3/1962

IN THE PRIVY COUNCIL No. 48 of 1959

ON APPEAL FROM
THE COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI

B E T W E E N:

ATA UL HAQ Appellant

- and -

CITY COUNCIL OF NAIROBI Respondents

CASE FOR THE APPELLANT

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1. This is an appeal from an Order of the East African Court of Appeal, dated the 19th August 1959, allowing an appeal by the Respondents from a Judgment and Decree of the Supreme Court of Kenya, dated the 6th September 1957, and ordering that the Appellant do pay to the Respondents the sum of Shs.312,955/45 (plus Shs.10,000/- for certain repairs if the Respondents should carry out such repairs and a further sum consisting of such loss of rent as the Respondents might suffer by reason of repairs being carried out) less a sum of Shs.260,868/- due from the Respondents to the Appellant to be set off against the sum of Shs.312,955/45, and further ordering that the Appellant do pay to the Respondents two thirds of the Respondents' costs of the proceedings before the Supreme Court and before the Court of Appeal. p.674.

2. The Appellant is a building contractor who agreed to construct for the Respondents seventeen blocks of houses at the Respondents' African Housing Estate at Ofafa, Nairobi, during 1954 and 1955.

3. The principal questions arising on this appeal are:-

(i) whether in a building contract which provides that the contractor shall complete the

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contract in accordance with the specification of the contract and also to the satisfaction of the Respondents' Engineer, completion to the satisfaction of the Engineer was sufficient compliance;

(ii) whether the acceptance in writing by the Respondents of 11 out of 17 blocks prevented the Respondents from setting up a claim for defects which were known to them in respect of those 11 blocks;

(iii) whether the Respondents by their agents waived strict compliance by the Appellant with the terms of the specification;

(iv) whether the Respondents were estopped from complaining of non-compliance by the Appellant with the terms of the specification;

(v) whether damages could be awarded for remedial work which the Respondents might do but which there was no evidence that they would do;

(vi) whether damages could be awarded for a breach of contract by the Appellant where the Respondents were found to have failed to mitigate the damages incurred and where there was no evidence as to the amount of damage that would have been suffered if there had been no failure to mitigate.

p.1, l.10. 4. In a Suit No. 170/56, the Appellant claimed Shs.190,018, comprising Shs.140,018/- in respect of the balance of the contract price for work undertaken, including retention moneys; Shs. 50,000/- in respect of a sum deposited as security for due performance of the contract; and further that proper enquiries be made into the value of extra work alleged to have been carried out by him in connection with the contract and that payment be ordered of the amount found due. The Respondents denied liability of the amount claimed and maintained that the work had not been completed in accordance with the contract.

p.5.

p.9, l.4. 5. In Suit No. 1314/56, which was consolidated with Suit No. 170/56, and in which the Respondents were Plaintiffs, the Respondents claimed Shs.882,950 damages from the Appellant, comprising as to

p.18, l.27.

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Shs.826,849, the alleged cost of bringing the buildings up to specification, or where this was impracticable, the alleged reduction in the value of the buildings; as to Shs. 9,881/-, the cost of a detailed survey and report on the work; and as to Shs. 46,220/-, excessive maintenance costs alleged to be required by reason of the impossibility of bringing the buildings up to the standard required by the specifications. The Appellant in p.16.
10 his Defence to Suit No. 1314/56, pleaded inter alia that he had duly completed the contract, that the Respondents had accepted all the works and had gone into possession and let them, and that if there were defects (which he denied) the Respondents had waived any claim in respect thereof. Further, the Respondents were estopped from denying that the works had been carried out in accordance with the contract.

6. Before the hearing 10 issues which arose on
20 the pleadings were agreed as follows:-

(1) Is the Contractor's claim premature?

(2) In the alternative is it barred by limitation wholly or partially?

(3) Have the works been completed by the Contractor in accordance with the contract?

(4) If so, is the Contractor entitled to the sum claimed, or any part thereof in the absence of the final certificate?

(5) If the answer to number 3 is in the negative,
30 in what respect has the Contractor failed to perform the contract?

(6) Has the Council waived any breach of the contract by the Contractor wholly or partially?

(7) Is the Council estopped from alleging such breaches or any of them?

(8) If the Council is entitled to any damages in respect of such breaches - how much?

(9) Has the Contractor carried out the extra work as alleged in the Plaint?

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(10) If so, to what sum is the Contractor entitled in respect thereof?

Ex.1, p.1. 7. The Agreement between the Appellant and the Respondents was contained in a Deed of Contract, dated the 29th June 1954, which incorporated the
Ibid p.5. p.19. General Conditions of the Respondents, a tender submitted by the Appellant, the specifications prepared by the Respondents' Engineer, a Schedule of rates and certain contract drawings.

8. The Deed of Contract provided, inter alia, as follows:-

(a) By clause 1, in consideration of the Works thereinafter mentioned, the Council undertook to pay to the Contractor £85,476 subject to the provisions of Clause 2 at the times and by the instalments and subject to the provisions for retention monies mentioned in the attached documents. The contract price includes Shs. 50,000 for contingencies. "The Engineer" is interpreted for purposes of the Deed as "the City Engineer for the time being of the Council."

(b) By clause 2, in case the City Engineer thinks proper at any time during the progress of the works to make any alteration in or additions to or omissions from the works or any alteration in the kind or quality of the materials to be used therein, and shall give notice thereof in writing to the Contractor, the Contractor is to comply with the notice "but the Contractor shall not do any work extra to or make any alteration or addition to or omission from the Works or any deviation from any of the provisions of this Contract without the previous consent in writing of the Engineer ....."

(c) By clause 4, the attached documents and conditions are "except where the same are varied by or inconsistent with these presents" to form and be deemed to be part of the Contract as if the same were repeated therein categorically and the Contractor is to observe and perform the conditions set out in the attached documents.

9. The General Conditions included the following provisions:-

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1. (i) ENGINEER. The term "Engineer" wherever used hereinafter and in all contract documents shall be deemed to imply the City Engineer or such person or persons as may be duly authorised to represent him on behalf of the City Council of Nairobi or the successors in office of such person or persons and also such person or persons as may be deputed by such representative to act on his behalf for the purpose of this particular contract. During the continuance of this contract, any person acting for the Engineer, or exercising his authority, or any successor in office of such Engineer, shall not disregard or overrule any decision, approval or direction given to the Contractor, in writing, by his predecessor, unless he is satisfied that such action will cause no pecuniary loss to the Contractor or unless such action be ordered as a variation to be adjusted as hereinafter provided.

(ii) APPROVED AND DIRECTED. The terms 'Approved' and 'Directed' wherever used hereinafter and in all contract documents shall mean the approval and direction in writing, of the Engineer. Ex.I, p.5, l.26.

2. (i) The Contractor shall at his own risk and cost execute and perform the Works described in the Contract Agreement and detailed in the Specification and Drawings provided and supplied to the Contractor for the purpose of the Works and completely finish the said Works in a good and workmanlike manner with the best materials and workmanship and with the utmost expedition, in accordance with the said Contract Agreement, Specification and Drawings, which shall have been signed by the Contractor and the Engineer, and in accordance with such further drawings, details, instructions, directions and explanations as may from time to time be given by the Engineer. Ex.I, p.6, l.2.

3. The said Works shall be executed under the direction and to the entire satisfaction in all respects of the Engineer, who shall at all times have access to the Works ..... Ex.I, p.6, l.42.

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Ex.1, p.8, l.26. 7.(iv) When the Works have been completely executed according to the provisions of the Contract and to the satisfaction of the Engineer, the date of such completion shall be certified by him, and such date shall be the date of commencement of such period of maintenance as may be provided by the Contract.

Ex.1, p.9, l.26. 9. (i) All materials and workmanship shall be the best of their respective kinds and shall be provided by the Contractor, except as may be otherwise particularly provided by the Specification or directed by the Engineer, and the Contractor shall, upon the request of the Engineer, furnish him with proof that the materials are such as are specified. The Engineer shall at all times have power to order the removal of any materials brought on the site which, in his opinion, are not in accordance with the specification or with his instructions, the substitution of proper materials and the removal and the proper re-execution of any work executed with materials or workmanship not in accordance with the Specification and Drawings or instructions, and the Contractor shall forthwith carry out such order at his own cost.

Ex.1, p.9, l.41. (ii) Any defect which may appear, either of material or of workmanship, during the period of maintenance provided by the Contract, shall be made good by the Contractor at his own expense, as and when directed.

Ex.1, p.10.l.1. (iii) If the Contractor shall fail to carry out any such order, as by the preceding sub-clauses provided within such reasonable time as may be specified in the order, the materials or work so affected may, at the option of the Engineer be made good by him in such manner as he may think fit, in which case the cost thereby incurred shall, upon the written certificate of the Engineer, be recoverable by the City Council as a liquidated demand in money.

Ex.1, p.10.l.11. (iv) If any defect be such that, in the opinion of the Engineer, it shall be impracticable or inconvenient to remedy the same, he shall ascertain the diminution in the value of the

works due to the existence of such defect and deduct the amount of such diminution from the sum remaining to be paid to the Contractor, or failing such remainder, it shall be recoverable as a liquidated demand in money.

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16. Payment shall be made to the Contractor by instalments in accordance with the provisions of the Specification, under the Certificate therein stipulated to be issued by the Engineer to the Contractor.

Ex.1, p.12, l.13.

No certificate so issued by the Engineer shall of itself be considered conclusive evidence as to the sufficiency of any work or materials to which it relates so as to relieve the Contractor from his liability to execute the works in all respects in accordance with the terms and upon and subject to the conditions of this Agreement or from his liability to make good all defects as provided thereby.

17.(i) The Engineer may at any time during the progress of the Works, by order in writing under his hand, make or cause to be made any variations from the original Specification and Drawings by way of addition or omission or otherwise deviating therefrom, and the said Works shall be executed according to the said variations or deviations under his direction and to his satisfaction, as if the same had been included in the said original Specification and Drawings; and any work or materials which shall be ordered not to be done, or used, shall be omitted and shall not be used by the Contractor.

Ex.1, p.12, l.28.

26.(i) If any dispute shall arise between the Engineer and the Contractor as to anything contained in or incidental to the Contract otherwise than such matters or things hereinbefore left to the decision or determination of the Engineer, every such dispute shall at the instance of either party, be referred to arbitration and unless the Engineer, and the Contractor concur in the appointment of a single arbitrator, the reference shall be to two arbitrators and every such reference shall be deemed a submission within the meaning of the Arbitration Ordinance, 1913 and

Ex.1, p.17, l.40.

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any Ordinance in amendment thereof or in substitution therefor, and shall be subject to the provision of such Ordinances.

Ex.1, p.18, l.19. 27. If any clause, stipulation or provision contained in any contract document shall be wholly or partially repeated in the same document or contained in these Conditions or in the Contract Agreement and also in the Specification or on the drawings, the Engineer may at his option, adopt either of such clauses, stipulations or provisions.

10. The Form of Tender signed by the Appellant begins with the following words:-

Ex.1, p.20, l.10. "I/We hereby undertake to supply all labour, plant, tools, materials, transport etc., and to execute and perform in accordance with the attached Drawings, Specification, General Conditions of Contract and to the entire satisfaction of the City Engineer, all works necessary to complete the buildings and erections enumerated below, together with all works pertaining thereto for the total sum stated below."

11. The Specification was headed as follows:-

Ex.1, p.25, l.2. "Specification of works required to be done and materials to be provided and used in the erection, completion and maintenance of the 161 dwelling units together with 18 ablution units and all works pertaining thereto, for the City Council of Nairobi, under the supervision of and to the entire satisfaction of the City Engineer."

Paragraph 1 of Part 1 of the Specification reads:-

Ex.1, p.25, l.10. 1. Scope of contract. The Contract is for the erection, completion and maintenance including the supply of all necessary labour and materials of 'Doonholm Neighbourhood, Stage 1, Part C.' (This should be 'Part B') 'African Housing Scheme', as shown on and in accordance with the Contract, Drawings, this Specification and the General Conditions of Contract and to the entire satisfaction of the City Engineer.

Paragraph 2 reads: Record

2. Entirety of Contract. Any details of construction which are fairly and obviously intended and which may not be definitely referred to in the Specification and/or drawings, but which are usual in sound building construction practice and essential to the works, are to be considered as included in the Contract.

Paragraphs 14, 15 and 17 of Part 1 of the Specification read:

14. Period of maintenance. The period of maintenance of any dwelling and/or ablution blocks shall be six months after the date of completion of the block as certified by the City Engineer under Clause 7 of the General Conditions.

15. Terms of payment. Payments will be made on Certificates issued by the City Engineer at his discretion. Interim payments shall not exceed 90% of the value of the work properly executed. When the work has been satisfactorily completed and taken over by the Council, the Contractor shall be entitled to a Certificate for 95% of the value of the work so executed. The remaining 5% shall be paid to the Contractor at the termination of the period of maintenance as laid down in Clause 13 hereof.

17. Cash Deposit. The Contractor is required to deposit with the Council the sum of Shs. 50,000/- as surety for the due performance of the Contract. This sum must be deposited when the Contract is signed and will be refunded when the final certificate is issued by the City Engineer.

Paragraph 26 reads:

26. Hardcore. Fill in between walls under concrete ground floor slab with approved hard, dry, broken stone in layers not exceeding 6" up to underside of floor slab, and ram each layer.

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Paragraph 6 of the Part of the Specification headed "Concretor" (p.5.) reads:

> 6. Mixing. All materials for concrete are to be well mixed by means of an approved mechanical mixer.....

Paragraphs 8 and 9, so far as material, read:

> 8. Foundation concrete. Concrete in foundation is to be a 1:3:6 mix composed of cement, sand and aggregate mixed in the following proportions .....
>
> 9. Concrete in Floors etc. Concrete in floors, channels, drains, troughs, etc. to be a 1:3:6 mix as specified above and consolidated to the thickness shown on the drawings.

12. Evidence was given in the Supreme Court of Kenya on behalf of the Appellant, inter alia, by one T.H. Stone, the Clerk of the Works, who was on the site till something over 80% of the work had been done. Evidence was given on behalf of the Respondents, inter alia, by one R.F. Mould, a qualified architect who commenced supervision of the contract under one Tanner (the original architect in charge) in March 1955 when work was about 80% complete, and who in June 1955 took over complete control as architect on Tanner's departure, and by one A.E. Wevill, a practising architect and quantity surveyor who carried out a survey of the works in April 1956 and wrote a report for the Respondents.

13. The facts found by the learned trial Judge and accepted by the Court of Appeal were as follows:-

p.554, l.20. Day to day supervision of the execution of the contract works was carried out by an "African Housing" Architect and a Clerk of the Works. Tanner had been the architect until June 1955 when he was succeeded by Mould, and Stone had been Clerk of the Works until May 1955 when he was succeeded by one Goodwin. The work was commenced in June 1954. In due course 11 out of the 17 blocks provided for in the contract were completed, accepted in writing and taken over by the Respondents. Payments were made to the Appellant on certificates issued by the City Engineer for 95% of the certified value of

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these 11 blocks. Of the remaining 6 blocks, 4 were completed and ready for inspection and the other 2 were complete except for minor details, when differences arose between the Appellant and the Respondents. Interim payments made in respect of these 6 blocks amounted to 90% of the certified value. They were never formally accepted but were occupied by the Respondents after the Appellant had withdrawn from the site.

The Respondents were seeking to erect cheaply priced buildings and the contract envisaged a low or economical standard of work. During Tanner's term of office he deliberately allowed a low standard of work within the specification, and in a number of instances, below the specification. Mould on his arrival did his best to insist on compliance with a far higher standard. The trial Judge did not accept that the Respondents through its officers had no knowledge of the standard to which the works were being built. Tanner was aware of it and accepted it and there was evidence that this knowledge and acceptance was shared by more senior officers of the Respondents, such as one Roberts, who was for a time City Engineer and one Saunders who was for a time Acting City Engineer. In many cases work was authorised or knowingly accepted which was not strictly in accordance with specification. On occasion Tanner ordered work to be done which was additional to specification. Notwithstanding provisions in the contract, practically the whole of the dealings between Tanner (and later Mould) and the Appellant were on a verbal basis and the Appellant accepted and gave effect to verbal directions given to him by Tanner. Written variation orders were only given in 3 cases (Exhibits 18, 19 and 20).

p.558, 1.12.

p.558, 1.42.

14. The learned trial Judge held after considering Clauses 9 (i) and 16 of the General Conditions, that where the Engineer had not made use of his powers under Clause 9 (i) to order removal of materials and re-execution of work not up to specification and had accepted work as satisfactory with full knowledge of defects and subsequently issued a certificate, the issue of the certificate operated as a waiver of strict compliance with the specification; that the Engineer was the agent of the Respondents for the purpose of passing the work as satisfactory and that acceptance of the work by an

p.566, 11.11-34.

p.567, 11.1-21.

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owner (or his agent authorised in that behalf) with knowledge of defects disentitled the owner from claiming for those defects. He also held that, the
p.67, 1.6. general conduct of the contract having been left in the hands of the Architect, as the Engineer's representative, the Architect was held out as having authority to waive strict compliance with details of the specifications and that waiver by the Architect was binding on the Respondents.

15. With regard to individual complaints made by the Respondents, the learned Judge made the following findings, inter alia, as to alleged defects:

p.570, 1.27. (i) A proportion of the concrete and cement
p.573, 1.5. used in the foundations, the floors and the super-
p.574, 11.9-18. structure walling was not of the mix specified or
p.577, 11.18-27. was badly mixed or laid. Neither Stone nor Tanner
p.578, 11. 1-8. knew of this.

p.575, 1.15. (ii) With regard to the filling materials used
p.577, 1.2. for the floors and the laying and ramming, he was not satisfied that the absence of small filling between the larger boulders used was a non-compliance with the specification or the drawings. There had been a breach in using larger boulders than would go into 6" layers. But Tanner and Stone saw and approved of the type of stones used and the method of laying.

p.579, 11.1-21. (iii) The Respondents complained that the internal faces of walling were not dressed off to a fair face. The Judge stated that there appeared to be considerable divergence of opinion as to what constitutes a "fair face". In any event the faces of the walling were seen or must have been seen by Tanner and Mould and the City Engineer and were accepted as complying with the specification up to the time when the last 6 blocks were ready for final inspection.

p.579, 1.37 to p.580, 1.6. (iv) There was a breach of contract in that door frames were not properly set or fixed. In general Stone and Tanner were aware of what was being done but in particular cases it might not have been noticed at the time. The defects could have been picked up during inspection before taking over
p.582, 11.1-11. or during the maintenance period. Further, screws and not bolts were used, though bolts were required by the specification. But Tanner and Stone knew of

this and accepted it. Record

(v) Defects existed in the damp-course proofing which was not in accordance with the specification. p.578, 11.22-45.

(vi) Doors in the ablution blocks were not hung to be self-closing as specified, but Tanner and Stone were aware of these defects. p.582, 11.12-23.

16. The learned Judge further held that the contract work had been substantially completed and, applying the principle stated in Dakin v. Lee, 1916 1 K.B.566, decided that the Appellant was entitled to recover the contract price less any sums allowed for defects; that the Appellant's claim was not premature or either wholly or partially time-barred; and that the Appellant was entitled to recover despite the absence of final certificates in respect of the six blocks not accepted by the Respondents. He held that letters of acceptance written by the Engineer constituted certificates of completion in the case of the 11 blocks accepted. p.583, 1.1. p.586, 1.4. p.591, 1.43. p.591, 1.16. p.586, 1.1.

17. The learned trial Judge went on to hold that certificates of completion must be conclusive subject to Clause 9 (ii). Once the six month maintenance period had commenced, the liability of the Appellant was limited by Clause 9 (ii) to such defects as appeared within that period (which could not include defects known to and accepted by the Engineer, or the Architect on his behalf, during the course of construction). Applying the decision of Marsden U.D.C. v. Sharp and Another, 47 T.L.R. 549, he held the Appellant not to be liable for defects discovered after the maintenance period had expired. p.593, 1.10. p.593, 1.46. p.594, 1.6.

18. As regards the defects of concrete and mortar, the learned trial Judge found no evidence of the extent of the defects discovered within the maintenance period relating to the 11 blocks accepted. Accordingly he could not assess any figure for the damages recoverable. For the 6 blocks not accepted he quantified the damages by taking the total figure assessed by Wevill and awarding 6/17ths of that sum in the case of the foundations (amounting to Shs. 13,764) and in the case of the superstructure walling (amounting to Shs. 6,564). He could not quantify the damages for defective concrete and mortar in the floors, since the figure in p.594, 1.27 to p.595, 1.6. p.595, 1.27. p.595, 1.40. p.595, 1.34.

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Wevill's report did not relate solely to faulty concrete. He also awarded the Respondents Shs. 2000 as a proportion of the cost of a detailed survey and report. Finally, he awarded the Appellant a sum of Shs. 70,850 in respect of Extras. As a result he held that the Appellant was entitled to recover Shs. 140, 018 balance of contract price; Shs. 50,000 for the deposit; and Shs. 70,850 for extras; and that the Respondents was entitled to Shs. 22,502 damages for defective work. He gave costs to the Appellant in Suit No. 170/1956 and to the Respondents in Suit No. 1314/1956, holding that one-eighth of the costs were attributable to the latter suit.

p.596, l.5.
p.599, l.27.
p.599, l.30 to p.600, l.4.

19. On appeal by the Respondents from the Judgment of the learned trial Judge, the East African Court of Appeal allowed the appeal and set aside the Decree of the Supreme Court of Kenya.

20. The Court of Appeal upheld the findings of the trial Judge that the Appellant's claim was not premature, that the absence of a final certificate did not preclude the Appellant from claiming and that the Appellant was entitled to Shs. 78,850 for extras. There was no appeal against the finding that the Appellant's claim was not barred by limitation.

p.631, l.28.
p.631, l.33.
p.661, l.38.

The further findings of the Court of Appeal were as follows:

(i) The effect of the provisions of Clause 2 of the Deed was that the Appellant could not do or be required to do extras or vary or be required to vary the works contracted for or alter or be required to alter the kind or quality of the specified materials, without a written notice from the City Engineer.

p.616, l.38.

(ii) The correct construction of Clause 2 of the Deed and Conditions (1)(i), (1)(ii) and (2)(i) of the General Conditions was that the City Engineer's representative or the representative's deputy could illustrate, explain or direct (writing being required for a "direction") within the limits of the contract documents and where the contract documents were silent; but that if alteration, variation or deviation from the contract were desired, the written direction or written consent of the City Engineer himself would be necessary.

p.621, l.37.

(iii) General Condition 9(iv) seemed to indicate that it was contemplated that sums might be recoverable after the expiration of the period of maintenance. Record p.624, l.22.

(iv) On the authority of Hoenig v. Isaacs, 1952 2 A.E.R.176, the principal of Dakin v. Lee did not apply where the contract provided for retention moneys as in the present case. The work had been substantially completed according to contract, with some defects. As regards the 6 blocks not accepted, the Appellant was not entitled to payment of the retention moneys where he could show waiver, or that the refusal to take them over was unjustified. As regards the 11 blocks accepted he was entitled to the retention moneys subject to the Respondents' right to show that the work was not satisfactorily completed and to sue for defects notwithstanding acceptance. p.632, l.9 to p.634, l.40.

(v) Acceptance of work by the owner (or his agent authorised in that behalf) with knowledge of defects did not disentitle the owner from claiming for those defects, unless actual waiver could be shown as well. p.640, ll.24-31.

(vi) Following the decisions of Petrofina S.A. v. Compagna Italiana, 53 T.L.R. 223, and Newton Abbot Development Co. v. Stockman, 47 T.L.R. 616 (and not following Bateman v. Thompson (1875) 2 Hudson's B.C. 4th Ed. 35 or Harvey v. Lawrence (1867) L.T.N. S. 571), they held that where there was provision in the contract to complete work according to specification and also to the satisfaction of the Engineer there was a dual obligation on the Appellant and even if the Engineer was satisfied, the Appellant was in breach if he failed to complete to specification. p.653, l.12. p.654, l.9.

(vii) On a proper construction of the contract, letters of acceptance by the City Engineer and the City Engineer and the taking over by the Respondents of the 11 blocks were not conclusive so as to prevent the Respondents from claiming damages for defects, notwithstanding that the defects might appear and suit be brought after the expiration of the maintenance period. In the absence of a written or oral waiver authorised by the contract, a waiver would be a new contract and would require to be by a resolution or by-law of the Respondents. p.655, l.39 to p.656, l.2. p.656, ll.12-31.

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p.656, ll.42-47. The Respondents' representatives had no actual authority to accept orally sub-standard work and materials. Nor did they have any ostensible authority to do so where deviations from the contract were

p.657, l.45. required to be in writing by the terms of the contract.

p.658, l.18. (viii) As to estoppel, no estoppel arose from the

p.660, l.10. Respondents' inspection of the works, or their approval and taking possession after executing certain repairs, or by the issue of interim payment certificates. But if the Respondents' officers knowingly stood by and did not ask for defects which were patent before the commencement of the maintenance period to be corrected at or before acceptance of the building, the Appellant might be relieved of the additional expense caused by such standing by.

21. The Court of Appeal awarded damages to the Respondents under different heads:-

p.663, l.19 to p.664, l.17. (i) Foundations and Foundation Walling. As the court did not hold the Respondents debarred from claiming for defects of concrete and cement in respect of the 11 blocks, they awarded damages of Shs. 38,967/20, the total figure assessed by Wevill (not 6/17th as awarded by the trial Judge), plus Shs. 9,741/80 extra for work done by contract or Shs. 10,000/- for pumping and baling to keep the foundations clear of water if the remedial work was done by the Respondents themselves.

(ii) Floors and Hardcore fill underneath. The total sum claimed by the Respondents was Shs. 309,639/10 plus Shs. 77,409/80 if the work was done

p.664, l.46 to p.665, l.8. by contract. The Court held that if the stones had been broken smaller so as to go into 6" layers and the broken fragments put in, there would have been both consolidation and the ramming would have been more effective. However, the fill should have been

p.667, l.12 to p.669, l.31. corrected and the damage suffered by the Appellant's breach of contract should have been mitigated at the time when Tanner saw the type of hardcore used and the method employed. There was no evidence what it would have cost at the time to have insisted on proper filling, but it would have been much less than the cost of the remedy now required; nor what was the proportion of the sum claimed attributable to faulty concrete. As both parties were at fault the court allowed the Respondents half the sum

claimed, i.e. Shs. 193,524/45. Record

(iii) Superstructure Walling. For defective cement, the Court awarded the Respondents damages in respect of all 17 blocks, as assessed by Wevill, at Shs. 18,573/30 plus Shs. 4,643/30 the cost of having the work done by contract and the sum of Shs. 23,216/50 for similar internal treatment. p.669, 1.32.

(iv) Door Frames and Windows. The Court held that the Respondents could recover for the defects found by the trial Judge, although they were patent defects, in the sum of Shs. 8,430/- plus Shs.10,537/50 for work done by contract. p.670, 1.5.

(v) Damp Course. The Court awarded the Respondents damages in respect of all 17 blocks, in the sum of Shs. 500/-. p.671, 1.5.

(vi) Joinery - Hinges. The Respondents were entitled to recover, despite the fact that the defects were patent, in the sum of Shs. 7,252/50. p.671, 1.9.

(vii) Loss of Rent. If the buildings should have to be evacuated whilst remedial work was done, the actual loss would be recoverable by the Respondents. p.671, 1.26.

(viii) Cost of Survey. The Court awarded Shs. 6,000/- in respect of survey costs incurred. p.671, 1.42.

22. It is respectfully submitted that the Court of Appeal erred in the following respects:-

(i) Where the contract provided that the works should be completed to the entire satisfaction of the Engineer and also that the term "Engineer" included persons authorised to represent him on behalf of the Respondents, failure to comply with specifications was waived in those cases where the Clerk of the Works, the Architect or the Engineer himself were aware of such failure and raised no objections.

(ii) Acceptance and approval of 11 blocks with knowledge of defects constituted waiver by the Respondents of their right to claim damages for those defects, subject to the Respondents' rights under General Condition 9(ii).

(iii) Completion of the works to the satisfaction

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of the Engineer was sufficient compliance with the contract. The decision of Bateman (Lord) v. Thompson Hudson's B.C. 4th Ed. Vol. 2 p.36, is to be preferred to the case of Newton Abbot Development Co. v. Stockman 47 T.L.R., and the decision of Petrofina S.A. v. Compagna Italiana 53 T.L.R. 223 is not applicable to building contracts.

(iv) The Respondents were estopped from claiming for defects, variations from or breaches of the specification which the Appellant had been led to believe had been approved.

(v) There was no evidence on which the Court could award damages for breaches of contract by the Appellant in respect of the hardcore filling underneath the floors. Once the Court had accepted that owing to the Respondents' actions the cost of repair had become much greater it was for the Respondents to prove how much of the damage was attributable to the Appellant's breach. There could be no apportionment of damages according to degree of culpability.

(vi) There was no finding of fact by the trial Judge on which the Court of Appeal could base an award of Shs. 23,216/50 in respect of internal treatment of the Superstructure Walling.

(vii) No award should have been made for work to be done by contract when there was no evidence whether work would be done by contract or by the Respondents themselves. Nor was the Court entitled to make an award for loss of rent when there was no evidence that this would be incurred.

23. The Appellant respectfully submits that this Appeal should be allowed with the costs of this Appeal and of the Appeal in the East African Court of Appeal and that the Judgment and Decree of the Supreme Court of Kenya be restored for the following amongst other

R E A S O N S

(1) BECAUSE completion to the satisfaction of the engineer was sufficient compliance with the contract.

(2) BECAUSE except as found by the learned trial Judge, the Appellant's breaches of contract

(if any) were waived by the Respondents. Record

(3) BECAUSE except for such damages proved as were awarded to the Respondents by the learned trial Judge, the Respondents were estopped from claiming damages for defects.

(4) BECAUSE the Court of Appeal erred in awarding damages:

(i) for defective hardcore filling, in that they had no evidence for awarding damages and did so on an apportionment of blame;

(ii) for repairing internal facing of the Superstructure Walling, in that there was no finding of fact on which such award could be based;

(iii) for items of expense which might not be incurred.

(5) BECAUSE the judgment of the learned trial Judge was right.

DINGLE FOOT.

E.F.N. GRATIAEN.