27th August, 1986.

Between	Iris Daphne Rimeur, widow of William John Warner and Executrix of the Estate of the said William John Warner	Plaintiff
And	John Joseph Hendrick	Defendant

BAILIFF: Mr William John Warner was the owner of the property "Antrim," Sunshine Avenue, St Saviour. In 1984, because he was ill and found it difficult to go upstairs, he and his family - consisting of his widow, then his wife, Mrs Iris Daphne Warner, née Rimeur, and his son - decided that it would be advisable to build an addition to the property in order that he could live and sleep on the flat.

Accordingly, because he was able to do so, having had some training whilst he was in charge, for some years, of the kitchen department at Huelin's the builders' merchants, he drew certain plans indicating what he wanted. We were told that an architect was employed to finish them off, to prepare the necessary details for the Island Development Committee; we were not told and nothing was produced to us to suggest that there were any properly drawn specifications.

Because some earlier work had been carried out at the premises by the defendant, Mr John Joseph Hendrick, a small builder who had been on his own as a building contractor for some ten years before these events took place, he was offered the opportunity to tender for the construction. It was a small construction and was not a large job, consisting of building on a bedroom, bathroom and extension to the kitchen and joining the extension to the existing house. We were told there were two other persons who tendered, one of whose tender was higher than Mr Hendrick's and one of whose tender was lower than Mr Hendrick's and that, according to the widow and the son, after discussing it with them, Mr Warner accepted the middle tender, that of Mr Hendrick.

However, according to Mr Hendrick - and this evidence has not been able to be disputed inasmuch, of course, as the late Mr Warner is not available to assist us - he was to do as cheap a job as possible, consistent with a proper standard of work and the estimate was submitted by him, dated the 13th March, 1984, in the following terms:-

"To undertake the additions to "Antrim" as per your approved drawing number W100/83, (which indicates to us that W is Mr Warner, of

course) excluding all plumbing, electrical, decorating and tiling, internal, and supplying and fitting of windows and glazing - £7,193."

That work was carried out in the course of 1984. During that year, Mr Warner, unhappily, was a very sick man and had to attend the hospital for quite a long time. In fact, he was in and out of hospital throughout the contract period and it is not denied that he spent from the 27th March to the 3rd April, from the 27th April to the 3rd May, from the 21st June to the 30th August, in hospital, and then he went back to hospital on the 25th December and died in January, 1985. However, it is to be noted that there is a considerable period from the 30th August until he was re-admitted on the 25th December, 1984, when he was at home and, of course, there are periods when he was at home in between his admissions to hospital before that date.

The work was started, as we have said, and continued and, as a result of the agreement with Mr Hendrick, certain amounts of monies were paid. There was some dispute as to whether monies were paid in advance or monies were paid in arrears as and when the work proceeded. The evidence of Mr Hendrick is that the only sum that was paid in advance was the 10% commencement figure of £719.30; other amounts were paid on a percentage basis which was a rough estimate of what stage the building had reached. The final account of £110.55 was paid finally on the 13th October, 1984, the balance having being paid on the 18th September, 1984, less the figure I have mentioned of £110.55.

There was some discussion following the death of Mr Warner and a meeting on the site by the IDC officials when a number of defects, that is to say, building bye-law defects,which would prevent the IDC from issuing their final certificate of completion, which is a matter between Mr Hendrick, the owner and the IDC but not strictly a matter between the parties, a number of defects, as I say, were pointed out.

Subsequently, those defects were confirmed in a letter by the IDC to Messrs Mourant, du Feu & Jeune, acting for the plaintiff, on the 24th September, 1985; there were six matters mentioned in that letter and I will read them:

1. The eaves ventilation to be increased to comply with Bye-law 101.
2. Fibre glass insulation to roof space does not comply with Bye-law 101.

3. Junction between the new extension and the old wall not carried out correctly.
4. Slipping roof slates to be re-fixed.
5. Window heads to be sealed.
6. Rainwater pipe joints and gulley kerbs to be completed.

The evidence of Mr Hendrick is that he was prepared to carry out these matters; number 3, that is to say, the junction between the new extension and the old wall, not being carried out correctly was not something, he said, that was mentioned at the site meeting.

The evidence shows that, subsequently, Mr Hendrick agreed to come and put right these matters but was turned away from the site by the son telephoning to him because, as the son told us, he and his mother were disgusted with the work and felt that Mr Hendrick would not put it right and he was, therefore, refused the opportunity to put these "IDC work" matters right.

So far as the junction is concerned, between the extension and the house, Mr Birch gave evidence before us that he, in fact, had been called in by the plaintiff to complete this work which was defective and he himself had carried it out and received payment in 1986 and had been paid the sum of £167.59. He agreed it was not a large job and it was one that, in fact, Mr Hendrick was quite capable of having done.

There was some correspondence between the plaintiff's solicitors, Messrs Mourant, du Feu & Jeune, and the defendant about work which was to be carried out and complaints which they were making and the last letter indicates to us, which was sent in May, 1985, that Mr Hendrick was asking for details from the solicitors. The last letter was the 30th May and Mr Hendrick's reply to Mourant, du Feu & Jeune - there is no need to quote all the correspondence - "I know the other contractors who are employed on the site but think the onus is on the Warners to supply you with their names and details of the works they undertook. In fact, as the complainants, the onus is on the Warners to supply you with all the relevant information." Nothing was received by Mr Hendrick, he was not allowed back on the site and, finally, the Order of Justice was signed in October, 1985.

Now, the position is that the plaintiff, as executrix of the estate of her late husband, has actioned Mr Hendrick for damages, claiming that there were a number of defects as set out in the Order of Justice, which I need not read, and that, as a result, the defendant is in breach of the implied terms of the contract,

which are set out in paragraph 5 of the Order of Justice, and I will read these:

1. That the defendant would carry out the works in a good and workmanlike manner.
2. That the defendant would use materials of good quality.
3. That the defendant would use materials which were reasonably fit for their intended purposes.
4. That the works, as completed, would be fit for human habitation.
5. That the works, as completed, would comply with the provisions of the Building Bye-laws (Jersey) 1960 (as amended).

Among the evidence which we heard was a report of a surveyor, Mr Le Gresley, indicating that the amount required to remedy the defects, which were also listed or part listed by Messrs Gothard and Trevor in an earlier report, would cost something over £10,000.

It could be that the explanation why the third item set out in the letter from the IDC to Mr Hendrick in September, 1985, resulted from the examination of Messrs Trevor and Gothard after the meeting on the site between the IDC and Mr Hendrick, and because their report is dated February, 1985; but it is not a very important matter.

The issue that the Court has to decide is whether, because payment was made by Mr Warner, the plaintiff is prevented now from suing the contractor for the defective work. It should be said that the contractor does not deny that there were implied terms in the contract, nor does he deny that the defects are there but he sets up a defence which I will come to in a moment.

We, first of all, had to decide whether we should look at the English law on the matter or whether we should look and seek to find what the Jersey law is which, of course, would be the common law of Jersey traceable to the Norman customary or common law. It is clear to us that, in matters of this sort, as the Royal Court said in the case of Wood -v- Wholesale Electrics Limited, which is reported in Jersey Judgments, 1976, at page 415, (that was a slightly different case; it was to do with the sale of goods in a contract): "We think that on this issue, Poitier is to be preferred in this jurisdiction." Now, in a case of this nature,which is before us, we are satisfied that, so far as English law is concerned, Mr Binnington's client would not be prevented from bringing this action but we decided that it would be right, as Mr Pallot invited us to

do, to look at the common law of Normandy, our customary law, to see what the position was there, bearing in mind, as I have said, that payment was made by the late Mr Warner.

There are a number of matters relating to that payment which I shall come to in a moment but there is something I should mention now. The defects, with the exception of one, which was the join of the roof of the extension to the existing building and which was put right by Mr Birch, were not 'vices cachés'; they were not hidden defects, they were 'vices apparents', they were all ascertainable and could be seen by anyone down below.

Looking at the common law of Normandy, Mr Pallot, first of all, quite properly, drew our attention to the definition of the word 'réception' which is defined in the "Lexique de Termes Juridiques", by Dalloz, la 5e édition of 1981. 'Réception' stems from the 'droit civil' but for the purposes, I think, of understanding it, we are entitled to have regard to this definition. It is: "Acte unilatéral par lequel le maître d'ouvrage approuve, dans le cadre d'un contrat d'entreprise, les travaux effectués par l'entrepreneur".

It is quite clear what that is. Then Mr Pallot drew our attention to Dalloz on "Louage, d'Ouvrage et d'Industrie", sections 133, 134 and 139, and I shall start by reading, in fact, from page 139; but before I do that, it appears to us that the common law of Normandy, or, at least, France, appeared to envisage that a 'réception', in other words, a payment by a master to an employee or contractor precluded a claim by the master for bad workmanship except where there were large works when, according to a particular article in the code, there was a ten-year period in respect of these larger works. For that authority, I cite the treatise on the Civil Law by Planiol (in English translation) of article 1910: "According to general principles (and that would be the general principles of the common law) a contractor who has constructed a house is discharged from all responsibilities as soon as the building is delivered and received, that is to say, examined and verified," and he goes on to give the exception in respect of the ten-year rule. Well, we are not concerned with the ten-year rule because that would be a statutory restriction and we are concerned solely with the common law.

Let us return, therefore, to section 139 of Dalloz in the section I have mentioned:

"Mais la responsabilité que ces articles imposent à l'architecte ou à l'entrepreneur pendant les dix ans (which I have just mentioned) qui suivent la réception des travaux n'est applicable qu'aux gros ouvrages (well, that's understood). Quand aux menus ouvrages même de construction, leur réception élève une fin de non-recevoir (Mr Pallot admitted and accepted that this was not a 'menue reception'. He produced a case which suggested that digging a well was not a 'menu ouvrage', and we don't think that the extension, although quite a small extension, could be a 'menu ouvrage'.) However, the article goes on:

"placés en dehors de la disposition toute spéciale des articles 1792, 2270, ces sortes d'ouvrage rentrent à cet égard dans le droit commun. Ces sortes d'ouvrage ..." (which means, obviously, 'gros ouvrages') - and this is the important part - "d'après le droit commun, la réception de l'ouvrage dégage l'ouvrier de toute résponsabilité, même pour malfaçon."

The other two sections are to do with 'vérification'. Article 134 is as follows:

"S'il s'agit d'un ouvrage à plusiers pièces ou à la mesure, porte l'article 1791, la vérification peut s'en faire par parties, elle est censée faite pour toutes les parties payées si le maître paie l'ouvrier à proportion de l'ouvrage fait". Well, of course, that's an actual codification which really cannot apply, we must keep ourselves tied to the common law itself. However, it is quite clear that, under article 132, again in the code:

"La résponsabilité de l'ouvrier cesse, d'après l'article 1770 du code civil, lorsque l'ouvrage a été reçu où que le maître a été mise en demeure de le vérifier."

Well, the question is: was Mr Warner, in this case, able to verify ... that is, put in a position to verify the work? Having read those articles and sections of Dalloz, having decided that the defects were not 'vices cachés' but 'vices apparents', we think that we should apply that law to this case.

In doing so, we have had to look at the evidence which we have. There is a conflict of evidence between that of the defendant and that of the widow and her son. The defendant's evidence, so far as the payment of the amounts are concerned, which were by cheque - that is common to both parties - was that the husband, Mr Warner, came out of hospital, when he was there, by yellow taxi and when he wasn't, paid the bills on the spot. He was able to verify and, indeed, see what was going on. The evidence of the widow and the son is that he was too ill; he suffered from emphysema

and that he could hardly move around the house at all.

Mr Hendrick, on the other hand, said Mr Warner was able to go as far as the door and could see outside and go as far as the gate of the property. However, there is no suggestion that his faculties were impaired; quite the reverse, his faculties were agreed by the family to be unimpaired and he was, of course, having regard to the time I have mentioned as to his stays in hospital, from August to December, which was the finishing time, the important time, in the property. And we have heard no medical evidence at all to suggest that his state of health, his physical state of health, although serious, obviously, because he died in January, was such that it would incapacitate him completely from looking at the state of the work, except, as we have said, on the roof, of course, the join, which was a 'vice caché' which Mr Birch had to put right later.

Now, we have to decide which version we should prefer and the Court considers that, on balance, it should prefer the evidence of Mr Hendrick. Mr Warner was a careful man, from the evidence we heard, his faculties were unimpaired and, as we have said, we have heard no evidence that he was physically incapable ... he might have had to do it slowly but there is no evidence that he was physically incapable of looking at the work; but, of course, the principal fault was, indeed, the failure of the join between the new extension and the house.

So we have concluded that Mr Warner was in a position to verify the defects and, having done so, he paid the defendant. There is also a further point to be considered. Even after the visit from the officials of the IDC, the heir and his mother did nothing, except, perhaps, instruct their lawyers. After the letter of Mourant, du Feu & Jeune and the reply in May of Mr Hendrick, nothing was done at all except that the Order of Justice was served or signed in October. We cannot but feel that Mr Warner and his family were in a position, had they so wished and had they felt strongly about the condition of the property and the new extension, to have terminated the contract and sent Mr Hendrick packing; indeed,we are strengthened in our view that Mr Warner knew perfectly well what was going on and yet paid because he noticed the defect in the drive. Again, there is a conflict of evidence as to whether there was an undertaking by Mr Hendrick to put the drive right for £50, which incensed the family, or whether, as Mr Hendrick said, that he made an allowance as a result of representations by Mr Warner, of the defect, of £90 in the bill and we think that Mr

Hendrick's evidence on this point is to be preferred and an allowance of £90 was made.

And, therefore, if Mr Warner was able to see and take action to remedy the defect in the concrete drive, all the more was he able to take action, if he so wished, as regards the other defects (except that of the roof join).

We, therefore, find, so far as the principal action is concerned - I say principal because it is the only action but, as regards the bulk of the action, I should put it this way - for the defendant. However, as I have already said, the work which Mr Birch had to put right and for which he charged £167.59 was not in respect of a 'vice apparent' and we think that it would be right that the defendant should pay that sum - £167.59 - for putting that right, and we do not know, because we have not examined Mr Birch's account, whether there was any allowance in it for decoration inside the house, which, obviously, had to be done as a result of the water pouring down; if there was an allowance, well, that will be the end of it, but we rather think that probably there was not; if there is not an allowance, then the amount which should be allowed for decorating the inside, as a result of the leak because of the faulty join, should be sent before the Greffier Arbitre if the parties cannot agree.

Under the circumstances, it would not be right to make an order for costs.