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Judgment: approved by the Court for handing down | *Delivered:* **18/03/2005**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL LIST)

BETWEEN:

BRIAN KENNEDY

Plaintiff;

And

GERRY HAMILL PRACTISING AS GERRY HAMILL, CHARTERED ARCHITECT

Defendant.

COGHLIN J

[1] In this action the plaintiff, Brian Kennedy, is a Chartered Building Surveyor while the defendant practices as a Chartered Architect. The dispute between the parties relates to the terms and conditions of an agreement by virtue of which the defendant was to provide certain architectural services with respect to the refurbishment and extension of premises owned by the plaintiff at 205 Ballylesson Road, Drumbo ("the premises"). For the purpose of these proceedings the plaintiff was represented by Mr Mark Orr QC and Mr Mulqueen and Mr Craig Dunford appeared on behalf of the defendant.

Background facts

[2] The plaintiff purchased the premises in 1997 and he initially approached the defendant for the purpose of seeking his assistance in relation to the refurbishment and extension in April or May of that year. While there was some debate about the precise details of their relationship, I am satisfied that the plaintiff and defendant were well known to each other in 1997 and that, in particular, the plaintiff was aware that the defendant had provided similar professional services to a mutual friend, Paul Fox, who had extended his house in Bangor. Mr Fox was friendly with both men and it appears that he probably recommended Mr Hamill to the plaintiff.

[3] The plaintiff had purchased the premises at auction and they were in a dilapidated and run down condition with an overgrown garden. The plaintiff had not arranged for the premises to be surveyed but said that a

"builder/developer" friend had "walked through" the house. The plaintiff probably told the defendant that he had paid more than he intended for the premises and that therefore he wished for the budget for refurbishment/extension to be kept at £40,000 or less. He wanted the work done as economically as possible and he said that he himself would organise the Aga, the wood-burning stove, the kitchen, the slate and wooden floors together with any sanitary wear. The plaintiff personally dealt with ordering these items and his intention was to arrange for them to be installed by different contractors.

[4] On 8 July 1997 the defendant sent a fax to the plaintiff's business office indicating that he proposed to discount the recommended RIBA fee by 33% and setting out each of the services that he could perform up to tender action. The relevant percentage of the discounted fee was set against each service indicating to the plaintiff how much it would cost if he chose to commission all or any of the services. The defendant performed all of the services down to tender stage and assisted the plaintiff with the appointment of a contractor, Messrs Gray and Son ("the contractor"). The defendant recommended, amended and completed a standard JCT Agreement for Minor Building Works as the basis for the contract between the plaintiff and the contractor.

[5] The works then proceeded and, as they did so, the defendant issued interim certificates upon foot of which the plaintiff made payments to the contractor. In addition, as the work progressed, a number of changes occurred. In the course of giving his evidence, the defendant accepted that there might have been approximately 64 variations. Sometimes these might have occurred as a result of a telephone request from the plaintiff which would be passed on by the defendant to the contractor for the purpose of obtaining a price acceptable to the plaintiff. Alternatively, upon some occasions, the plaintiff discussed variations directly with the contractor who then sought confirmation from the defendant.

[6] It seems that the relationship between the plaintiff and the contractor began to deteriorate somewhat towards the latter part of 1998 and it would appear that at least one factor of significance was the plaintiff's decision to personally organise sourcing of individual items such as an Aga, the kitchen, the wood stove and the slate and wooden floors. The plaintiff accepted that this had made "life difficult" for the contractor in co-ordinating the various activities on site. It seems that the relationship went from "tense" to "bad" in February and March 1999 with the contractor becoming increasingly reluctant to work without payment and the plaintiff insistent upon withholding payment/retention monies until he was personally satisfied. Despite the issue of a certificate of Practical Completion in February, backdated to December, the plaintiff refused to release the retentions although he was advised to do so by the defendant by letters on 30 June and 22 July. Eventually, the contractor consulted solicitors and proceedings were issued

upon his behalf seeking arbitration of his claims in accordance with the contract. The plaintiff filed an answer and counter claim and my impression is that both the claims made by the contractor and the counter claim made by the plaintiff for the purpose of the arbitration were significantly exaggerated.

[7] The plaintiff sought the assistance of the defendant as an expert witness in relation to the arbitration. The plaintiff initially sought to persuade me that, in relation to the arbitration, he considered the defendant to be a "witness of fact" but he was compelled to accept that he had been used as an expert witness after a letter from his solicitors was produced seeking an expert evidence declaration from the defendant. No criticism appears to have been made of the defendant in relation to the arbitration proceedings although he does not seem to have performed a particularly prominent role, other than providing the plaintiff and his advisors with a report.

[8] The arbitration came to an end towards the middle of 2000 as a result of the contractor going into liquidation. This left the plaintiff with a worthless counter claim for damages. The plaintiff was dissatisfied with the way in which the arbitration had been conducted and refused to pay the arbitrator's fees. The arbitrator sued for his fees and the plaintiff counter claimed for the removal of the arbitrator. Ultimately, the plaintiff had to bear the costs of the arbitration including the fees.

[9] At this stage the plaintiff appears to have turned his attention to the defendant. In cross examination he denied that this was because the defendant was the only remaining viable target and maintained that, earlier, he had "enough on his plate".

[10] On 12 December 2000 the plaintiff's solicitors wrote to the defendant claiming damages in respect of his alleged negligence, breach of contract and misrepresentation in and about the design and supervision of the works carried out at the premises. By letter dated 20 December 2000 the defendant responded in the following terms:

> "Mr Brian Kennedy is not only our Client but is also a personal friend. It is our intention to do everything we can to help Brian and Anna in this matter. We now make a formal request through you, that we may be given the opportunity to visit the house, at Brian and Anna's convenience, with our Structural Engineer and an alternative Main Contractor. We would be grateful if you could advise on which dates would suit so that we can make our arrangements."

An inspection was duly carried out at the premises on 23 January 2001 at 2.30 pm. The defendant was accompanied by Mr Murray, a structural

engineer, and a building contractor. This inspection, which included the interior of the roof, was also attended by a Building Control Surveyor from Lisburn Borough Council. Mr Murray gave evidence on behalf of the defendant in these proceedings. A number of items were identified by the Building Control Surveyor as requiring to be completed before the issue of a certificate confirming compliance with the requirements of the Building Regulations (Northern Ireland) 1994. The defendant's contractor estimated the cost of these items at £2,000 plus VAT. The defendant wrote to the plaintiff's solicitors on 6 February 2001 seeking the plaintiff's consent for the defendant's contractor to proceed to carry out the remaining works necessary for the issue of a certificate from Lisburn Borough Council and noting that retention monies of £1,725 were still being withheld in relation to the original contract. There does not appear to have been any response from the plaintiff's solicitors until more than two years later when, on 17 April 2003, the defendant received a letter from them informing him that the plaintiff had arranged for further extensive repairs to be carried out to the premises, amounting to some £44,000, and indicating that it was the plaintiff's intention to recover this sum, together with £21,000 by way of expenses incurred in connection with the arbitration proceedings, from the defendant.

Was there a contract between the parties and, if so, what were the terms thereof?

[11] The plaintiff claims that the defendant agreed to provide a full architectural service in relation to the extension, refurbishment and renovation of the property. According to the plaintiff when he had first contacted the defendant they had discussed various options and he understood that, as a first stage, the defendant would provide drawings. The plaintiff stated that he later instructed the defendant to take the project through the tender stage and on to completion. The plaintiff was unable to recall a date when or the circumstances under which he concluded this alleged agreement with the defendant. The plaintiff said that he thought the agreement had been verbal, but he could not remember whether it had been concluded by telephone or during a direct conversation or, if the latter, whether it had taken place at an office or on site. The plaintiff's case was that the contractual relationship between himself and the defendant was defined by the terms and conditions relating to the role of the architect as set out in the JCT Agreement for Minor Building Works, such terms having been implied into their oral agreement. He also relied upon the activities of the defendant during the course of the contract, including, for example, his visits to the site, liaising with the plaintiff and the contractor, the production of interim, Practical Completion and Final Certificates and the receipt of a final invoice for architect's services up to practical completion stage as constituting evidence that supported a contractual obligation undertaken by the defendant to provide full architectural services. In his closing submissions the plaintiff sought to rely upon an acceptance by the defendant in cross-

examination that he had provided a full architectural service in the post tender stage but since this was immediately followed by a firm denial by the defendant that he had carried out such a service it does not seem to me to be a matter upon which I should place any great weight.

[12] For his part, the defendant was quite prepared to accept that an agreement had been reached between himself and the plaintiff but he denied that he had ever agreed to provide full architectural services. The defendant maintained that he had known the plaintiff for some time largely as a consequence of their mutual friendship with Paul Fox. According to the defendant, the plaintiff had seen the results of similar work which he, the defendant, had performed for Mr Fox in relation to an extension of his home. The defendant said that he was contacted by the plaintiff who arranged a meeting at his home on 23 July 1997. The plaintiff told the defendant that he would like something similar to be done in relation to the empty property which he had recently purchased and in respect of which he had a budget of £40-£45,000. The defendant agreed to provide the plaintiff with a written proposal which would permit the plaintiff to opt for one or more of a number of specified services. This proposal was set out in the fax from the defendant to the plaintiff of 28 July 1997. The defendant said that he subsequently received a telephone call from the plaintiff during which they went through the various options contained in the fax and the plaintiff decided to instruct the defendant to proceed to tender stage and to pay 100% of the fees specified in the fax. The defendant also agreed that he had selected and amended the JCT Minor Works Form of Contract to be entered into between the plaintiff and the contractor. The contract was made on 5 March 1998 and the defendant signed his name thereon as Architect. However, the defendant emphasised that this document related only to the contractual relationship between the plaintiff and the main contractor and that his agreement with the plaintiff was based on the information set out in the fax of the 28 July 1997.

[13] The defendant described how he took part in several meetings with the plaintiff and his wife during the course of preparing the design drawings and that during one such meeting the plaintiff's wife asked him if he would "keep an eye on the builder while he was on site". The defendant responded by pointing out that, as far as he was concerned, the main contractor would be responsible for the works and that supervision of his activities was not part of his agreement with the plaintiff but, nevertheless, he volunteered, as a friend, to perform some supervisory/administrative duties during the course of the contract. He described how he made sporadic site visits, sometimes twice a month sometimes not at all. It appears that there were many changes and variations during the course of the contract and he described how he had operated as a conduit between the plaintiff and the contractor either by telephone or as a result of being contacted by one party or the other. However, the defendant emphatically denied that he had ever agreed to provide the plaintiff with a full architectural service He noted that he had

agreed to provide advice and an expert report to assist the plaintiff in the arbitration but had done so without charge. With regard to his final account, the defendant confirmed that it was standard practice for an architect to apply the appropriate percentage to the ultimate construction costs and noted that the employment of the word "say" in the second line of the fax of 28 July 1997 indicated that the figure of £40,000 quoted was simply an estimate.

[14] I am quite satisfied that, on the balance of probabilities, the evidence of the plaintiff relating to what was agreed between the parties should be rejected and that of the defendant preferred. The plaintiff was not an impressive witness and much of his evidence was unsatisfactory. The allegation that the defendant had verbally agreed to provide full architectural services was fundamental to the plaintiff's claim but he was unable to recall anything of significance about the time at which or circumstances under which this agreement had been reached. Furthermore, his response to the defendant's evidence as to what was agreed, in addition to the initial fax of the 28 July 1997, was equally unsatisfactory. The defendant had a clear recollection of volunteering to keep an eye on the contractor on site in response to a request from the plaintiff's wife at a meeting at which the plaintiff was present. The plaintiff was simply unable to recall either the meeting or the conversation. The plaintiff's wife was not called to give evidence on behalf of the plaintiff. I note that, at all material times, the plaintiff's wife has been a member of the firm of solicitors acting on behalf of the plaintiff and that she corresponded directly with the defendant with regard to the preparation of the plaintiff's case for arbitration.

[15] In view of the fact that I am satisfied that the defendant simply agreed, on a voluntary basis, to keep an eye on the contractor and his activities, I also reject the plaintiff's submission that any of the conditions relating to the duties of an architect set out in the JCT Form were relevant to the defendant's post tender activities. In the circumstances of this case I am satisfied that the contract of the 5 March 1998 related only to the relationship between the plaintiff and the contractor.

[16] There is no doubt that during the course of the contract the defendant did perform some of the services and discharge some of the functions that would have been the responsibility of an architect contractually bound to provide a full architectural service, including supervision. For example, he accepted that he had carried out irregular inspections although he explained that these only permitted him to see the stage at which construction had reached rather than to assess the quality of the materials and/or workmanship. However, I am satisfied that he did so on the basis that he considered himself to be a friend of the plaintiff. Despite the plaintiff's protestations, I am satisfied that the relationship was conducted on a friendly basis throughout the contract. The existence of such a relationship was clearly responsible for, by way of example, the extremely generous discount

on the standard RIBA fees offered initially by the defendant and accepted by the plaintiff, the fact that the defendant advised and prepared a report to assist the plaintiff in the arbitration without any charge and, even when threatened with litigation by the plaintiff's solicitors for the first time in December 2000, the defendant responded by confirming his friendship with the plaintiff together with his intention to do everything he could to assist him and his wife.

[17] The plaintiff placed considerable emphasis on the fact that the defendant based his final fee on the ultimate cost of the contract works, namely £65,000. In the invoice dated 20 October 1998 the defendant calculated his fee to Practical Completion as:

> "9.85% times updated estimate at 65K (incl.addit works) £50,447.50."

Indeed, in the closing submissions the plaintiff argued that it was quite crucial that the defendant's architect, Mr Jones, had accepted during cross examination that he would only have charged a fee based on a percentage of the initial contract sum and that, when pressed as to what services could have been covered by this additional fee, Mr Jones had conceded that it must have referred to inspection and co-ordination of the works subsequent to tender. The plaintiff argued that this evidence:

(a) undermined the defendant's credibility with regard to his assertion that he carried out all post tender services voluntarily and as a favour to a friend and;

(b) charging for such services give rise to a contractual and common law duty to ensure that the works were properly executed in accordance with the original design and specification.

[18] I reject these submissions. Unfortunately, one of the features of this case was the unimpressive quality of the expert evidence given by the architects called by both sides. Mr Jones did say in cross examination that the defendant's extra fees were justified by his inspections and negotiations/liaison between the plaintiff and the contractor. He also asserted that "All architects fees were charged initially on the estimated cost of the works but based ultimately on the full contract amount." He also observed that he did not think that the defendant had been charging for inspections because he, the defendant, had said in evidence that he had not charged for inspections. The point was not raised with the plaintiff's architect, Mr Hawthorn, until re-examination when he was asked about the fee calculated on the basis of 9.85% of £65,000 and he replied that such a fee reflected the fact that the plaintiff had not charged any fees after tender or for any additional activities such as inspections. In evidence the defendant himself dealt with this point by stating that he had not charged the balance of

his fee, which would then have been based on either the pre-tender estimate of £40,000 or the eventual tender figure of £58,000, but had delayed it because of his friendship with the plaintiff. Even if it is accepted that it is standard professional practice for an architect to base his fees upon the ultimate construction costs, it is not particularly easy to understand how the defendant's friendship with the plaintiff was being served by postponing the final percentage of the fee until a time when the overall cost to which it was to be applied had considerably increased. However, I return to the basic agreement and, as I have already indicated above, I am satisfied, on the balance of probabilities that the defendant agreed to carry out post tender supervision and inspections voluntarily as a favour at the request of the plaintiff's wife in the presence of the plaintiff. Furthermore, I consider that the letter from the defendant to the plaintiff of 17 November 1998 is consistent with such an agreement. In the final paragraph of that letter the defendant wrote:

> "In response to your last paragraph within your fax concerning our final fee request, in view of the above, as the works within the Main Contract are at a Practical Completion stage and in consideration of our input, over and above the normal architects service to which we have made no claim for professional fees, our final fee is now due and we would be grateful for your full remittance by return."

I fail to understand how the inclusion of such a paragraph could be consistent with the plaintiff's case that the defendant had agreed to provide full architectural services in return for appropriate fees and I note that the plaintiff subsequently discharged the defendant's account without raising any queries in relation to this part of the letter.

Did the defendant owe the plaintiff a duty of care?

[19] While I am satisfied that the defendant undertook the post tender activities that he carried out upon a voluntarily basis, I am also satisfied that he was requested to do so by the plaintiff and his wife because of his professional qualifications and experience as an architect upon which, as he would have appreciated, they wished to rely. The parties, correctly in my view, accepted that the term "Architect" was accurately defined in R v Architects Registration Tribunal ex parte Jaggar [1945] 2 All ER 131 at 134 as;

> "…One who possesses, with due regard to aesthetic as well as practical considerations, adequate skill and knowledge to enable him to –
>
> *(1)* originate,

> *(2)* design and plan,
> *(3)* arrange for and supervise the erection of such building or other works calling for skill and design in planning as he might, in the course of his business, reasonably be asked to carry out or in respect of which he offers his services as a specialist…".

In Voli v Inglewood Shire Council [1963] ALR 657 Windeyer J stated;

> "An Architect undertaking any work in the way of his profession accepts the ordinary liabilities of any man who follows a skilled calling. He is bound to exercise due care, skill and diligence. He is not required to have an extraordinary degree of skill or the highest professional attainments. But he must bring to the task he undertakes the competence and skill that is usual amongst Architects practising their profession and he must use due care. If he fails in these matters and the person who employed him thereby suffers damage, he is liable to that person. The liability can be said to arise either from a breach of his contract or in tort…".

The latter quotation seems to me to express the appropriate standard to be applied to the activities which the defendant did carry out as an architect in the context of the character of the agreement which I have found to exist, that is to say, an agreement that, as a favour, the defendant would keep an eye on the builder on site.

What activities did the defendant perform during the post tender stage of the contract?

[20] The defendant agreed that he had inspected the works upon a number of occasions but said that his visits to the site had been sporadic and infrequent. Sometimes he would visit the site a couple of times a month – sometimes not at all. He accepted that he had issued 10 certificate of valuation including a certificate of Practical Completion and Final Certificate. There were some 64 variations of the contract which were generally carried out by telephone with the plaintiff ringing the defendant with a particular instruction which the defendant would then pass on to the contractor. Alternatively, the plaintiff might have made direct contact with the contractor who, in turn, would confirm the variation with the defendant. There were occasions upon which either the contractor or the plaintiff telephoned the defendant and arranged for him to attend the site. The defendant agreed that, when he did attend, he was able to assess the stage to which on-site

construction had progressed but could not judge the quality of any work that had been covered up in the meantime. He gave evidence that, prior to receiving a valuation estimate from the contractor, he would generally have been on site to see the stage that the works had reached although he would not have made a point of making a site visit upon receiving such a valuation. The defendant also agreed in cross-examination that he had been in the roof space in July 1997 during construction and noted that the end of the beam had been built into the wall. He went into the roof space at completion and had a good look around.

Was the defendant negligent and, if so, what is the extent of any loss established by the plaintiff to have resulted there from?

[21] In order to put these issues in context I found it helpful to remind myself of some of the relevant chronology in relation to the plaintiff's approach to this claim.

(1) The arbitration between the contractor, William Gray and Son Limited, and the plaintiff terminated on or about 12 September 2000.

(2) In November 2000 the plaintiff instructed Messrs Watts and Partners, a firm of Chartered Building Surveyors, to carry out a full inspection of the subject premises. The inspections were carried out by a partner in that firm, Michael Johnson BSC MIRCS, who also provided a report, dated April 2002, and gave evidence. During cross-examination Mr Johnson confirmed that, when he first received instructions, the plaintiff did not tell him that he intended to sue the defendant nor that he had employed the defendant as an expert witness during the arbitration. It would appear that Mr Johnson was not told of a pending claim until after he had completed his first inspection on 21 November 2000.

(3) On 12 December 2000 the plaintiff's solicitors wrote the initial letter of claim to the defendant.

(4) On 16 January 2001 Mr Johnson again inspected the plaintiff's premises and, upon this occasion, he was accompanied by Mr Ennis BSC CEng MICE MIEI of Ennis Gruhn and Company, the expert retained by the plaintiff in relation to the structure of the roof. This was a familiarisation inspection of the roof structure as far as Mr Ennis was concerned.

(5) On 20 December 2000 the defendant wrote to the plaintiff's solicitors confirming his intention to do everything he could to help the plaintiff and making a formal request to be allowed to inspect

the plaintiff's property with a structural engineer. This inspection took place on 23 January 2001, approximately a week after the inspection carried out by Mr Johnson and Mr Ennis.

(6) On 6 February 2001 the defendant wrote again to the plaintiff's solicitors providing details of the results of the inspection which he had carried out and suggesting a solution to deal with the minor items of outstanding work. The defendant advised that the contractor to whom he had referred the matter could carry out these works for £2,000 plus VAT.

(7) There was no response whatever to this letter from the defendant for more than 2 years when, on 17 April 2003, the plaintiff's solicitors replied referring to the letter of 6 February without recording the year in which that letter had been written. In this letter the plaintiff's solicitors rejected the proposal made by the defendant and informed him that the plaintiff had now completed satisfactory repairs amounting to £44,095.28 and that he had also incurred additional expenses totalling approximately £21,000 in respect of the arbitration proceedings. The result was that the defendant did not receive any notice that the proposal contained in his letter of 6 February 2001 had been formally rejected and that a much more substantial claim was to be made until all the alleged remedial works had been completed. In the course of cross-examination the plaintiff stated that he had been advised by his solicitors to have the remedial work completed before initiating proceedings against the defendant. By that time it was too late for the defendant to retain the services of an independent architect to inspect the alleged defects. Perhaps of even greater significance is the fact that, despite appreciating that he was going to commence proceedings alleging professional negligence on the part of an architect it appears that neither the plaintiff nor his solicitors saw fit to arrange for Mr Hawthorn to inspect the premises prior to the remedial works at any time from the initial decision to commence litigation against the defendant up to initiation of the said remedial works in the spring of 2002. Indeed, the first reference by the plaintiff to instructing a suitable architect appears to occur in the letter from his solicitors of 17 October 2003.

[22] In such circumstances, I now turn to consider the specific items of loss alleged to have been sustained by the plaintiff:

Costs incurred by the plaintiff in the arbitration proceedings brought by the contractor, William Gray and Son Limited:

The plaintiff quantified these costs in the statement of claim at £21,000 and by letter dated 13 February 2004 the plaintiff's solicitors indicated an intention to amend the statement of claim to include an additional claim for costs incurred by the plaintiff in defending High Court proceedings brought by the arbitrator for his fees. However, in a subsequent letter, dated 30 March 2004, the plaintiff's solicitors confirmed that, after a consultation with counsel, it had been decided not to seek to recover any legal costs or other expenses which the plaintiff had incurred either in the arbitration proceedings themselves or in the subsequent High Court litigation commenced by the arbitrator. No application was made to amend the statement of claim and on the first day of the trial the plaintiff's senior counsel formally abandoned the claim to recover the sum of £21,000.

Tender increase amounting to £8,000:

[23] The allegation that the defendant, having appreciated that the tender was too low, allocated an additional £8,000 to the tender of William Gray and Son Limited without justification or affording any explanation to the plaintiff was based on the evidence of Mr Johnson and, to some extent, that of Mr Hawthorn. In his report Mr Johnson suggested that the defendant might have made this adjustment because the ambiguous nature of his design drawings had resulted in each contractor pricing on a difference basis. Mr Johnson was referred to the defendant's reconciliation letter of 24 February 1998 which he accepted providing a partial though not full explanation. However, in cross-examination, the plaintiff accepted that he had received this important letter which he thought had been written after he had expressed some concern to the defendant about a tender from Gray and Son Limited being too low. It is quite clear that the letter from the defendant to the plaintiff of 24 February 1998 explained the basis upon which the defendant had analysed the competing tenders and, in the course of giving evidence, it had confirmed that he had been content with this explanation. Accordingly, this claim was formally abandoned by the plaintiff in his closing written submissions.

Failure to deduct £2700 from the contractor's final account

[24] Mr Johnson of Watts and Partners, at page 4 of his report, set out four elements included in the defendant's design drawings which appeared not to have been undertaken by the contractor including:

(i) design requirements for all doors to be half hour fire resistant door sets,
(ii) design requirement to enclose the meter cupboard in fire resistant construction and provide a new fire resistant door,
(iii) design requirement to provide two layers of Lafarge plasterboard to the first floor,

(iv) allowance of £1,400 to reline chimneys.

In cross-examination Mr Johnson agreed that these items might not be regarded as essential requirements in the context of the other works being done and that Building Control would not have criticised their absence. He said that he was not aware of any agreement between the plaintiff and the contractor not to proceed with relining the chimneys and to allocate the £1,400 towards other works which they had agreed. Contrary to paragraph 8 of the defendant's written submissions, the defendant did not give any evidence upon this topic. In the absence of any evidence in any of the relevant correspondence or in the final account that the plaintiff received credit for these sums it seems to me that he is entitled to recover the sum of £2,700.

Failure to ensure that all works were completed to a satisfactory standard of construction before issue of the Certificate of Practical Completion and Final Certificate.

[25] In all, the defendant issued ten certificates, 8 in respect of interim payments together with a Certificate of Practical Completion and Final Certificate. The first snagging list was issued on 14 October 1998 which included 20 items. On 11 January 1999, after a site visit, the defendant issued a further snagging list which was followed by the Certificate of Practical Completion on 30 January 1999. This certificate was back-dated to allow the defects liability period to start running from 2 December 1998. A further snagging list was issued on 16 February 1999. On 25 June 1999 the defendant issued a Final Certificate and some of the snagging items had yet to be completed. Mr Hawthorn expressed the view that the making good of all snags was a condition precedent to the issue of the Certificate of Practical completion although, according to the minute of the experts' meeting of 26 March 2004, he was prepared to accept that, in certain circumstances and in proportion, this certificate might be issued prior to the completion of all snags. Mr Hawthorne was of the opinion that the defendant should not have issued the Final Certificate prior to the completion of the works. According to Mr Hawthorne the issue of the Final Certificate left the defendant unprotected and he did not think that the Certificate of Non-completion issued by the defendant on 30 September 1999 was of any practical assistance although it did confirm that, even at that date, there were items to which the contractor had still not attended.

[26] On behalf of the defendant Mr Jones accepted that it was good architectural practice to ensure that items on the snagging list had been dealt with prior to the issue of a certificate of Practical Completion although, in this case, he felt that a factor to be taken into account was the undertaking by the contractor to complete the work after he had been paid to date. He was prepared to accept that the Final Certificate could be issued when snagging items remained outstanding in return for a solemn undertaking from the

contractor that they would be dealt with but he agreed that this was a "rare occurrence" and something that he himself had never done.

[27] It seems to me that the issue of the Certificate of Practical Completion and the Final Certificate fall to be considered within the context of my finding that these were voluntary activities on the part of the defendant, performed as a favour, and that they appeared to have been carried out against a background of a rapidly deteriorating relationship between the contractor and the plaintiff. The plaintiff, no doubt in the interests of economy, withdrew a significant number of substantial items from the main contract and dealt directly with the suppliers. As the plaintiff himself conceded in evidence this lead to considerable difficulties in co-ordinating some aspects of the contract. For example, Haldane Fisher refused to deliver the Aga to the site until they had been paid thereby holding up the plumbing work, the kitchen units were not ordered until after the shell of the kitchen had been completed and, as a result, the kitchen units did not co-ordinate with the plumbing and electrical points and there were difficulties with the contractor charged with the supply of the family room wooden floor and the slate floor. The plaintiff was married during the latter part of 1998 and he and his wife started living in the premises in December 1998/January 1999. On 16 February 1999 after a meeting with the plaintiff the defendant wrote to the contractor setting out a number of items that needed attention and it is interesting to note that in the final paragraph of this letter the defendant confirmed that the plaintiff had specifically asked that the contractor should be in attendance to supervise the works and that responsibility should be solely with the contractor to ensure that the works were neatly and efficiently carried out. During the month of February the relationship between the plaintiff and the contractor became tense and, on one occasion, the plaintiff refused to make any further payment. On 11 March 1991 the plaintiff wrote to the contractor referring to a meeting and subsequent telephone conversation noting that he was going to retain approximately £1,500 for external re-painting. On 15 March the contractor replied in the following terms;

> "…I am sorry that you chose to go back on your word following our meeting last Monday and have not paid in full the certified amount. …As you have already broken your word by not paying in full last week or by paying within 14 days of the issue of the certificates by Gerry it is with regret that I must inform you that it is my intention to issue proceedings against you for recovery of the monies outstanding."

[28] The defendant, in conjunction with the plaintiff, prepared a paint-work schedule and assured the contractor that, once this had been carried out, the plaintiff would pay the outstanding amount. The defendant was satisfied that

there had been compliance with this schedule by 26 May 1999 and advised the plaintiff to discharge the outstanding monies. The defects liability period ended in June and the defendant issued a Final Certificate. The plaintiff did not release the outstanding sums stating that the contractor had not complied with the snag list and, on 22 July 1999, the defendant wrote to the plaintiff pointing out that he and the plaintiff had compiled a series of such lists from December and that, at each stage, additional items of snagging had been added. The defendant's letter concluded;

> "Contractually, it is not reasonable to hold monies due to William Gray Limited for an indefinite period. If there are other minor items of work within the contract, which have arisen since the start of July, Mr Gray will honour this work and these items shall be put right. However, this retention of 'good will' can only be anticipated upon payment being made to honour the issued certificate. "

An exchange of letters took place between the contractor's solicitor and the plaintiff but the defendant continued his attempts to resolve the situation even after he had been paid by the plaintiff. On 30 July 1999 he wrote to the contractor pointing out a number of items on the snagging list which seemed to have been overlooked. The contractor responded by saying no further trust existed between himself and the plaintiff and the defendant again contacted both parties. On 10 August 1999 the contractor's solicitors responded to the letter of 30 July 1999 by stating that, upon prior payment of some £2,000, he would deal with four of the items and that he would arrange for the plumbing contractor to deal with others.

[29] Taking in account all the circumstances, I do not consider that the defendant was negligent in issuing the Certificate of Practical Completion prior to compliance with the snagging list. It is certainly arguable that he should not have issued a Final Certificate while some items remained outstanding but, in practical terms, it seems to me, that by the date of the Final Certificate, the relationship between contractor and the plaintiff had reached such a low point that there was no realistic prospect of the contractor performing any further work without prior payment. In such circumstances, the issue of the Final Certificate concluded the contractual relationship and permitted the plaintiff to use the retention monies to employ an alternative contractor to deal with the outstanding items.

> *The liability of the defendant to compensate the plaintiff for the remedial works carried out other than the works included in the snagging list.*

[30] The plaintiff's expert witnesses quantified the cost of these remedial works at £26,546 to which it was alleged there should be added £4,300 in

respect of professional fees for survey work, reports and consultancy and £3,981.90 in respect of fees for pre and post contract duties to complete the remedial works making, in all, a total of £34,827.90. The defendant took no real issue with these figures, as figures, but submitted that the plaintiff had not established liability.

[31] In support of this submission the defendant relied upon the judgment of the Court of Appeal in Sansom and Another v Metcalf Hambleton and Company [1998] PNLR 542 in which, after referring to Investors in Industry Limited v South Bedfordshire Council [1986] 1 All ER 787 and Bolam v Friern Hospital Management Committee [1957] 1 WLR 582, Butler-Sloss LJ said, at page 549:

> "In my judgement, it is clear, from both lines of authority to which I have referred, that a court should be slow to find a professionally qualified man guilty of a breach of duty of skill and care towards a client (or third party), without evidence from those within the same profession as to the standard expected of the facts of the case and the failure of the professionally qualified man to measure up to that standard. It is not an absolute rule as Sachs LJ indicated by his example but, unless it is an obvious case, in the absence of the relevant expert evidence the claim will not be proved."

Mr Dunford argued that this was not an obvious case and that, therefore, in the absence of appropriate evidence from a professionally qualified Architect, the plaintiff had not proved his case.

[32] By way of response to this submission Mr Mulqueen made the following submissions;

(1) The Sansom case required to be considered in context in so far as it concerned an attempt to use the evidence of a structural engineer to establish negligence on the part of a chartered surveyor in relation to the preparation of a valuation report on the structural condition of a property whereas this case related to supervision and inspection of construction works in progress and to completion.

(2) Both the witnesses relied upon by the plaintiff, Mr Johnson (Watts and Partners) and Mr Ennis (Ennis Gruhn and Company), were professionally and suitably qualified to provide comment upon the alleged defects and, indeed, at no

stage did the defendant seek to challenge their suitability for this purpose.

(3) Neither Mr Hawthorn nor Mr Jones, respectively, the Architects called on behalf of the plaintiff and the defendant had an opportunity to inspect the defective works prior to the preparation of their reports and, therefore, could provide no direct evidence in relation thereto.

(4) The commissioning by the defendant of a report from an expert structural engineer indicating his acceptance as to the suitability of such evidence in relation to all defects associated with the roof construction.

(5) Mr Hawthorn did comment on the performance of the defendant in relation to Certificate of Practical Completion and the Final Certificate.

(6) The case was one of "obvious" failings on the part of the defendant and, therefore, fell within the exception identified by Sachs LJ in Worboys v Acme Investments Limited [1969] 4 ELR 133 at 139 cited with approval by Butler-Sloss LJ in the Sansom case.

[33] I accept Mr Mulqueen's submission that the principle annunciated by Butler-Sloss LJ in the Sansom case requires to be considered within the context of the circumstances of the particular case. In Sansom, in relation to the issue as to whether the allegation of professional negligence against a chartered surveyor must fail unless supported by evidence from a chartered surveyor, the judge at first instance had remarked:

> "I confess to some difficulty in resolving this question, for it is certainly normal to find a like professional being called in a professional negligence case, and no reason has been advanced by the plaintiffs why this was not done in this case on the issue of liability."

That case concerned evidence of a crack in a wing-wall and whether, if he had seen it, the chartered surveyor should have sought advice from a structural engineer. Both the structural engineers called by the respective parties agreed that such investigation would have demonstrated that a linked retaining wall was not adequately designed or constructed. Butler-Sloss LJ did not consider that it was such an obvious case that there was not room for two views of the relevance of the crack and the steps, if any, which ought to have been taken in 1992 by a reasonably competent character surveyor. While

the structural engineer called on behalf of the plaintiff was able to give evidence that a reasonable body of chartered surveyors would have referred a similar crack to him for further investigation, he was unable to say whether similar cracks would not have been referred to a structural engineer by other equally competent chartered surveyors.

[34] It is also important to bear in mind when considering the principle relied upon by Mr Dunford that it is the court rather than the expert witness who has the ultimate responsibility for determining liability in this type of case. In this context, I note the detailed and helpful discussion of the role of expert evidence in claims against construction professionals contained in the judgment of Judge Lloyd QC in Royal Brompton Hospitals NH Trust v Hammond [2002] EWHC 2037 (TCC), (2003) 88 CON.LR1. In particular, at paragraph 20, Judge Lloyd QC made the following observations:

> "Mr Williamson contended that, subject to the qualifications to the Bolam rule set out in Williams, a claimant must still adduce competent expert evidence to support allegations of professional negligence. In my judgment these submissions need to be expanded. First, the Bolam test applies where the court cannot answer the question without expert evidence as to the body of professional practice prevailing at the time where the negligence lies in not following established practice. It is required both to prove that practice, as a matter of evidence, since the court would not otherwise know of it either as a matter of common sense (or judicial notice) or as a matter of expertise which the court should possess (see Oliver J in Midland Bank Trust). Secondly, it is needed in certain situations, since as a matter of policy, since a professional person should not be held liable without the court being satisfied that any competent professional would have done otherwise and that as a result the consequences of the negligence would not have occurred. However as Sedley LJ observed in Williams, it cannot be an absolute requirement without which the court cannot reach its decision. Thirdly, however, expert evidence may be needed to help the court assess the available evidence such as, in the case of professional negligence, by indicating what factors or technical considerations would influence the judgment of a professional person, or, in other instances, aspects of the way in which construction work is executed which might effect findings of fact, eg as to the extent of delay or

> disruption. That evidence is not needed at all where the decision is a matter of common sense (the front door in Worboys), but it is helpful where the allegation does not require or should not depend on evidence of established practice, such as, in a case of professional negligence, where there is no such practice and therefore the court has to understand what would go through the mind of a professional person in those cases where what could be common sense to the rest of the world would not nor might not be sensible in that profession or occupation…. however in those cases, while most claimants will provide expert evidence, it is not indispensable and a party may proceed with out: see Williams. The court is able to form its own view, and is entitled to do so, without the need for such evidence of practice or opinion from an expert for this is the territory the purposes or the upshot of the opinion is no more than a statement of belief as to what he or she would have done in the circumstances, presented as evidence of practice."

[35] In the circumstances of this case it seems to me that the following are important factors in the light of these authorities:

(1) The letter of claim from the plaintiff's solicitors dated 12 December 2000 contained allegations of professional negligence in the discharge of his duties as an architect. However, despite this allegation, it appears that the plaintiff neither instructed an architect to inspect the premises in the condition that they were at that time nor engaged an architect to supervise the remedial works. Mr Hawthorn was not instructed by the plaintiff until almost 3 years later, long after the remedial works had been completed. He did not visit the site until just before his report which was dated 12 February 2004. As he stated in evidence it was "all done in short order". No reason for omitting to instruct an expert architect until this relatively late stage in the proceedings was forthcoming from the plaintiff or his advisors.

(2) The remedial works carried out by the plaintiff are alleged to have been necessary to put right the defective workmanship and omissions of the contractor and the plaintiff's claim against the defendant in respect of such omissions and defective work must be based on allegations that, as a professional architect, he should have identified such omissions and defective work, should have drawn them to the defendant's attention and should not have certified the same for payment. On the other hand, Mr Hawthorn made no criticism of the

intermediate certificates issued by the defendant in his report or in his evidence.

(3) Taking into account the evidence relating to the inspection carried out by the defendant, Mr Murray and the Building Control Surveyor on 23 January 2001 I am not persuaded that this was the type of "obvious case" contemplated by Sachs LJ and Butler- Sloss LJ.

(4) The only other expert evidence called on behalf of the plaintiff was that of Mr Johnson, a Chartered Building Surveyor employed by Watts and Partners and Mr Ennis, a senior partner in Ennis Gruhn and Company, a firm of Consulting Civil and Structural Engineers. The latter was brought into the case by Mr Johnson for the purpose of dealing solely with the roof structure. Both these witnesses identified aspects of defective workmanship and failure to comply with the original design on the part of the contractor. However it does not seem to me that, in the circumstances of this case, the evidence of either of these witnesses is sufficient to establish professional negligence on the part of the respondent architect. Mr Johnson purported to make some criticism of the defendant's performance upon the assumption that, by virtue of the contract, he was the contracts administrator. As I have already indicated I have rejected such a submission on the part of the plaintiff. Furthermore, it seems that Mr Johnson was never provided with any of the snagging lists prepared by the defendant nor was he shown the letter of 28 July 1997 nor was he ever informed that the defendant's case was that he had been asked by the plaintiff's wife to attend the site and keep an eye on the works on a voluntary basis. Perhaps an even more fundamental difficulty is the fact that the report from Watts and Partners was unequivocally represented by the plaintiff's solicitors to be restricted to quantum. On 4 December 2003 the defendant's solicitors wrote to the plaintiff's solicitors in the following terms:

> "We note your client's intention to serve an expert Architects report. In this context, we should be obliged if you would inform us as to the status of the report by Watts and Partners. We assume that your client will rely on both the Architects report and the Watts and Partners report to establish liability. However, in our view, once your client intended to initiative proceedings against our client, your client should have been advised to obtain critical evidence from a fellow professional."

When no response was forthcoming the defendant's solicitors reminded the plaintiff's solicitors of this point in the course of a letter dated 31 March 2004 adding, upon this occasion, the following:

> "Given the fact that, as far as we are aware, Watts and Partners have not attended any liability expert meetings, we ask this question again; what is the status of the Watts and Partners report? Will they be called as expert witnesses? Are they liability or quantum experts, or both?"

In a letter dated 8 April 2004 the plaintiff's solicitors indicated that they had some difficulty understanding this enquiry and on 14 April 2004 the defendant's solicitors made the following observations:

> "We take it from your letter that Mr Johnson will be called to give evidence on quantum. However, it seems that your client's liability expert, Mr Hawthorn, relies upon Mr Johnson's evidence on the defects apparent at your client's property. This is the reason why we ask whether Mr Johnson will be giving evidence on the liability issue. If Mr Johnson is to give evidence on the liability issue, is it as a witness of fact or as an expert? If the latter, why did he not present his evidence at the meeting of liability experts ie so that Mr Jones could hear the evidence which Mr Johnson may or may not give on the liability issue in the same way that it has been presented to Mr Hawthorne?"

This elicited from the plaintiff's solicitors by way of reply on 20 April 2004 the unambiguous statement that;

> "For the avoidance of doubt, we confirm that Mr Johnson of Watts and Partners will be called to give evidence on quantum."

[36] The net result is that, despite alleging professional negligence against an architect, the plaintiff did not engage an expert architect until the alleged defective work was covered up. The plaintiff did call an architect to give expert evidence but that witness made no criticism of the defendant's inspections or certificates nor did he express any view as to the standard of care to be expected of an architect who voluntarily undertakes to " keep an eye" on the contractor, In particular, if no criticism was to be made of his inspections for whatever reason, what action should or might the defendant have taken in the circumstances of this case that might have prevented the plaintiff from sustaining loss? The only other expert evidence called on behalf of the plaintiff was expressly restricted to quantum. In such circumstances I do not consider that the plaintiff has established on a balance

of probabilities that the additional remedial works which have been carried out or the costs thereof were necessitated as a result of professional negligence on the part of the defendant.

[37] Accordingly there will be judgement for the plaintiff for £2,700 to which must be added £275 being the balance between the retention monies and the amount that the defendant appears to have accepted was due to ensure the issue of a Building Control certificate. I will hear counsel on the issue of costs.