Privy Council Appeal No. 48 *of* 1959

Ata Ul Haq – – – – – – – – – *Appellant*

v.

City Council of Nairobi – – – – – – – *Respondent*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH FEBRUARY 1962

Present at the Hearing:

LORD KEITH OF AVONHOLM.

LORD MORRIS OF BORTH-Y-GEST.

LORD HODSON.

[*Delivered by* LORD MORRIS OF BORTH-Y-GEST]

In 1954 the City Council of Nairobi undertook the development of an African Housing Estate at Ofafa. For purposes of construction the Housing Estate was divided into sections. On one of these sections 17 blocks of buildings were to be erected. They were to comprise dwellings and ablution units and other ancillary works. Tenders were invited. The appellant (the contractor) submitted a tender which was accepted. A deed of contract between him and the respondents, the City Council of Nairobi, (the Council) was made on the 29th June, 1954. By such deed of contract there was agreement for the execution of the proposed work. The work was to be done in accordance with certain general conditions, with the contractor's tender, with a specification prepared by the Council's engineer, with a schedule of rates, and also in accordance with certain drawings.

The contractor entered upon the site and commenced work in June, 1954. In due course 11 of the 17 blocks were completed. They were accepted in writing and were taken over by the Council. Payments were made to the contractor on certificates issued by the City Engineer to a total which was 95 per cent of the certified value of the work in respect of those blocks. As to the remaining 6 blocks the position was that 4 were completed and the other 2 were complete except for minor details when differences arose between the contractor and the Council. Interim payments had been made to the contractor in respect of these 6 blocks of amounts which were 90 per cent of the certified value of the work done. The 6 blocks were never formally accepted but in fact they were occupied by the Council after the contractor had withdrawn from the site.

On the 18th February, 1956 the contractor as plaintiff issued a plaint (in Suit No. 170) against the Council and claimed that he had duly completed his work in accordance with the contract and further that he had done additional work. His main claims were (1) for a sum of Shs. 140,018/- in respect of the balance of the contract price including retention monies (2) for a sum of Shs. 50,000/- in respect of a deposit which he had made by way of security and (3) for payment of such amount as should be held to be the value of extra work carried on by him. Included in the defences raised by the Council (who denied liability) were that the works had not been completed in accordance with the contract and that the Council were justified in not taking over the 6 blocks. The Council also pleaded that there had been no certificates for any payment beyond what had already been made and that the contractor's suit was premature. If however any money was due from them they claimed to be entitled to make deductions in respect of defects.

Later in the same year (on the 14th November, 1956) the Council issued a plaint (in Suit No. 1314) against the contractor. They asserted that the contractor had failed to execute the works in accordance with the contract and that defects of which they complained were latent and had not been known to them when certificates, upon which payment had been made, had been issued. The Council claimed Shs. 882,950/- damages from the contractor. This total included (i) Shs. 826,849/- the alleged cost of bringing the buildings up to specification or where that was impracticable the alleged reduction in the value of the buildings (ii) Shs. 9,881/- the cost of a detailed survey and report on the work and (iii) Shs. 46,220/- for unusual maintenance costs which it was alleged would be caused by the poor quality of the buildings. In his defence the contractor pleaded that he had duly completed the contract and that the Council had accepted all the works (including the 6 blocks) and had gone into possession and let them and collected rents from them. He further pleaded that after inspections of the works on behalf of the Council he had carried out all the repairs or alterations that he had been required to do. There were also pleas of waiver and of estoppel.

As was obviously convenient and desirable the two actions were consolidated and were tried together. The trial took place on days in April, May and June, 1957. In all the hearing occupied some 17 days. A number of issues were formulated and agreed. On the 6th September, 1957 the learned Judge (Mr. Justice Forbes) gave judgment for the contractor in his action for Shs. 260,868/- and costs. That sum included the three following items (i) Shs. 140,018/- in respect of the balance of the contract price (ii) Shs. 50,000/- in respect of the deposit for security (iii) Shs. 70,850/- in respect of extras. In the Council's action the learned Judge gave judgment for the Council for Shs. 22,502/- for damages in respect of defective work with costs on that amount. For the purpose of assessment of the costs of the hearing which should be respectively attributable to the two actions he held that one eighth of the costs of the hearing were attributable to the Council's action.

The Council appealed to Her Majesty's Court of Appeal for Eastern Africa. After a hearing in September, 1958 judgment was given on the 10th December, 1958. Before further referring to the issues which were most prominent at the hearing and on the appeal it is convenient to set out that the decision of the Court of Appeal resulted in an order summarised in the respondent's case as follows:—

" (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:—

	Shs.
(i) For Foundations and Foundation Walling ..	48,708.00
Plus for pumping and baling if remedial work carried out Shs. 10,000.	
(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 cost of both suits; and

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

It will be seen that in one form or another the order of the Court of Appeal provided that the contractor should have credit for the sums of Shs. 70,850/-, Shs. 140,018/-, and Shs. 50,000/- which were awarded by the learned Judge. As regards the first of these (the sum for extras) the Court of Appeal gave judgment in favour of the contractor. As regards the other two sums the Court of Appeal allowed credit for them as against the damages to which they held the Council to be entitled. The view of the Court of Appeal was that though the works had been substantially completed in accordance with the contract, but with some defects, the works had not been satisfactorily completed and that the retention money was only payable on satisfactory completion on entire performance. They said: " As to the retention money the contractor is not entitled to any of it until he has satisfactorily completed the work which he has certainly not done to date. Only if and when the contractor has discharged his liabilities to the Council enumerated above, so that it can be said that the defects for which the contractor is liable have been remedied or damages paid in lieu will he be entitled to receive payment of the retention monies and of the sum of Shs. 50,000/- deposited by way of security ".

It may here be stated that the Council did not on the hearing before their Lordships' Board seek to support the items of damage which the Court of Appeal awarded contingently upon the actual execution of remedial work or the actual incidence of loss. The item for pumping and baling under (3) (i) above is therefore eliminated as also is item (3) (v).

The first part of clause 1 of the deed of contract provided as follows:—

" In consideration of the Works hereafter mentioned the Council shall pay to the Contractor the sum of Pounds eighty five thousand four hundred and seventy six (£85,476) (hereinafter referred to as " the Contract Price ") subject to the provisions of Clause 2 hereof at the times and by the instalments and subject to the provisions for retention monies mentioned in the attached documents or if no time is therein mentioned then on the completion of the work."

By clause 2 it was provided that the engineer could give a notice in writing to the contractor requiring him to make some alteration in addition to or omission from the works or some alteration in kind or quality of the materials to be used but that without the previous consent in writing of the engineer the contractor was not to do any work extra to or to make any alterations or addition to or omission from the works or any deviation from any of the provisions of the contract.

For a consideration of the questions of construction of the contract which arise it is necessary to have regard to all its various provisions and their Lordships here refer only to some of them. Condition 2 (i) of the general conditions was as follows:—

" 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."

The first sentence of condition 3 was as follows:—

" 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, to the yards and Workshops of the Contractor or other places where work is being prepared for the building."

Condition 7 (iv) was:—

" 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."

Condition 9 was as follows:—

" (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 Specifications and Drawings or instructions, and the Contractor shall forthwith carry out such order at his own cost.

(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.

(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.

(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."

Condition 10 provided for the opening up of work at the request of the engineer.

Condition 16 was as follows:—

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

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."

Conditions 17, 18 and 19 dealt with variations and payment for them and with claims for extras.

Condition 23 (i) was as follows:—

" In case at any time during the progress of the works:—

(*a*) any unnecessary delay shall occur in the carrying out of the same through some default of the Contractor, or

(*b*) the Contractor shall not carry out the said works to the satisfaction of the Engineer, or

(*c*) the Contractor shall fail to comply with the directions given by the Engineer, or

(*d*) the Contractor shall at any time neglect or omit to pull down or remove any work or material which the Engineer shall have certified in writing to be defective or not according to the Contract then, and in any such case, the Engineer shall give written notice to the Contractor to proceed with the said works or to remedy such default or defect to the satisfaction of the Engineer."

Condition 23 (ii) (*a*) was as follows:—

" If the Contractor shall—

fail to comply with the instructions given in such written notice to the satisfaction of the Engineer, within six days after such notice shall have been given, then, and in any such case, the Engineer shall be at liberty, without avoiding the Contract, to take the said Works wholly or partially out of the hands of the Contractor and to enter upon and take possession of all materials, plant, tools, implements and things on or about the said Works (or on any grounds contiguous thereto) intended for use for the purpose of the Contract, and the Engineer shall retain and hold a lien upon such plant until the Works shall have been completed under the powers hereinafter conferred upon him."

Condition 26 (i) and (ii) were as follows:—

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

(ii) Provided always that either party to the Contract shall give notice in writing to the other party of his intention to submit any such dispute to arbitration not later than thirty days after the date of receipt by the Contractor of the final certificate."

There was a specification which contained some 70 paragraphs.

Paragraph 1 was as follows:—

" 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, 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 14 was as follows:—

" 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."

Paragraph 15 was as follows:—

" Terms of Payment.

Payments will be made on Certificates issued by the City Engineer at his discretion.

Interim payments shall not exceed 90 per cent 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 per cent of the value of the work so executed. The remaining 5 per cent shall be paid to the Contractor at the termination of the period of maintenance as laid down in Clause 13 hereof. [It is clear that the figure 13 should read 14.]

The value of any materials which it is intended to use in the work and which are unfixed will not be included in any interim payment certificate."

Paragraph 17 was as follows:—

" 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."

The work of constructing the buildings began in June, 1954. It was held by the learned Judge at the trial that the day to day supervision of the execution of the work was carried out by an African Housing architect and a clerk of the works. They were both employed by the Council. The architect was a Mr. Tanner and the clerk of works was a Mr. Stone. When certain blocks (of the 17) were completed they were accepted in writing. Letters of acceptance were from time to time sent by the City Engineer. Some units were so accepted before the end of the year 1954. In May, 1955 Mr. Stone was succeeded as clerk of works by a Mr. Goodwin. In March, 1955 (at a time when the works were about 80 per cent complete) Mr. Mould under Mr. Tanner became associated with the work and as architect took over from Mr. Tanner in June, 1955. Both Mr. Stone and Mr. Mould gave evidence. Apart from the contractor they were the only witnesses who gave evidence as to the progress of the work on site: Mr. Stone's evidence covered the first 80 per cent or so of the work and Mr. Mould's evidence related to the latter part of the work. Mr. Tanner was not available as a witness. The learned Judge regarded Mr. Stone as an " impressive witness " who appeared to be " genuinely impartial ": the learned Judge did not accept Mr. Mould's evidence as entirely impartial and he noted " a tendency to exaggeration ". The learned Judge stated in his judgment that there had been no suggestion of the existence of any fraudulent collusion between Mr. Tanner or Mr. Stone and the contractor.

The facts as found by the learned Judge were not seriously questioned on the appeal to the Court of Appeal and in the judgment of the Court of Appeal the following passage from the judgment of the learned Judge was quoted:—

" 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 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.

" 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."

In reference to the certificates referred to in condition 7 (iv) of the general conditions it was common ground between the parties that different parts of the works were to be completed at different times and that more than one certificate of completion could be issued. It followed that there were different maintenance periods in respect of different parts of the works. It was also common ground that various letters which were signed by the City Engineer in reference to the first 11 blocks did constitute certificates as contemplated by condition 7 (iv).

The learned Judge at the trial held that the contractor had been guilty of certain failures in regard to the contract. He found for example that the contractor had 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: defective mortar and concrete resulted. Without referring to all the detailed findings it may be mentioned that in regard to the filling materials used for the floors and the laying and ramming he held that there had been a breach in using larger boulders than would go into 6 in. layers though 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. The conclusion of the learned Judge was that as regards the 11 blocks in respect of which the City Engineer had issued certificates under condition 7 (iv) no claim could be presented by the Council for the certificates were conclusive as to the sufficiency of the work at the date of their issue: the further issue of the certificates operated as a waiver of strict compliance with the specification and the engineer had been the agent of the Council for the purpose of passing the works: and acceptance of the works with knowledge of defects disentitled the Council from claiming for such defects. As to the 11 blocks the learned Judge considered that the contractor's responsibility was limited to defects which appeared during the maintenance period (but not including any alleged defects known to but accepted by the engineer). He held that defects of concrete and of mortar in the foundations were not discovered within the maintenance period. As regards the mortar in the walls he held that the extent of the defects had not been established sufficiently to enable him to assess a figure for damages.

As to the 6 blocks the conclusion of the learned Judge was that the contract work had been substantially completed and that the contractor was entitled to recover the contract price less any sums allowed for defects. In regard to the 6 blocks he held that the sums to be allowed against the contractor for defects should relate to the foundations and the superstructure walling: he quantified the damages by taking six-seventeenths of the sums assessed by Mr. Wevill, a practising architect and quantity surveyor, who had carried out a survey of the works in April, 1956 and had made a report for the Council. He did not quantify the damages in relation to defective concrete and mortar in the floors since the figure in Mr. Wevill's report did not relate solely to faulty concrete.

The Court of Appeal held that while the representative of the engineer could give directions within the limits of the contract documents there could be no alteration variation or deviation from the contract without the written direction or consent of the engineer. As to the 11 blocks they held that the Council could show that the work was not satisfactorily completed and could sue for defects notwithstanding acceptance. They held that the contract imposed a dual obligation: it was (*a*) to complete the work according to the provisions of the contract and (*b*) to complete the work to the satisfaction of the engineer. They held that even if the engineer was satisfied the contractor was in breach if he failed to complete the contract in accordance with its provisions. They further held that acceptance of the 11 blocks by the engineer and the taking over of them by the Council did not prevent the Council from claiming damages for defects even though such defects might appear and a claim in respect of them be made after the expiration of the maintenance period. Rejecting the contentions of waiver or of estoppel they awarded damages as indicated above. As regards the floors they held that if the stones had been broken smaller so as to go into 6 in. layers then there could have been consolidation. They considered that as Mr. Tanner had seen the progress of the work and the type of hardcore used there could have been timely correction of the defects and mitigation of the damage. Though evidence was lacking as to what would have been the cost at the time of remedying the defects and as to what was the proportion of the sum claimed which was attributable to faulty concrete the Court of Appeal considered that as both parties were at fault it was reasonable to allow the Council one half of the sum that they claimed in respect of the floors and the hardcore fill underneath them.

It seems clear that different considerations apply in regard to the 11 blocks and the 7 blocks. As to the former it is common ground that the engineer issued certificates of completion under condition 7 (iv). One of the principal questions concerns the effect of such certificates. This must be determined by considering the provisions of condition 7 (iv) in its setting in the contract as a whole. A certificate of completion is not in terms said to be " final " or " conclusive " but this circumstance taken by itself is not decisive. It is said on behalf of the Council that the certificates amounted to no more than acknowledgments of delivery up and completion which marked the beginning of the maintenance period and the end of the time during which the contractor was entitled to possession of the site and during which he was under obligation to insure (see condition 24) but which in no way precluded the Council from asserting and seeking to prove that the buildings had not been erected in accordance with the provisions of the contract.

Their Lordships consider that this approach gives inadequate meaning to condition 7 (iv). It is to be remembered that the contract as a whole is a very elaborate document and it is reasonable to expect that within the diverse terms of it will be found the methods by which the arrangements between the parties were to be adjusted. Under the contract the engineer has a very important role. He is much more than an officer of or an agent of the Council charged with the duty of controlling the execution of the contract. He also has functions which he must discharge in an impartial judicial spirit. The specification provides that the work is to be done " under the supervision of and to the entire satisfaction of the City Engineer ". Under clause 3 (i) of the general conditions it is provided that the works are to be executed " under

the direction and to the entire satisfaction in all respects of the engineer ". Furthermore in many stipulated circumstances it is for the engineer to certify and the contract contemplates that his certification is to be conclusive. Thus clause 2 of the deed of contract provides for his authority and certification in regard to " unforeseen work ". Under clause 7 of the general conditions further time may be allowed " as the engineer shall in writing, certify to be reasonable ". See also condition 7 (iii), condition 9 (iii), condition 16, condition 22, condition 23 (i) (*d*), condition 23 (iv). The wording of the arbitration clause condition 26 suggests that the parties were agreeing to give finality to the decisions of the engineer. They agreed that the disputes that might go to arbitration were those which should 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 ".

The effect of condition 7 (iv) must be examined in the light of all these considerations. " 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 ". Their Lordships consider that when " the date of such completion " is certified by the engineer he is certifying (*a*) that the works have been completely executed according to the provisions of the contract and (*b*) that the works have been completely executed to his satisfaction. Condition 2 obliged the contractor to execute and perform the works and completely to finish them in accordance with the contract. It seems to their Lordships that condition 7 provided that it was for the engineer to decide whether the contractor had carried out his obligations under condition 2. Condition 3 imposed a further obligation upon the contractor. He was to execute the works under the direction and to the entire satisfaction of the engineer. For this reason the engineer had at all times access to the works and to the yards and workshops of the contractor. The engineer had full powers of supervision and had rights to call for work to be opened up for inspection. The engineer was naturally the person to certify whether works had been executed to his satisfaction.

When the engineer gave his certificate under clause 7 (iv), which involved a dual certification, then the maintenance period began and furthermore (see specification 16) the contractor became entitled to a certificate for 95 per cent of the value of the work so executed. The provisions regulating the period of maintenance then became operative. Its period was six months (see specification 14). Any defect which might appear during it (either of material or workmanship) had to be made good by the contractor at his own expense as and when directed. (See general condition 9 (ii).) Other provisions as to defects were contained in general condition 9 (iii) and (iv). The remaining 5 per cent of the value of the work executed had to be paid to the contractor at the end of the period of maintenance (see specification 15)—subject always to the powers of the engineer under general condition 9.

In all these various and detailed provisions their Lordships consider that the terms agreed upon by the parties for regulating their dealings are to be found. Their Lordships find no reason to apply any principles of waiver or estoppel. The position was that by their contract the parties agreed that the engineer was to decide and was to be the final arbiter as to whether the works had or had not been completely executed in accordance with the provisions of the contract and also to his satisfaction. If he so decided, and of course decided impartially and not in collusion with the contractor, then as regards such of the works as he covered by his certificates the provisions governing the maintenance period then became applicable.

It is said however that the contractual provisions as to payment point to a different conclusion. By clause 16 of the general conditions it is provided that payment shall be made to the contractor by instalments in accordance with the provisions of the specification: clause 15 of the specification provides for interim payments up to 90 per cent and provides that " when the work has

been satisfactorily completed and taken over by the Council the contractor shall be entitled to a certificate for 95 per cent of the value of the work so executed. The remaining 5 per cent shall be paid to the contractor at the termination of the period of maintenance." There is a proviso to clause 16 of the general conditions that " 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." Their Lordships cannot think that these words ought to be taken as in any way modifying the provisions contained in 7 (iv) of the general conditions. A certificate under 7 (iv) will only be given by the engineer when he decides that the works have in fact been completely executed according to the provisions of the contract and to his satisfaction. Then the provisions relating to the maintenance period become operative. The Council and the engineer could then avail themselves of any of the provisions of clause 9 (ii) and (iv) of the general conditions. Within those provisions there were ample means for the protection of their interests.

Their Lordships conclude that as to the 11 blocks the contractor was entitled to full payment and it was not shown that any directions were given to him or that he was guilty of failure to obey any directions in respect of any defects appearing during the various maintenance periods.

The various contractual documents taken as a whole contain very full and detailed and comprehensive provisions and their Lordships consider that though 7 (iv) does not specifically use such words as " final " or " conclusive " the certificate of the engineer if given was intended to record a decision which was binding upon the parties. Their Lordships cannot accept the submission that the certificate of the engineer was only a document which had to be given for administrative reasons or was one which merely recorded a personal opinion or a provisional opinion. It seems to their Lordships that the whole scheme of the contract involved that a certificate under 7 (iv) was final subject only to the provisions in regard to the maintenance period and the rights given to the Council in respect of defects either of material or of workmanship which might appear during the maintenance period.

In regard to the 6 blocks the position is different. No certificates under 7 (iv) were issued. It is said on behalf of the contractor that certificates should have been issued and that the Council cannot avoid payment if there was a wrongful failure to certify. In view of the findings of fact of the learned Judge it cannot however be said that there was any such wrongful failure. If certificates are issued by the engineer then they are issued by the person who was charged under the contract with the duty of decision and whose decision it was for the parties to accept. As to the 6 blocks there was no such decision. It was said that when Mr. Mould came on the scene he disregarded and overruled decisions, approvals and directions previously given to the contractor and that this was in contravention of clause 1 of the general conditions. Their Lordships cannot accept this submission. The approach of Mr. Mould may well have been a new one and his interpretations may have been more exacting than those of his predecessor but their Lordships cannot think that he was circumscribed by any prior events or that he was not entitled to insist upon his own appreciation of the standards required by the contract or that it can properly be said that Mr. Mould acted in contravention of clause 1 of the general conditions.

Their Lordships consider that the decision in the present case must depend upon the construction of its own particular contractual documents and though a consideration of the opinions of Courts on other words in other contracts in other cases is of assistance the adjudication in this case involves thereafter a return to a study of the contract under review. The wording of the contract in the well known case of *Lord Bateman v. Thompson* (2 Hudson's B.C. (4th Edn.) 36) differed much from that in the present case, but in that case even apart from the proviso in the contract the Court was of opinion that if work has to be done so as to satisfy an owner and his architect and if satisfaction with work done is expressed in the way provided then there is

performance by the contractor in such a way that no action is maintainable against him. By contrast in *Newton Abbot Development Co. Ltd. v. Stockman Brothers* 47 T.L.R. 616 a provision in a building contract that the work was to be carried out to the satisfaction of the surveyor and the sanitary inspector of the local Urban District Council was held to be only a superadded protection for the building owner who was not prevented from suing for damages in respect of work improperly done even though the surveyor and the sanitary inspector had approved the work. In *Petrofina S.A. of Brussels v. Compagnia Italiana Transporto Olii Minerali of Genoa* 53 T.L.R. 650 it was held that clause 27 gave an added right to the charterers and that the fact that the tanks had been inspected on their behalf did not prevent them from claiming in reliance upon the express warranties contained in clauses 1 and 16. These cases and also *Harvey v. Lawrence* (1867) L.T.N.S.571 are amongst the cases which are reviewed in the careful and full judgment in the Court of Appeal and which were considered in the submissions of Counsel. Helpful though a survey of them has been their Lordships have found themselves in the end driven to a return to the particular wording of the elaborate contract now in issue.

There remains the question of the damages payable to the Council in respect of the 6 blocks. It will be convenient to deal with the damages by reference to the items awarded by the Court of Appeal. As stated above any items for pumping and baling and for loss of rent are to be excluded. Certain of the figures assessed by the Court of Appeal were on the basis of including sums by way of extra cost for work done by contract. Their Lordships are not satisfied that the necessity for doing work by contract was established. It was argued that the basis upon which the item for floors and hardcore fill underneath was arrived at (i.e. the basis of awarding a half of the sum assessed on the footing that there should have been mitigation by taking earlier action) was not on principle supportable. Their Lordships do not find it necessary to examine this matter further because they consider that (if the extra cost for work done by contract is eliminated) the sum assessed by the Court of Appeal is in any event not more than the sum that could properly be awarded. Other items were debated before their Lordships but subject to the matters here mentioned their Lordships do not dissent from the assessment of the Court of Appeal. As the Council fail, in their Lordships' view, to establish any right to damages in respect of the 11 blocks and as the contractor's defence fails in respect of the 6 blocks the Council are entitled to damages to the extent of six-seventeenths of the sums resulting if from items 1 to 6 declared in the order of the Court of Appeal there are first deducted the sums which as stated above are to be excluded.

The result of their Lordships' opinions is that in his action the contractor was entitled to recover the actual balance on the 11 blocks (Shs. 53,216/-) and Shs. 70,850/- in respect of extras. In their action the Council were entitled to recover the sums of damages which will be ascertained on the basis set out above. Provided the Council are credited with (and in that way recover) the damages to which they are entitled then, on the principle stated by the Court of Appeal, the contractor will thereafter be entitled to receive payment of the balance of the retention monies referable to the 6 blocks (Shs. 86,802/-) and of the sum of Shs. 50,000/- deposited by way of security. The order of the Court of Appeal included an order that there be liberty to apply for the purpose of working out the Court of Appeal's decree. Their Lordships will therefore humbly advise Her Majesty that the appeal of the appellant should be allowed and the order of the Court of Appeal set aside and the matter remitted to the Court of Appeal for the purpose of working out a new decree on the basis of their Lordships' conclusions. The Council must pay the contractor three quarters of his costs of the consolidated suits. The contractor must pay the Council one half of their costs of the appeal in the Court of Appeal. The Council must pay the contractor one half of his costs of his appeal to their Lordships' Board.

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In the Privy Council

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v.

CITY COUNCIL OF NAIROBI

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