3/192

No. 48.—1.—1959

In the Privy Council

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
29 MAR 1963
25 RUSSELL SQUARE
LONDON W.C.1.

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI.

BETWEEN

ATA UL HAQ . . . . *Appellant*

68157

AND

CITY COUNCIL OF NAIROBI . . . . *Respondents.*

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Case for the Respondents

RECORD

1. This is an appeal from an Order of the Court of Appeal for Eastern Africa dated the 10th December, 1958. The said Order allowed the appeal of the Respondents from a Decree of the Supreme Court of Kenya dated the 6th day of September, 1957, which was given in two consolidated suits arising out of a contract to build seventeen blocks of African Housing in the Ofafa Estate, Nairobi. The said contract, which was dated the 29th June, 1954, was made between the Appellant as contractor and the Respondents as building owner. The said Order set aside the said Decree, and ordered that the Respondents pay the Appellant Shs. 70,850/–, that the Appellant pay the Respondents Shs. 312,955,45/– (but with liberty to set off against such sum the aforesaid sum of Shs. 70,850/– and certain other sums), and that the Appellant pay two-thirds of the Respondents' taxed costs of both suits both below and on appeal.

P674.

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2. On the 18th February, 1956, the Appellant as Plaintiff issued a Plaint against the Respondents, in Civil Case No. 170 of 1956, in which he claimed that he had duly completed his work in accordance with the said contract and had done additional work thereunder and claimed :—

P1. l. 10

(i) Shs. 140,018/– in respect of balance of the contract price including retention monies ;

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(ii) Shs. 50,000/– in respect of a deposit which he had made by way of security ;

(iii) Enquiries into the value of the extra work carried out by him and payment of the amount shown to be due ;

(iv) Costs, Interest and other relief.

On the 28th May, 1956, the Respondents filed a defence in this suit in which they denied liability and said that the works had not been

P5. l. 35. To P9. l. 14.

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completed in accordance with the contract and that they were justified in not taking over six out of the seventeen blocks. They pleaded alternatively that if any money was due then they were entitled to make deductions in respect of defects, and they said that the Appellant's suit was premature since no certificate had been issued for payment beyond that which had already been made, or alternatively that it was barred by limitation under s. 129 of the Municipalities Ordinance (Cap. 136).

P9. 1. 4.

3. On the 14th November, 1956, the Respondents filed a plaint in Civil Case No. 1314 of 1956 in which they claimed *inter alia* that the Appellant had failed to execute the works in accordance with the contract. They said that the defects complained of were latent and had not been known to them when certificates for payment had been issued to the Appellant and payment made thereon. They claimed damages in respect of these defects amounting to Shs. 826/849/- being the estimated cost of remedial work, loss of rent, and supervision charges while the work was being done. They also claimed Shs. 9,881/- being the fee paid to Mr. Wevill, a quantity surveyor, for his survey and report, and damages of Shs. 46,220/- for unusual maintenance costs which would be caused by the poor quality of the buildings.

P16. 1. 40, TO P18. 1 14.

4. On the 31st January, 1957, the Appellant filed a Defence in Suit 1314/56 in which he said that he had duly completed the work, that the Respondents had accepted all the works (including the aforesaid six blocks) and had gone into possession and let them and continued to collect rents for them ; he denied that there were any defects latent or otherwise and said alternatively that the Respondents with knowledge of any defects had waived any claim in respect thereof ; he said that after inspections of the works by the Respondents their servants or agents he the Appellant had duly carried out all such repairs and alterations as he was required to do, and that the Respondents by their servants or agents had approved all the works and taken possession thereof, and that the Respondents by their City Engineer had issued interim payment certificates amounting to Shs. 1,612,540. The Appellant further pleaded that the Respondents were estopped from denying that the works had been carried out in accordance with the contract, having induced the Appellant to think that the works were approved and having failed to object during the progress of the works when alterations or repairs could more easily have been carried out ; the Appellant alleged that the Respondents, by refusing to pay the balance, were in breach of contract, and denied any breaches of contract by himself ; he asked that the Respondents' suit be dismissed.

P13. 15. 27. TO P601. 10. 30

5. These two suits were consolidated and tried together. The hearing took place on divers dates in April, May and July, 1957, and occupied 17 days. On the 6th September, 1957, the learned trial Judge the Honourable Mr. Justice Forbes, gave judgment for the Appellant in suit No. 170 for Shs. 260/868/- and costs. The said sum was made up of—

(A) Shs. 140,018/- in respect of the balance of the contract price ;

(B) Shs. 50,000/- in respect of the deposit for security ; and

(C) Shs. 70,850/- in respect of extras.

In suit No. 1314 the learned Judge gave judgment for the Respondents for Shs. 22,502/– for damages in respect of defective work with costs on that amount; and directed that for the purpose of assessment of the costs of the hearing attributable to each suit, one-eighth of the costs of the hearing should be deemed to be attributable to suit No. 1314. A Decree was signed accordingly on the 6th September, 1957.

6. By a Memorandum of Appeal dated 16th November, 1957, the Respondents appealed against the said judgment and decree. The appeal was heard at Nairobi in her Majesty's Court of Appeal for Eastern Africa on the 23rd, 24th, 25th and 26th days of September, 1958, before the President of the Court, Sir Kenneth O'Connor, Mr. Justice Gould, a Justice of Appeal and Sir Owen Corrie acting as Justice of Appeal. Judgment was given by the Court on the 10th December, 1958, and by the Court's Order of the same date (referred to in paragraph 1 hereof) it was ordered—

(1) That the appeal be allowed and the Decree of the 6th September, 1957, be set aside;

(2) That the Respondents (the City Council) do pay the Appellant (Ata Ul Haq), in respect of his claim in suit No. 170, Shs. 70,850/– for Extras;

(3) That the Respondents (the City Council) were entitled in Suit No. 1314 to the damages following :—

(I)	For Foundations and Foundation Walling .. *Plus* for pumping and baling if remedial work carried out Shs. 10,000.	Shs. 48,708.00
(II)	For Floors and Hardcore fill underneath ..	193,524.45
(III)	For Superstructure Walling	46,433.00
	Door Frames and Windows	10,537.50
	Damp Course	500.00
(IV)	For Joinery—Hinges	7,252.50
(V)	Loss of Rent—the actual loss incurred by excavation of buildings for carrying out remedial work, if put in hand and completed with reasonable despatch	—
(VI)	For cost of Survey and Report	6,000.00
		312,955.45

(4) That against the said sum of Shs. 312,955/45 the Appellant might set off the sum of Shs. 70,850/– for extra work under (2) above, retention monies of Shs. 140,018/– being the balance of the contract price, and his deposit by way of security of Shs. 50,000/–;

(5) That the Appellant pay the Respondents two-thirds of their costs of both suits; and

(6) That there be liberty to apply for the purpose of working out the Court of Appeal's Decree.

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7. By his petition No. 48 the Appellant now prays that the Order of the Court of Appeal for Eastern Africa referred to in paragraph 6 hereof be revised altered or varied or for such further relief as may seem just.

8. Both before the learned trial judge and in the Court of Appeal the issues which arose on the pleadings (apart from an issue as to costs) were agreed to be as follows :—

(1) Is the Contractor's claim premature ?

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

(3) Have the works been completed by the Contractor in accordance with the contract ? 10

(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 No. (3) is in the negative in what respects has the Contractor failed to perform the contract ?

(6) Has the Council waived any breach of 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 ? 20

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

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

P553. 11.46. To P600. 1. 30

9. The salient facts, as found by the learned trial judge, appear from the following extracts from his judgment as cited in the judgment of O'Connor, P., in the Court of Appeal :—

P611. 34. 44 To P612. 1. 12.

" In or about the year 1954 the Council undertook the development of an African Housing Estate at Ofafa. The projected estate was divided into sections for construction purposes, the particular section with which this case is concerned being known as 'Part B.' Part B comprised 17 blocks of dwellings and ablution units with minor ancillary works. Tenders were invited for the construction of Part B, that submitted by the Contractor was accepted, and a contract for the carrying out of the work was duly entered into between the Contractor and the Council on 29th June, 1954. The contract itself is a fairly brief document of four clauses, but it incorporated in the Contract the General Conditions of Contract of the Council, the Tender of the Contractor, the Engineer, a Schedule of Rates, and the Contract Drawings." 30 40

* * * * * *

P612. 13. 46.

" In practice, day to day supervision of the execution of the contract works was carried out by an African Housing Architect

and a Clerk of Works, both of whom were employed by the Council. Initially, the Architect was a Mr. Tanner and the Clerk of Works was a Mr. Stone. Mr. Tanner was succeeded as Architect by a Mr. Mould who took over in June, 1955. Mr. Mould had been associated with the work since March, 1955, under Mr. Tanner, and it appeared that the works were about 80 per cent. complete when Mr. Mould came on to the scene. Mr. Stone was succeeded as Clerk of Works by a Mr. Goodwin in about May, 1955.

In pursuance of the contract the Contractor entered upon the site and commenced work in June, 1954. Work proceeded, and in due course, eleven of the seventeen blocks provided for in the contract were completed, accepted in writing, and taken over by the Council. Payments were made to the Contractor on certificates issued by the City Engineer under Clause 15 of the Specification up to a total of Shs. 1,011,104/- being 95 per cent. of the certified value of the work in respect of these blocks.

Of the remaining six blocks, four were completed and ready for inspection and the other two were complete except for minor details, when differences arose between the Contractor and the Council. Interim payments made to the Contractor in respect of these six blocks amounted to Shs. 493,398/- being 90 per cent. of the certified value of the work done. These blocks were never formally accepted, but were in fact occupied by the Council after the Contractor had withdrawn from the site."

* * * * * *

" Taking the evidence of Mr. Stone and Mr. Mould together, a very clear general picture emerges. I do not think it is disputed that the Council were seeking to erect cheaply priced buildings in this Housing Estate, and that this contract did envisage a low, or shall I say, economical standard of work. This, of course, is no excuse for an even lower standard than is called for by the specification. There is, however, some latitude for interpretation of the specification, and it is perfectly clear that during his term of office as Architect in charge of the contract, Mr. Tanner deliberately allowed a low standard of work within the specification, in a number of instances below specification, while Mr. Mould on arrival, no doubt performing the function of a new broom, did his best to insist on compliance with a far higher standard. The position is really summed up by Mr. Mould's admission in cross-examination when he agreed that a different standard is being applied now, when he whole-heartedly condemns all the blocks or buildings, from that applied when acceptance of certain of the blocks was recommended to the Council. I accept Mr. Mould's evidence that when he drafted letters of acceptance in respect of five of the blocks he was not fully aware of the general character of the buildings. He had, of course, not seen the major part of the work being carried out; and I have no doubt that he was sincerely shocked when he did discover the standard to which the building had been carried

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out and considered it was a scandalously low standard. I do not accept, however, that the Council, through its officers, had no knowledge of the standard to which the works were being built. It is clear from Mr. Stone's evidence that Mr. Tanner was in general fully aware of the standard of the work that was being done and accepted it, and there is some evidence that this knowledge and acceptance was shared by more senior officers of the Council. Mr. Mould stated that he did not recommend acceptance of the five blocks of buildings without protest but that he was overruled. He said that he indicated his objections to Mr. Roberts, then City Engineer, and that later, when Mr. Saunders was Acting City Engineer, he explained his grounds of objection to Mr. Saunders in detail. Mr. Mould said that Mr. Saunders put it to him often that he (Saunders) would have to put it to the Council and Mr. Mould also said that there were many meetings between Heads of Departments. Mr. Mould was not present and was unable to say what was put to the Council or what was discussed at the meetings of Heads of Departments, and other evidence does indicate that Mr. Mould's superior officer, and possibly the Council itself, was at one time prepared to accept a lower standard of work than he was.

P614. 24. 46

However this may be, I am satisfied that, with certain exceptions to which I will refer later, Mr. Tanner, and Mr. Stone on Mr. Tanner's authority, allowed a low standard of work; and that in many cases work was authorised or knowingly accepted which was not strictly in accordance with specification. I am also satisfied that on occasion Mr. Tanner directed work to be done which was additional to specification. It seems equally clear that notwithstanding the provisions of the contract documents, to which I will refer in detail presently, practically the whole of the dealings between Mr. Tanner (and later Mr. Mould) and the Contractor were on a verbal basis and that the Contractor accepted and gave effect to verbal directions given him by Mr. Tanner. Written variation orders for additional work in accordance with the contract appear to have been issued in only three cases, that is, Exhibits 18, 19 and 20."

10. As appears from the above extracts, and from the more detailed findings of the learned trial judge to which reference is made below, the learned trial judge found that certain of the Appellant's work in all seventeen blocks was not carried out in accordance with the contract.

P599. 30. 35. to P600. 1.

11. The learned trial judge also found that the Appellant had carried out extra work to the value of Shs. 70,850/–.

12. The findings of fact referred to in paragraphs 9, 10 and 11 above were in substance accepted by both parties before the Court of Appeal and that Court proceeded to deal with the learned trial judge's decisions on the issues referred to in paragraph 8 hereof in the light of the relevant provisions of the contract.

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13. The contract was contained in :—

(i) The Deed of Contract (hereinafter called " the Deed "). EX1. P1.

(ii) General Conditions of Contract (hereinafter called " the General Conditions "). EX1. P5, TO P18.

(iii) The Appellant's Tender.

(iv) Specification. EX1. P19. TO P42.

(v) Schedule of Rates.

(vi) Numbered Contract Drawings.

14. The relevant provisions of the Contract are set out fully in the judgment of the Court of Appeal. Their substance and effect, the Respondents submit, is as follows (in this paragraph the Respondents are called " the Council " and the Appellant is called " the Contractor ") :— P15, 6, 41, TO P16, 18, 1, 22.

(A) Clause 2 of the Deed expressly prohibits the Contractor from making any alteration or omission from the Works or any deviation from any of the provisions of the Contract without the previous consent in writing of the Engineer. The effect of Clauses 1 and 4 of the Deed (as both the learned trial judge and Court of Appeal held) is to limit the meaning of " the Engineer " in Clause 2 to the " City Engineer " as defined in Clause 1, and not to include deputies or representatives of the Engineer as in the wider definition of " Engineer " contained in Condition 1 (i) of the General Conditions. Furthermore, by Condition 1 (ii) of the General Conditions the terms " approved " or " directed " wherever used mean approved or directed in writing. The combined effect of these clauses is, firstly, that deviations from the contractual provisions must be ordered by the City Engineer as defined by the Deed, and, secondly, that any approval or direction, whether of the City Engineer as so defined or of his deputies or representatives, must for the purposes of the contract be in writing. EX1. P2. EX1. P1. EX1. P2.

(B) By Condition 2 (i) of the General Conditions the Contractor is required to execute and perform the works described in the Contract Agreement and detailed in the Specification and Drawings and complete them in a good and workmanlike manner with the best materials and workmanship in accordance with the Contract Agreement, Specification and Drawings, and in accordance with such further drawings details instructions directions and explanations as may from time to time be given by the Engineer. EX1. P6.

(C) By Condition 3 the Contractor is separately required to execute the works under the direction and to the entire satisfaction in all respects of the Engineer. EX1. P6. 7.

(D) Condition 7 (ii) provides for possession of the site to be given to the Contractor after the signing of the Contract. EX1. P7. 8.

(E) Condition 7 (iv) provides for the date of completion of the works according to the provisions of the Contract and to the satisfaction of the Engineer to be certified by him, such date to be the date of commencement of the period of maintenance under the Contract. EX1. P8. 9.

Record
Ex1. P9.

(F) By Condition 9 (i) all materials and workmanship are to be the best of their respective kinds, except as otherwise particularly provided by the Specification or directed by the Engineer. (Having regard to Condition 1 (ii) " directed " here must mean directed in writing). Further a power is conferred by Condition 9 (1) upon the Engineer to order the removal of materials brought onto the site which are not in accordance with the specification or his instructions, and the re-execution of work executed with materials or workmanship not in accordance with the Specification or Drawings or instructions. 10

Ex1. P9. 10.

(G) Conditions 9 (ii) (iii) and (iv) impose an obligation upon the Contractor to make good defects in materials or workmanship which might appear during the period of maintenance as and when directed, and in default of compliance empower the Engineer to make good the defects (the cost to be recoverable by the Council as a liquidated demand in money on the Engineer's certificate), or to ascertain the diminution in value of the works and deduct that amount from any sum remaining to be paid (failing which remainder, the amount is to be recoverable as a liquidated demand by the Council). 20

Ex1. P12.

(H) Condition 16 provides for payment to the Contractor by instalments in accordance with the provisions of the Specification under the Certificates therein stipulated, and that no certificate so issued (i.e. of payment under the provisions of the Specification) 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 conditions of the agreement or from his liability to make good all defects.

Ex1. P12. 13.

(I) By Condition 17 the Engineer is authorised by order in writing to make variations from the Specification and drawings by way of omission or addition or otherwise deviating therefrom. 30

Ex1. P17

(J) Condition 24 requires the Contractor to insure the works as therein provided until they are delivered up. (References to delivery up of the works are also made in Clauses 8 and 11 of the Specification.)

Ex1. P27. 28.
Ex1. P7. 8.

(K) Clauses 14 and 15 of the Specification provide for a maintenance period of six months after the certified date of completion under Condition 7, and that interim payments shall not exceed 90 per cent. of the value of work properly executed. On being satisfactorily completed and taken over the Contractor is to be entitled to a certificate for 95 per cent. of the value of the work, and the remaining 5 per cent. is to be paid at the termination of the period of maintenance. 40

(L) By his tender the Contractor undertook to carry out the works in accordance with the Drawings Specification and General Conditions and to the entire satisfaction of the City Engineer. He also undertook to complete the works in the successive stages set forth in the Schedule forming part of the said Tender.

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15. As to Issue No. 1, both the learned trial judge and the Court of Appeal answered this issue in the negative and no question arises thereon. The Respondents do not now suggest (and did not suggest in the Court of Appeal) that if the Appellant had satisfactorily completed the whole of the 17 blocks his action for the balance of the purchase price would be barred simply by the absence of certificates of completion or certificates for payment. Similarly in the case of Issue No. 4, both the learned trial judge and the Court of Appeal held that the mere absence of a final certificate (assuming this to mean a certificate under Clause 15 of the Specification for payment of 95 per cent. of the value of the work done) would not in itself preclude the Appellant from claiming if in fact he was otherwise entitled ot the sum claimed. This also the Respondents conceded in the Court of Appeal. The Respondents did however argue, and the Court of Appeal so found in dealing with Issue No. 3, that, since none of the 17 blocks was satisfactorily completed, the Appellant never in fact became entitled to the retention money or the return of his deposit. In this sense the Appellant's action was in the Respondents' submission, rightly held to have been premature.

P630. 41. 42. To P631. 1. 29.

P631. 32. 48.

P631. 47. To P635. 1.

16. As to Issue No. 2, the learned trial judge found that the Appellant's claim was not barred by limitation, and there was no appeal against this finding. Here also, therefore, no question now arises.

17. As to Issues Nos. 3 and 5, the learned trial judge's findings on Issue No. 5 were as follows :—

P583. 43. 46. To P584. 1. 16.

> " Issue 5.—I find that the Contractor has—
>
> (a) failed to maintain the specified mix for mortar and concrete in a proportion of the mortar and concrete used, or that the mix was not properly mixed or laid, the result in either case being defective mortar and concrete ;
>
> (b) failed in certain other comparatively minor details to comply strictly with specification, e.g., hoop-iron reinforcements ; bitumen damp course ; fixing of door frames.
>
> (c) failed to comply strictly with a number of other specifications as detailed earlier in this judgment, but that in each of these cases the variations were either expressly directed by or else known to and accepted by the Architect or Clerk of Works, acting for the Engineer."

P635. 21. 22

These findings were accepted by the Court of Appeal.

In view of the above findings, the learned trial judge answered Issue No. 3 as follows :—

P583. 37. 42.

> " Issue No. 3.—I find that the works have been substantially completed in accordance with the Contract, with some defects in respect of which the Council is entitled to a reduction of the amount recoverable on the Contract."

The learned trial judge, as appears from his judgment, approached Issue No. 3 on the basis that the question to be answered was whether there

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had been substantial compliance with the Contract. He found that there had been such compliance, and held, in effect, that entire performance in the strict sense was not a condition precedent to payment. In his view the principle to be found in the case of *Dakin & Lee* [1916] 1 K.B. 566, was applicable, namely, that as long as there had been substantial performance the Appellant was entitled to recover the Contract price less so much as ought to be allowed in respect of defective items.

18. In the Court of Appeal the Respondents submitted that the principle in *Dakin & Lee* was not applicable in the present case ; *Dakin & Lee* was a simple case of a lump sum contract whereas in the present case provision was made for payment by instalments and for retention money. The Respondents relied *inter alia* upon the *dicta* of Denning, L.J., in the case of *Hoenig & Isaacs* [1952] 2 All E.R. 176, where he said :— 10

> " It is, of course, always open to the parties by express words to make entire performance a condition precedent. A familiar instance is when the contract provides for progress payments to be made as the work proceeds, but for retention money to be held until completion. There entire performance is usually a condition precedent to payment of the retention money, but not, of course, to the progress payments. The Contractor is entitled to payment *pro rata* as the work proceeds, less a deduction for retention money. But he is not entitled to the retention money until the work is entirely finished without defects or omissions." 20

P634. 41. 48 TO P635. 1.

The Court of Appeal accepted the learned trial judge's finding of fact that the works had been substantially completed in accordance with the contract, with some defects ; but they also accepted the Respondents' arguments referred to above and held that the retention money was only payable on entire performance. They held that the principle in *Dakin & Lee* was not applicable. In effect, therefore, the Court of Appeal's answer to Issue No. 3 involved the finding that the Appellant's action, except for his claim in respect of extras, failed ; and that, since he had not completely performed the works in accordance with the contract he was not entitled to claim the retention moneys or return of the deposit (which, by Clause 17 of the Specification was required for the due performance of the contract). 30

P673. 13. 19

19. In the event of the Court of Appeal ordered a set-off of the retention moneys and the deposit against the damages which they awarded to the Respondents under Issue No. 8. The Respondents concede that it was proper to order such a set-off and thus, so long as the Respondents are entitled to damages exceeding the sums ordered to be set-off, the Court of Appeal's answer to Issue No. 3 (and their refusal to apply the principle in *Dakin & Lee*) makes no practical difference to the financial result of the Court of Appeal's judgment as a whole (except, possibly, as to costs). The Respondents nevertheless submit, and will contend so far as may be necessary, that the Court of Appeal were correct in refusing to apply the principle in *Dakin & Lee*, and that upon the true construction of the contract entire performance of the works in strict accordance with the contract was a condition precedent to payment of the retention money and return of the deposit. 40

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20. As to Issue No. 6 the learned trial judge's finding was as follows :—

> " ISSUE NO. 6.—I find that the acceptance of work by the Engineer or Architect on his behalf with express knowledge of variations from the terms of the Specification and the issue of certificates in respect of such work amounts to a waiver by the Engineer as agent of the Council of any breach of contract that might be constituted by such variations. " P584. 17.25

The Court of Appeal rejected this finding for reasons which are set out at length in their judgment. They held that the City Engineer had no authority, actual or ostensible, by oral acceptance of inferior materials and work, to waive the due performance of the contract ; and that the issue of letters of acceptance and certificates for payment (in respect of the eleven blocks) was not conclusive against the Respondents and did not prevent them from subsequently alleging and claiming for defects. In reaching these conclusions the Court of Appeal acceded to the proposition that acceptance of work with knowledge that it was defective was not enough to disentitle the owner from claiming in respect of those defects ; an actual waiver must be shown. They also held that upon the true construction of the contract the Appellant was under a separate obligation to do the work to the specified standards with the specified materials as well as to do it to the satisfaction of the Engineer. The Court of Appeal accordingly answered Issue No. 6 in the negative. The Respondents submit that the Court of Appeal was right in so holding, both for the reasons given by them and for the reasons hereinafter set out. P635. 33. 43. To P660. 9.

21. The Contract makes no provision for any " acceptance " of the Works by the City Council or the Engineer, nor it is submitted does the doctrine of acceptance as understood in regard to sale of goods have any place in a building contract such as this Contract.

22. The Contract provides for the Works to be delivered up to the Respondents in Condition 24 and in Clauses 8 and 11 of the Specification. On such delivery up the right to possession of the site given to the Appellant by Condition 7 came to an end and his obligation to insure under Condition 24 also ceased. The Respondents were thus free to allow the buildings delivered up to be occupied subject to the necessary access being given to enable the Appellant to carry out his obligations during the maintenance period. It was therefore important to fix the date of delivery up, and the letters in which buildings were said to be accepted by the Respondents did fix this date. EX1. P17. EX1 P26. 27. EX1. P7. 8. EX1. P17.

The Contract also provided for a certificate of completion by the Engineer in Condition 7 (iv). Having regard to the fact that different parts of the Works were to be completed at different times, it was conceded that more than one certificate of completion could be issued and consequently that there might be different maintenance periods in respect of different parts of the Works. It was also conceded by the Respondents that the letters signed by the City Engineer stating that buildings had been accepted by the Respondents were tantamount to certificates of completion under Condition 7 (iv). With one exception the words used EX1. P8. 26. 32.

were "accepted under the above contract" and it is submitted that these letters cannot be construed as having any further effect than an acknowledgment of delivery up and a certificate of completion.

23. Alternatively even if the above submissions are wrong, and the letters are to be treated as an "acceptance" of the buildings taken over as that expression is understood in regard to the sale of goods, such acceptance constitutes no bar to an action for damages for breaches of contract in relation to the work or goods accepted.

24. Further, in relation to Issue No. 6 the Respondents submit :—

Ex1. P18. 10.13.
Ex1. P28. 35.40

(A) A certificate of completion given under Condition 7 (iv) is not termed "final" and does not purport to be "final." There are references to "the final certificate" in Condition 26 (ii) and in Clause 17 of the Specification. Whether these are to be regarded as substantive requirements that a final certificate shall be issued by the City Engineer when all the obligations of the Contractor including his maintenance obligations have been discharged, or are to be treated as mistakes, they emphasise the fact that the certificate of completion is not final. 10

Ex1. P27. 44.47. to P28. 7.11.
Ex1. P28. 12.33.

(B) The Appellant is entitled to a certificate for 95 per cent. of the value of the work on completion and taking over under Clause 15 of the Specification. This certificate is contemporaneous with the certificate of completion under Condition 7 (iv), and if the two documents are read together it is arguable that one certificate only is required. Thus the completion certificate is either the same certificate as, or is issued concurrently with, a certificate which by Condition 16 is expressly not to be conclusive. 20

(C) On the true construction of the contract as a whole there are two separate and independent obligations upon the Contractor, first to supply materials and carry out the work in accordance with the express requirements of the contract and secondly to do so to the satisfaction of the Engineer. It would be inconsistent with this construction and with the terms of the Deed (which are to prevail in the event of inconsistency) that an expression of satisfaction by the City Engineer should be treated as conclusive that both obligations were fulfilled. 30

(D) If any acts of the Respondents did amount to "acceptance" of the works, acceptance of work by a building owner under a building contract with or without knowledge of defects therein does not debar the building owner from claiming damages in respect of such defects. 40

(E) Provision for making good defects does not in the absence of express words prevent a building owner claiming damages for breach of contract up to the ordinary period of limitation.

(F) Departures from the requirements of the contract could only properly be made on the prior consent in writing of the City Engineer himself, as defined in the Deed and not otherwise.

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(G) If the Appellant had been duly authorised by the City Engineer to carry out the work with materials or workmanship of a lower standard than that specified, the contract price would have been reduced in accordance with the provisions of Clause 2 of the Deed. The result of the learned trial judge's judgment is that having provided inferior materials and workmanship without proper authority, but to the knowledge of representatives of the Engineer, the Appellant not only escapes liability for damages, but receives the full contract price without any reduction.

EX1. P1.30.40 TO P2. 15

10 (H) Having regard to the express provisions of the contract neither the Architect nor the Clerk of Works had any authority actual or ostensible to waive compliance by the Appellant with the contractual requirements as to materials or workmanship. Further such waiver would require to be evidenced by a new contract, which, in turn, would require to comply with the formalities of section 41 of the Municipalities Ordinance.

25. As to Issue No. 7, the learned trial judge, in view of his answer to Issue No. 6, held that this issue did not arise. In the Court of Appeal, however, since Issue No. 6 had been answered in the negative, it was 20 necessary to consider what answer should be given to Issue No. 7. The Court of Appeal answered this Issue also in the negative.

P584. 26.

P660.10.48.TO P661. 1.37.

26. The estoppel pleaded by the Appellant was thus summarised in the judgment of the Court of Appeal:

" (A) inspection of the works ;

(B) approval and taking possession thereof after the Contractor had been required to, and had done repairs and alterations ;

(C) The issue of interim payment certificates ; and

(D) thereby inducing the Contractor to believe that the works had been approved so that alterations and repairs would be more 30 expensive than they would have been if objection had been taken and the alterations and repairs effected during the progress of the works or within a reasonable time thereafter."

As regards the matters referred to in (A) and (B), the Court of Appeal held, in effect, that there could be no estoppel if the Appellant knew the extent of the authority of the Architect and the Clerk of the Works, and that this was being exceeded. They found that the Appellant did know, or should, from the terms of his contract, have known this. As to (C) the Court of Appeal held that estoppel could not be founded on the issue of interim payment certificates, which were not conclusive as to anything. 40 As to (D) the Court of Appeal held that the matters therein alleged might be relevant on the issue of damages but did not, or should not, have induced the Appellant to believe that the right of the Respondents to sue for defects would not be enforced.

27. The Respondents submit that the Court of Appeal was right in answering Issue No. 7 in the negative for the reasons given by them and for the following reasons. In order to found any estoppel there must be a

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representation made by the party alleged to be estopped or his authorised agent. The representation relied upon by the Appellant in the Court of Appeal was a representation that the rights of the Respondents in respect of breaches of contract would not be enforced. Even assuming that an estoppel can be founded on such a representation (which the Respondents do not concede), neither the City Engineer nor any of his representatives had any authority to make such a representation.

P661. 46-49, To
P672. 1. 25.

28. As to Issue No. 8, the learned trial judge approached the assessment of damages for defective work on the basis that he must exclude:

(A) any items in respect of which, in accordance with his findings under Issue No. 6, he considered the Respondents to have waived their right to complain of the defects in question; 10

(B) any items in the 11 blocks which were taken over by the Respondents, which did not appear during the maintenance period.

The second exclusion was based on the learned trial judge's view that the responsibility of the Appellant (in respect of the 11 blocks) was limited to defects which appeared during the maintenance period. The learned trial judge considered that letters of acceptance constituted certificates of completion and that these were conclusive as to the sufficiency of the work at the date of their issue. He also considered that the Appellant was not liable for defects discovered after the maintenance period had expired. 20

P66p. 3. 9.

29. The Court of Appeal having held that there was no waiver or estoppel, held further (as was inherent in their findings on Issue No. 6) that the right of the Respondents to sue for defects was not limited to those appearing during the maintenance period. The Court of Appeal (as it was proper for them to do) then proceeded to assess the damages in the light of their decisions on the questions of law.

In the result the Court of Appeal in substance awarded to the Respondents the amount of damage to which the Respondents claimed in that Court to be entitled, save that— 30

(A) in certain cases they made their award contingent upon the actual execution of remedial work or the actual incidence of loss;

(B) they reduced the amount claimed in respect of floors and hardcore fill on the ground that the Respondents had failed in part to mitigate their damage.

As to (A) the Respondents do not seek to support the contingent items of damage therein referred to. As to (B) the Respondents do not concede that the reduction of damages under this head is justified in principle, but they do not seek to have the Court of Appeal's judgment varied in this respect. Apart from these matters the Respondents submit that the amount of damages awarded by the Court of Appeal were correctly assessed. Since the learned trial judge did not make any alternative assessments 40

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of damages the Court of Appeal availed themselves of the learned trial judge's findings of fact, so far as they extended, and otherwise based their assessment upon the evidence.

30. The Respondents' submissions as to waiver and estoppel have already been set out under Issues Nos. 6 and 7; as have their submissions as to their right to damages not being limited to defects appearing within the maintenance period. Subject to the matters mentioned above, the Respondents will seek to support the Court of Appeal's answer under Issue No. 8.

10 31. As far as the Respondents are aware no question now arises in relation to Issues Nos. 9 and 10, since the Court of Appeal agreed with the learned trial judge's award of Shs. 70,850/– for extra work; and the Respondents accept this finding. P672. 36.40 to P673. 1.2.

32. The Respondents submit that the judgment appealed from should (subject to the matters mentioned in sub-paragraph (A) of paragraph 29 hereof) be affirmed for the following among other

REASONS

(1) THAT, upon the basis that the works were substantially completed but with some defects, the Appellant was not entitled, upon the true construction of the Contract, to payment of the outstanding retention moneys or return of his deposit, since he had not completely performed the contract. 20

(2) THAT the principle in the case of *Dakin & Lee* is not applicable to a contract, such as that here in question, which contains provisions for payment by instalments subject to retention monies, and makes complete performance a condition precedent to the payment of retention monies (and the return of the deposit). 30

(3) THAT neither the City Engineer, nor any other representative of the Respondents had authority, actual or ostensible, by oral acceptance of inferior materials or workmanship, to waive due compliance with the requirements of the contract in respect of materials and workmanship.

(4) THAT the letters of the City Engineer purporting to "accept" the eleven blocks were not conclusive against the Respondents and did not debar them from adducing evidence to show that the eleven blocks had not been properly completed or from claiming damages for defective work. 40

(5) THAT the doctrine of "acceptance" as understood in relation to sale of goods has no relevance in the case of the contract here in question.

(6) THAT even if there were held to have been " acceptance " in the above sense with knowledge of the defects, this would not constitute a waiver of the Respondents right to sue for damages.

(7) THAT certificates of completion issued under Condition 7 (iv) are not expressed to be, and should not be held to be in any sense final or conclusive.

(8) THAT the Appellant was under a separate and independent obligation (in which he failed) to supply materials and carry out work in accordance with the requirements 10 of the contract, as well as to do so to the satisfaction of the Engineer.

(9) THAT provision in a building contract for the making good of defects does not (in the absence of provision to the contrary) prevent a building owner claiming damages for defective work.

(10) THAT departures from the requirements of the contract in respect of materials or workmanship could only be made with the prior consent in writing of the City Engineer, which was not given in regard to the matters 20 complained of by the Respondents.

(11) THAT the contract should not be so construed, in the light of the facts of this case, as to allow the Appellant both to escape liability for damages and recover the full contract price.

(12) THAT in order to escape liability for his breaches of contract the Appellant would have to establish a new contract between the parties. No such contract was proved, nor, in any event, were the formalities of section 41 of the Municipalities Ordinance complied with 30 in respect thereof.

(13) THAT none of the matters relied on as creating an estoppel amounted to a representation upon which an estoppel could be founded, nor had the City Engineer nor any of the Respondents' representatives authority to make any such representation.

(14) THAT save as regards the matters expressly referred to in paragraph 29 hereof the Court of Appeal correctly assessed the damages to which the Respondents are entitled. 40

(15) THAT the judgment of the Court of Appeal was right and should be affirmed (except as to their award of contingent items of damage).

R. D. STEWART-BROWN.

J. STUART DANIEL.