Judgment of the Lords of the Judicial Committee of the Privy Council on the Consolidated Appeal and Cross-Appeal of The Commissioner of Public Works, and, as such, representing the Colonial Government v. *Hills; and of Hills* v. *The Commissioner of Public Works, and, as such, representing the Colonial Government, from the Supreme Court of the Colony of the Cape of Good Hope; delivered the* 24*th May* 1906.

Present at the Hearing:
THE LORD CHANCELLOR.
LORD DAVEY.
LORD DUNEDIN.
LORD ATKINSON.
SIR ARTHUR WILSON.

[*Delivered by Lord Dunedin.*]

The present Appeals arise out of three contracts which were made between the Government of the Cape of Good Hope and The Thames Ironworks and Shipbuilding Company, Limited. Arnold Frank Hills, the Respondent in the Principal Appeal and Appellant in the Cross-Appeal, has been assigned into the rights of the said Company.

These three contracts were all made on the same day, 4th July 1900, and were subsequently confirmed by Act of Parliament of the Cape of Good Hope, where they appear as Schedules G, H, and I of Act 19 of 1900. They had to do with the construction of three railways, viz.:—No. 1, Oudtshoorn-Klipplaat; No. 2, Somerset East-King William's Town; and No. 3, Mossel Bay-Oudtshoorn. The first two were contracts

for the construction of the lines of the Company and the handing over of them to the Government. They were constructed and handed over, and no question, in one sense, arises on them. But moneys payable under them are partly the subject of this litigation, for the following reason. In each of them there was a clause providing that 10 per cent. should be retained by the Government from the payments falling due as the lines were constructed, and each of them also contained clauses dealing with the ultimate fate of the 10 per cent. so retained. By these clauses the 10 per cent. retained from each instalment was to form a guarantee fund, which fund was to be primarily applied to making good any defects of construction, and then "the guarantee fund or the balance thereof "shall be dealt with in terms of the Agreement "entered into for the construction of the Mossel "Bay-Oudtshoorn line."

Section 49.

Under these clauses sums amounting *in cumulo* to 61,233*l*. 16*s*. 2*d*. have been retained.

The third contract, which related to the Mossel Bay line, was rather different. This line was to remain the property of the contractors, but in respect of their engaging to construct the line the Government was to pay them a subsidy at the rate of 2,000*l*. per mile of completed railway, not to exceed 150,000*l*. in all. Provision was made for the payment of this subsidy as the work went on, but subject to the retention of 10 per cent. of it by the Government.

A sum of 50,000*l*. had been lodged as security by the Company in the hands of the Cape Agent-General, and Section 15 of Schedule I. provides that this sum and the sums retained by way of 10 per cent. of the instalments out of the payments on lines (1) and (2) should be handed over to the Company as follows, viz., one-third when the Mossel Bay line

had been completed to a certain geographical point, one-third when to a certain further point, and one-third on final completion.

Then comes Section 17 on which the controversies in these Appeals directly turn. It is in the following terms:—

"17. The Concessionary undertakes to push forward the "construction of the line with all possible speed and to "complete the same within two years of the date of the "approval of this Agreement by Parliament. In the event of "the non-completion of the line within the time hereinbefore "mentioned, unless the delay is proved to the satisfaction of "the Commissioner of Public Works to have been caused by "the Act of God, war, insurrection, rebellion, strikes, lock-"outs, or combinations of workmen, or other extraordinary or "unforeseen circumstances beyond the control of the Con-"cessionary, or from or on the part of the Railway Department, "the security referred to in this Agreement to wit:—

"The ten per cent. (10°/o) retention money under this "Agreement, together with the ten per cent. retention money "under the Agreements for the construction of the Oudtshoorn-"Klipplaat and the Somerset East-King William's Town Lines, "dated 4th July 1900, and the security lodged with the Cape "Agent-General shall be forfeited to the Colonial Government "as and for liquidated damages sustained by the said Govern-"ment for the non-completion of the said line, and thereupon "the Agreement between the Government and the said "Concessionary shall cease and determine, and it shall be "lawful for the Government to enter upon and take possession "of such incomplete line of Railway as has been constructed "by the said Concessionary, and the Government shall there-"after as soon as the amount of the actual cost of such "incomplete line shall have been ascertained pay to the said "Concessionary the amount so ascertained less such amount as "shall have been paid on account of subsidy and less the "amount of retention money and security hereinbefore referred "to."

The Company failed to complete the line within the two years, or within a period to which the two years had been by mutual consent extended. They did not even advance with it so far as to be able to claim any of the partial payments under Section 15. Accordingly, on 15th June 1903, the Government applied to the Court to get a declaration of the failure of the Company to complete the line, and for leave to enter upon and take possession of the line in terms of Section 17. The Court gave Judgment

accordingly. Against that Judgment an Appeal was taken, but subsequently abandoned, and the Judgment now stands as final between the parties.

The Company, who by this time were represented by the present Appellant Hills, then brought the present action against the Government, asking for payment of the value of their line, and the handing over of the sums retained and of the sum of 50,000*l.* above mentioned, as also of a sum of 4,913*l.* 2*s.* 5*d.*, being 10 per cent. of the instalments of the subsidy retained on Railway No. 3. The Court gave Judgment in favour of the Plaintiff for a sum of 73,500*l.* 12*s.* 7*d.*, being the actual cost of the works as found by referees to whom it had remitted the question (but with no allowance for interest on capital), under deduction of the said sum of 4,913*l.* 2*s.* 5*d.*, and also gave Judgment for the Plaintiff for the sums of 66,146*l.* 18*s.* 7*d.* (made up of the said sums of 4,913*l.* 2*s.* 5*d.* and 61,233*l.* 16*s.* 2*d.*) and 50,000*l.*

The parties in the principal Appeal do not raise any question as to the sum of 73,500*l.* 12*s.* 7*d.* but in the Cross-Appeal the Appellant Hills prays for a further addition in name of interest on capital. On this point their Lordships entirely agree with the remarks of the learned Chief Justice. To add interest would seem to them to disregard the plain meaning of the word "actual" as applied to cost. The referees have here, as practical men, found the cost of the works—in other words, they have said that so much money was expended in order to make them. To add something more in name of interest would to be to add something which never could be actual cost, for it would either be a sum calculated on an assumed general rate of interest, or it would be a sum which varied according to the financial position of the particular contractor. That "actual cost" in this contract is

used in no such fanciful sense is clearly shewn by the use of the words in Section 7 of Schedule I., where provision is made for its ascertainment as regards each instalment by the certificate of an engineer.

This disposes of the Cross-Appeal. In the principal Appeal the Government has complained of the Judgment in so far as it gives the Respondent Hills the sums of 66,146*l.* 18*s.* 7*d.* and 50,000*l.*, and claims these in terms of Section 17 as being theirs in name of liquidated damages for non-completion of the line within the specified time.

Their Lordships have no doubt that the case of the non-completion of a railway would be a natural and proper case in which to make such a stipulation. But the question arises in each particular case whether such a stipulation has been made, and it is well settled law that the mere form of expression "penalty" or "liqui-"dated damages" does not conclude the matter. Indeed the form of expression here "forfeited as "and for liquidated damages," if literally taken, may be said to be self-contradictory, the word "forfeited" being peculiarly appropriate to penalty and not to liquidated damages.

The House of Lords had occasion to review the law in the matter in the recent case of *The Clydebank Engineering and Shipbuilding Company* v. *Don Jose Ramos Yzquierdo y Castaneda* (1905 A.C., p. 6). It is perhaps worthy of remark, in view of certain observations of the learned Chief Justice in the Court below, that that was a Scotch case, that is to say, decided according to the rules of a system of law where contract law is based directly on the Civil Law and where no complications in the matter of pleading had ever been introduced by the separation of Common Law and Equity.

The general principle to be deduced from that Judgment seems to be this, that the criterion of whether a sum—be it called penalty or damages—is truly liquidated damages, and as such not to be interfered with by the Court, or is truly a penalty which covers the damage if proved, but does not assess it, is to be found in whether the sum stipulated for can or can not be regarded as "a genuine pre-estimate of the "creditor's probable or possible interest in the "due performance of the principal obligation." The *indicia* of this question will vary according to circumstances. Enormous disparity of the sum to any conceivable loss will point one way, while the fact of the payment being in terms proportionate to the loss will point the other. But the circumstances must be taken as a whole, and must be viewed as at the time the bargain was made.

Applying this principle to the present case their Lordships are unable to come to the conclusion that the sum here can be taken as a genuine pre-estimate of loss. The determining factor is that the sum is not a definite sum, but is liable to great fluctuation in amount dependent on events not connected with the fulfilment of this contract. It is obvious that the amount of retained money under Contracts 1 and 2 depended entirely on the progress of those contracts, and that, further, as those moneys are primarily liable to make good deficiencies in these contract works, the eventual sum available to be dealt with under the provisions of Section 17 of this contract could not in any way be estimated as a fixed sum.

Their Lordships therefore hold that the sums are not liquidated damages under Section 17.

So far as a claim is made under Section 16 for 10,000*l.*, there seems no ground for argument that the sum is liquidated damages, as the

expression used points to forfeiture pure and simple.

Their Lordships are not, however, satisfied that the Government has been given a proper opportunity to prove such damages, not exceeding the sums in the penalties, as they can make out. In the Court below the whole contention seems to have turned upon the question of liquidated damages, yea or nay. The Judgment of the learned Chief Justice which decides—as their Lordships think, rightly—that the damages are not liquidated, does not directly deal with the question of damages, unless certain remarks are held to lay down the proposition that in such a contract the Government, as a Government, could suffer no damage. Their Lordships do not take that view. That the Government had a true and valuable interest in getting a line constructed, even although when constructed it was not to be their property, seems to be sufficiently established by the fact that they were content to pay a subsidy of 2,000*l*. a mile. They have not got that line completed, but, on the contrary, have got on their hands an incomplete line, incapable of yielding profit in its present state, but for which they have been obliged to pay a considerable sum of money. It seems to their Lordships that there are obvious elements of damage in such a position, and that the Government should be given the opportunity of proving such damage and evaluating it in money.

Their Lordships will therefore humbly advise His Majesty to declare that before the Plaintiff (the Respondent in the principal Appeal) obtains Judgment for the sums of 66,146*l*. 18*s*. 7*d*. and 50,000*l*. awarded to him by the Judgment of the Supreme Court dated the 29th February 1904, the Defendant (the principal Appellant) is entitled to prove

such damage as he may have actually suffered through the Plaintiff's breach of contract, and to obtain judgment in reconvention for such amount to be deducted from the sums awarded to him by the Judgment of the Supreme Court, and that subject to such Declaration the Defendant's Appeal ought to be dismissed, and further that the Plaintiff's Cross-Appeal ought to be dismissed.

The parties will pay their own costs of the Appeal and Cross-Appeal respectively.