linnell as deposed to by both Mary Linnell and Adem Mahomet did not occur. Moreover, given the nature and extent of the allegations made by Mary Linnell and the degree of particularity, that can lead to no other conclusion consequent on that finding other than that Mary Linnell is not a witness of truth. I am not prepared to accept her evidence.
39. The defendant then gave evidence. He confirmed that he was moving his jewellery shop to larger premises and required more display cabinets. He did not know exactly how many he needed and initially discussed seven but finally settled on five. He said that he decided to engage the plaintiffs as he had dealt with them before. He confirmed that he asked Cameron Linnell to come and see him at his existing premises in mid February 2004.

40. On that occasion he said that he showed Cameron Linnell the existing Octanorm cabinets and said that he wanted the additional ones to be exactly the same. In particular he said that he specified that the glass had to be 6mm and laminated, that the frame type and colour was to match, that the locking system was to be the same and keyed alike and that the lighting was to be installed and had to be the same as the existing unit. The lighting consisted of a strip with 5 quartz halogen lamps with a transformer underneath the cabinet.
41. He said that it was left on the basis that Cameron Linnell would provide a quote. He was shown Exhibit 2 and confirmed that that had been faxed to him. He confirmed that he had been happy with the price quoted.
42. He said that as he considered the size of his new premises in greater detail he realised that he would only need six units. He said that he accepted the quote by telephone and that two days later Cameron Linnell rang to tell him Octanorm did not make the same extrusion and that only a rounded extrusion was available. The defendant agreed that he approved of that with the proviso that the quoted price still applied.
43. He said that some three to four weeks later he saw the cabinets assembled at the plaintiffs' factory. He claims that he complained to Cameron Linnell then that the glass was not 6mm and that he asked him whether it was laminated. When told that it was not, he said that he stressed that lamination was one of the important points. He said that the cabinets did not have lights or locks installed at that point. He did not say that he raised this with Cameron Linnell then. He said that he returned to the plaintiffs' workshop approximately a week later. This time the glass had been changed to 6mm but it could not be fitted in the extrusion and it required a bracket to be utilised. He approved of its use. The side glass however was still 4mm and not laminated. He recalled that lights were installed but there were only two lamps. He claimed that he was told that was all that Octanorm supplied.

44. The defendant said that he told Cameron Linnell that the units were not as he ordered and he said that he considered the locks to be inadequate. He said that he told Cameron Linnell to rectify the deficiencies.
45. He said that his opening date for the store was 13 April 2004, the first day after Easter. He said that the cabinets were installed on 8 April 2004. He said that Cameron Linnell attended on the morning of the opening day to attend to another unrelated job and while there he gave him the invoice for the whole job. The defendant said that he was surprised by this and said that Cameron Linnell asked for payment and was becoming agitated. The defendant said that he then reminded Cameron Linnell that there was to be at least a part contra. Cameron Linnell declined that. It is at least curious that the defendant did not make any mention of this when he gave evidence earlier about his discussions leading up to the terms of the agreement.
46. In any event the defendant claims that he then indicated that he was not happy with the job and that the plaintiffs had not rectified all of the deficiencies. He said that Cameron Linnell asked him to at least try them out. Clearly the defendant was at a disadvantage at this point as he was due to open his new store that morning. I found it odd however that although the cabinets clearly did not match the existing cabinets in many respects, he only chose that morning to speak to Cameron Linnell about the deficiencies and not anytime in the five days since they were installed on the 8th of April.
47. Noting that Exhibit 3 showed a receipt endorsed as having been part paid on the 8th of April 2004, he insisted however that the payment occurred on 13 April 2004. He said that the cheque was dated and given that day and his bank records shows that it was presented for payment that day. This was confirmed by bank records which were tendered as exhibit D15. The defendant said that when he gave Cameron Linnell the cheque he also told him that he would pay the balance when the job was finished and that he

reminded him that he had to fix the glass to the cabinet and rectify the lights, locks and shoe rails as per the existing cabinets.

48. He said that thereafter Mary Linnell attended on the same day. She was very angry and was demanding the balance of payment. He claims to have spoken to her at length about the deficiencies and to having pointed them out to her on the cabinets. He said that he was lead to believe that she would arrange rectification.
49. The defendant said that approximately two weeks later that Cameron and Mary Linnell came into his shop with their baby. He said that Mary Linnell was looking at some rings and she picked one out and enquired of it. She then asked about offsetting the full cost of the ring against the balance of the invoice. The ticketed price of the ring was well in excess of the balance of the invoice and an argument followed. The defendant said that Mary Linnell became angry and loud. None of this was put to the plaintiffs in cross examination.
50. He was shown Exhibit 13, which was the invoice with the endorsement "Paid \$5,000.00 including GST. Ball in jewellery.". He said that he wrote that on a document on the day that he paid the \$5,000.00 which he maintained was the 13th of April 2004. I thought he was unconvincing when claiming he could not specifically identify the handwriting of the endorsement as his own. He said that he thought it was his handwriting. He agrees that the endorsement is what he actually wrote at the time but says that the document that it appears on was not the document that he actually wrote on as the contents of the document are incorrect and different. I could not make sense of this evidence, nor could I fathom any advantage that the defendant could gain by being untruthful about this.
51. He said that in July 2004 Mary Linnell rang for the balance. He said that as a result he attended at the plaintiffs' factory the following day and the matter was again discussed. He said that he left with the impression that

Cameron Linnell would attend at his shop the next day to take photos, presumably of the existing units, although why this was so was not made clear. However he said that he did not attend as arranged. Again, none of this was put to the plaintiffs. He said the next he heard was the start of the letters of demand starting with Exhibit 4 being the letter dated 6 August 2004.

52. He confirmed that he had discussions with Mary Linnell on 18 October 2004 and he confirmed that those discussions led to the creation of Exhibit 10. He said that came about as he met Mary Linnell on another job and this matter was discussed. He said that he told her that money was available to pay the balance due as soon as rectification work was done. She asked if he would put that in writing and he said that that is how Exhibit 10 came to be prepared. That document confirms that some work was to be done by the plaintiff. As I have already said in another context, the agreement by the plaintiffs to do further work is consistent with what the defendant has said were the agreed terms out the outset.
53. The defendant confirmed that it was arranged for Adem to turn up to reglaze the cabinets and he confirmed that this occurred. He also confirmed that Adem came on 24 November 2004 to finish off the job. He said however that the material Adem produced was not the stipulated colour. It was not gold and there is no dispute about that on any version of the evidence. He allowed Adem to do one cabinet to see how it looked with the silver frame. He was not happy with the result.
54. The defendant says that he rang Mary Linnell to say that the colour was incorrect and he claims that her response was to say words to the effect of “...*I knew you’d shift the goal posts*”. Again, none of this was put in cross examination of the plaintiffs. The defendant said that Mary Linnell came and ordered Adem out. He denied any assault or any contact at all with her. He said that Adem was disconnecting wires and Mary Linnell was lifting the

cabinet off. He said he kept putting hands down on the cabinet to prevent that. He said that Mary Linnell made an announcement into the mall and broadcast that she was being assaulted and naming the defendant as the assailant.

55. All of the foregoing events on that day as deposed to by the defendant are largely confirmed by the video surveillance, contrary to the versions given by both Mary Linnell and Adem Mohamet.
56. The remainder of the defendant's evidence related to the counterclaim. He initially produced two documents which became Exhibit 16. These comprised an account from Imagine-It Lighting and one from Syrimi Project Management ("Syrimi"). The former was the quote to instal lights into the new cabinets matching the existing cabinets. This quote was in the sum of \$750.00. The quote from Syrimi was to install gold tracks, to supply and fit locks and to fix the glass broken by Mary Linnell on 24 November 2004. That was in the sum of \$2,103.00.
57. The defendant's evidence however revealed that although the work was quoted by Syrimi, all work was done by the defendant himself. He said that he ordered the material and did the work himself. Clearly the Syrimi invoice can therefore only be looked at as a guide to assess the value of the work. The defendant said that the materials were purchased at tradesman's rates. All necessary documentation was not available on that day. As a result I allowed cross examination to commence then and on resumption on the next hearing day on 28 April 2006, I gave the defendant leave to reopen his evidence in chief on that point alone. Relevant invoices together with a schedule outlining the costs incurred were then tendered as Exhibit 18. The amounts of the invoices in Exhibit 18 were the following, and where the amount shown on the invoice is at variance with the defendant's evidence or schedule, the latter amount appears alongside in brackets, namely:

1. Imagine-It Lighting: \$750.00

2. Gamma Illumination, (1): \$387.20 (\$246.40)
3. Gamma Illumination, (2) \$297.00 (\$130.25)
4. Crowdroy, (1): \$331.89
5. Crowdroy, (2): \$11.80
6. Crowdroy, (3): \$115.50 (192.50)
7. All Spec Aluminium: \$138.37

The total of the amounts shown on the invoices is \$2,031.76. If the lower of the invoice amount and the amount in brackets is utilised, the total is \$1,724.21.

58. The defendant also claims amounts for his labour to rectify the deficiencies as well as repair the damage to the cabinet caused during Mary Linnell's attempted removal on 24 November 2004. In relation to the former, the defendant claims \$460.00 plus \$46.00 GST. In relation to the latter the amount claimed was \$400.00 plus \$40.00 GST. Both amounts are claimed at the rate of \$40.00 per hour and the schedule, coupled with the defendant's evidence, sets out the extent of the work performed.
59. The defendant was extensively cross examined. The cross examination was thorough and reasonably well conducted having regard to the fact that the plaintiffs were unrepresented. Mostly, the differences in versions between the plaintiffs and the version given by the defendant were challenged. The plaintiffs had prepared well for cross examination and made use extensively of the transcript which had become available during the period of the adjournment.
60. Given that the defendant largely and consistently maintained his version of events in the course of the cross examination, I do not think that anything useful is achieved by extensively summarising the cross examination. Suffice to say at this point that following cross examination of the defendant

the defendant maintained his position in much the same way as the plaintiffs maintained their position during the course of their evidence and cross examination. In dealing with what was an extensive cross examination in this cursory way I do not intend to give the impression that the cross examination was not useful or that I did not have due regard to it. Far from that, cross examination did reveal some deficiencies in the case of the defendant. On a number of occasions the defendant mentions something for the first time in cross examination. Notwithstanding that this was not always in relation to important critical points, that position renders the defendant's evidence unimpressive to a certain extent.

61. This was particularly so in relation to the evidence regarding the contra deal. Although I am not entirely satisfied that the plaintiffs have been totally open and truthful in relation to that, I am of the view that that is more apparent in the defendant's testimony. Particularly unimpressive was his suggestion that the endorsement on Exhibit 10 was not his own handwriting.
62. The evidence finally concluded with the evidence of Eve Ackerman on 7 July 2006. Her involvement was minimal and mostly related to the events occurring at the defendant's shop on 24 November 2004. She also confirmed the evidence of the defendant regarding the events on the occasion of the payment of the \$5000.00. Mostly she confirms the evidence of the defendant almost without variance. As such I do not separately summarise her evidence in any greater detail.
63. Other than the quotation and subsequent documents in the nature of invoices and correspondence, there is very little written evidence regarding the terms of the agreement. The terms of the agreement are mostly oral. In that situation oral evidence needs to be considered to determine what the terms of the agreement are. There is an essential dispute here. The plaintiffs

claim that they have performed the agreement in accordance with the agreed terms. The defendant says quite the opposite.

64. When the matter is left to resolving the terms of an agreement based on oral evidence in the most part, the matter must turn largely on credibility factors. I do not consider it helpful in the current circumstances to individually and minutely assess aspects of the evidence. As I have described in the foregoing parts of these reasons, there are aspects of the evidence of both parties which puts at least part of their evidence in a very unfavourable light.
65. I have taken the approach of considering the evidence and the consequent assessment of the witness as a whole. In the end I have come to the conclusion that the assessment of witness's credibility favours the defendant. At the end of the day the available objective evidence i.e., the video surveillance, supports the defendant. The video surveillance evidence is consistent in all material respects with the evidence of the defendant and Ms Ackerman as to the events of 24 November 2004. It certainly contradicts the evidence of Mary Linnell and Adem Mahomet. Not only does the video evidence indicate that the various assaults claimed to have been inflicted by the defendant on Mary Linnell and on Adem Mahomet did not occur, it indicates also that Mary Linnell's behaviour on that occasion was unsavoury. She has falsely, and clearly deliberately, broadcasted an allegation of an assault which simply did not occur. She made allegations in front of the police which are not borne out. Her assertion that she would repair the items but would need to remove them from the premises to do so was clearly a ruse designed to obtain possession of the disputed items.
66. I also have regard to the plaintiffs' willingness to do a considerable amount of what they say is work they were no obliged to at no cost, ostensibly out of a desire to keep the customer happy. That is an admirable philosophy however the extent of the concessions made in that regard goes well beyond

what I would expect to implement such a philosophy. It goes as far as to amount to agreeing at various times to ultimately doing all the work which, more than coincidentally, the defendant says was initially agreed upon. In my view it is a powerful indicator that the terms of the agreement were as the defendant alleged.

67. I also accept that it is logical and likely that the defendant would specify new cabinets to match his existing cabinets on a move to larger premises. He would wish as much as possible to have consistency throughout the shop and would want the items to match as much as possible. Likewise, security being an important issue for jewellers and the defendant being apparently satisfied with the security of the existing cabinets, it is quite logical that he would specify glass of a type, nature and thickness, and a locking system that matched the security qualities of his existing cabinets. In my view that makes it indeed much more likely that the terms of the agreement are as the defendant says. That is also supported by the fact that the initial discussions between the defendant and Cameron Linnell were at the defendant's then premises. That gives a ring of truth to the defendant's claim that he asked for cabinets "*like these*" while referring to the existing cabinets. It is quite logical and expected that he would describe his requirements by reference to the existing cabinets especially if the new cabinets were additional and not replacement items.
68. As to the events of 24 November 2004, quite apart from the video evidence confirming the defendant's version, what is also confirmed is that the wrong coloured tracks were supplied. This was confirmed by admission by Adem Mahomet. Re-examination on that point indicates nothing else other than a confirmation of that by the plaintiffs. Quite apart from any suggestion made by the plaintiff that the defendant was again "moving the goal posts" by complaining about the colour, with the obvious suggestion that the defendant's complaint about the colour was a pretence, clearly that was something where a previous agreement had been made and with which the

plaintiffs failed to comply. The fact that this may have occurred by reason of a breakdown in communication between the plaintiffs and their employee does not make any difference. In light of that, the defendant's evidence that he agreed to allow Adem Mahomet to complete one cabinet to assess its appearance, and to thereafter reject it, is credible in the circumstances.

69. In the end and assessing the evidence as a whole as I have said, I prefer the evidence led by the defendant to that led by the plaintiffs wherever the evidence conflicts. The end result of that is that the plaintiffs have not fully complied with the terms the agreement.
70. As to the counterclaim, the work comprised within that counterclaim accords with my acceptance of the evidence of the defendant in terms of the rectification work required. There are however two issues in terms of the quantum of the counterclaim as I see it. The first relates to the GST on the defendant's own labour. As he has not actually charged himself for labour, any amount that I allow as damages on account of the defendant's own labour will not attract GST. Consequently I would not allow any amount for GST. Secondly in relation to the defendant's labour in general, the work performed by the defendant has been briefly itemised and he has given evidence about that. The defendant had originally claimed an amount based on quotations for the supply and alteration of the cabinets, the rectification of the damaged cabinet and the supply of alternative lighting by third parties. In his evidence the defendant said that he obtained a quote from Syrimi and he said the quote from Syrimi was to put the new gold tracks in and to fit the locks and for fixing the glass that Mary Linnell had broken on 24th November.
71. The quote from Syrimi was \$2,103.00. According to the work set out in the quote document, this is inclusive of everything other the work in relation to the lighting. The costs of the lighting works as I would otherwise allow them are \$1,126.65 (being the total of the lesser amounts for items 1-3 in

paragraph 57). In part of his evidence the defendant said he performed the work himself and it was cheaper than the Syrimi quote. That is confirmed as the total of the Syrimi quote and the aforesaid amount in respect of lighting would be \$3,229.65. As it is for the defendant to prove the quantum of his claim, where there is an unexplained variance between his evidence and the supporting documents he produces, I allow the lesser amount in each case.

72. I therefore assess the quantum of the counterclaim at \$2,481.76 comprising:-

- (1) Defendant's labour, exclusive of GST: \$860.00
- (2) Lighting works: \$1,126.65.
- (3) Locks, tracks etc (items 4-7 in paragraph 57): \$597.56.

Total: \$2,584.21.

73. The measure of damages in a contract claim is an amount to put the innocent party in the position he or she would have been in had the contract been performed. Had the plaintiffs performed the work comprised in the defendant's claim then the defendant would not have had to expend the money on remedial work (which I have assessed at \$2,584.21) but he would have then owed the plaintiffs the balance of the contract price (which is \$3,646.00). The difference between the two amounts is \$1,061.79 and I will enter judgment for the plaintiffs for that amount.

74. In my view the plaintiffs should also receive their disbursements as claimed on the Statement of Claim namely \$199.30. Other than to give that indication in the hope that it assists the parties in resolving any costs issues, I make no orders for the present and I give the parties liberty to apply on seven days notice to the other as to costs or any other ancillary orders.

Dated this 14th day of November 2006.

Mr V M Luppino
STIPENDIARY MAGISTRATE