IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

CIVIL APPEAL No.11 OF 1981

Between:

PACIFIC GAS COMPANY LTD. Appellant

- and -

REDDY CONSTRUCTION CO. LTD. Respondent

S.M. Koya for the Appellant
B.C. Patel for the Respondent

Date of Hearing: 12th November, 1981
Delivery of Judgment: 27 NOV 1981

JUDGMENT OF THE COURT

Henry J.A.,

Respondent was requested by appellant to tender for the construction of a building in Walu Street Lautoka on the basis of plans and specifications prepared by appellant. Respondent submitted a tender for $335,000 which was not the lowest tender. As a result of discussions the tender was reduced to $325,000. A contract, prepared by the Solicitors for appellant, was signed on April 26, 1978. Work had begun a short time earlier. An essential feature of the background to the contract was an income tax accelerated depreciation allowance of which respondent could take advantage if the Lautoka City Council certified that the building was completed on or before December 31, 1978. Accordingly, that became the agreed on date for completion, and, in the event the final payments were to be made with reference to that certificate. Progress payments, up to 90% of the price, were payable upon valuations made by appellant's architect, Mr Krishna Nair.

Provision for payment of the price was made in clauses 7 and 8 of the contract. These read :-

> "7. The said sum of $325,000-00 (THREE HUNDRED AND TWENTY FIVE THOUSAND DOLLARS) shall be paid by the Owner to the Builder in the following manner :
>
> On the last day of each calendar month the aforesaid architect shall value the work done up to that date since the last payment (if any) and the Owner shall pay to the Builder 90% of such value as assessed by the architect who will certify such payments, which payments will be made within seven days of certification. The first payment will be on the 20th day of June, 1978 and thereafter on the last day of each calendar month.
>
> 8. Of the remaining ten per cent (10%) of the contract price five per cent (5%) will be paid by the Owner to the Builder upon the issue of completion certificate by the Lautoka City Council."

Progress payments were made normally until October when an application for a payment of $54,000 was reduced to $15,120. Upon respondent requesting an explanation it was told that work was still in progress and approval of the sum claimed would bring progress payments upto 74% of the price. The architect failed to value the work for that month. There was no complaint of defective work. However, on October 24 a further progress payment of $27,000 was sought. This was approved and paid without any question being raised and no complaints were made about the work done.

Without any prior warning the following letter was written on November 3 by the architect to respondent:-

> " re: Pacific Gas Co. Ltd. - Lautoka Project
>
> We have carried out a routine inspection of the above premises this morning and make the following observations :-
>
> 1. All external column edges are very wavy - to be properly smoothed and painted.
>
> 2. External front tiling is very uneven.

3. It is seen that Batten Holders are being installed instead of 48" Diffuser lights as shown on drawing A/8, therefore you are to remove all the Batten Holders and install light fittings as per Building Agreement clause 1, and drawing A/8.

4. Grille Shutters have been ordered in long lengths whereas the frontages of each section are in three parts, these should have been in three sections.

5. Painting is generally very poor where already finished off.

6. Plaster edging on all openings are very wavy and patchy which does not blend properly with general outlook of the Building.

7. Only one clothes hoist have been erected, there should be two as there are two flats. Only size and type given in the specification and not the quantity.

Note: As you are well aware that the Bill of Quantity does not form part of the Building Agreement.

Thanking you,"

A further letter dated 21 November was sent. It read :

" re: Pacific Gas Co. Ltd. - Lautoka Project

We have carried out a second routine inspection of the above premises yesterday morning along with your site Foreman Mr Mani and make the following additional observations :-

1. All the front aluminium grille shutters already installed have sagged and are out of alignment. These are to be fixed properly.

2. The shutters in front of the doors are all rubbing against the door handles - to be adjusted to clear the handles.

3. Some sections of the Ground floor slab at the parking area have cracks in the plaster. These are to be made good.

4. The kitchen service counter vertical formica panel joints are not fixed properly. These are to be redone properly.

5. All window and door glass panel rubber fixings are not set properly by the Aluminium Contractor. These are explained and shown to your foreman on the site.

6. The Quarry-tiles in the Balconies at 1st and 2nd floor are not set evenly and proper workmanlike manner as shown to your foreman.

7. The fly-screen door at 1st and 2nd floor flats are not closing properly due to faulty spring action. These are to be set and fixed properly.

8. The front yaka-shiplap lining covering the aluminium shutters have not been done properly. These have to be removed and refixed properly and in a straight line. (For example see the frontage of the opposite building which is of similar pattern.)

9. The 4" x 2" plates above the aluminium frames at Showroom section as shown on the drawing have not been provided as explained to the foreman before fixing the aluminium frames.

Thanking you,"

Respondent replied to the first letter by a letter dated November 24. This reply did not refer to the letter of 21 November. It is uncertain whether or not that letter had then been received. However, on December 1 a reply was sent to the letter of November 21. The respective solicitors took up the correspondence but events happened with somewhat startling rapidity. On December 12 appellant's solicitors wrote purporting to terminate the contract. This letter was short and read :-

" re: Pacific Gas Co. Ltd. - Construction of Building at Walu Street

We refer to our letter of 1st December, 1978 and various correspondence between yourselves and the Architect Messrs Lautoka Planning and Draughting Company and correspondence between us and your Solicitors M/S Stuart, Reddy and Co.

> We note that you have through your Solicitors frustrated all efforts by our client to refer the dispute to Arbitration in accordance with Clause 28 of the Agreement.
>
> This is to notify you that in view of your refusal and neglect to carry out the works and your failure in due performance of the work as directed by the Architect under Clause 1 of the Building Agreement our client hereby determines the said Building Contract under Clauses 14 and 15 of the Contract.
>
> Take notice that our clients request you to immediately cease work on the building in accordance with Clause 15 and our client will now employ other Contractors to complete the work and will look to you for compensation and damages for breach of the Agreement."

On November 20, the Lautoka City Council had written stating that it agreed that the building was satisfactorily completed except only the disputed light fittings. A copy was sent by the Lautoka City Council to appellant. Respondent obtained and installed the fittings with the result that the Lautoka City Council gave an unqualified certificate of completion on December 19 and this was served on appellant. Appellant's Solicitors had been insisting that respondent give up possession of the building which respondent says was then completed. Possession was surrendered on December 20. At the trial judgment was sought for the balance of the moneys payable under the contract. Particulars were as follows :

Contract Sum	$325,000.00
Less Contingency	10,000.00
	$315,000.00
Adjustment to P C sum foothpath	150.00
Add extra for colorbond gutters in lieu of galvanised	232.00
Adjusted Sum	$315,382.00

Adjusted Contract Sum	$315,382.00
Less Maintenance Retention 5%	15,769.10
	$299,612.90
Less previous payments	268,296.00
Due	$31,316.90

Respondent also sought a declaration that the final payment of $15,769.10 would become payable on March 19, 1979 which was the end of the maintenance period set by the contract. The sum of $2650 was also claimed for electric fittings supplied by respondent in order to comply with the requirements of the Lautoka City Council. Respondent claimed that this expenditure was the responsibility of appellant but that it was a necessary payment in order to get a certificate of completion. It had up until that time been one of a number of items in respect of which abortive attempts had been made for settlement under the arbitration clause in the contract. Interest was also claimed.

At the conclusion of argument in the Supreme Court the statement of claim and counterclaim were further amended. Later a document containing all the amendments was filed. It will be referred to as the statement of defence.

It is sufficient to give a general outline of the statement of defence. It was claimed that respondent frustrated all attempts to refer the disputes to arbitration in terms of the contract; that the giving of a certificate by the architect was a condition precedent to payment and no such certificate had been given; that the contract had been terminated under clause 14 of the contract so no further moneys were payable; that the certificate of completion issued by the Lautoka City Council was obtained by fraud on the part of respondent and that when possession was given on December 20, 1978, there had been affirmation that the contract had been terminated under clauses 14 and 15.

In the alternative a set-off was claimed for $6,185 for a failure to supply and install electric fittings being "in breach of the agreement". A further set-off of $30,814 was claimed for certain specific "defects in the building". The counterclaim sought judgment for :

Loss of rent	$24,000
Costs of Security	840
Replacement of locks	40
Total =	$24,880

In his judgment the learned judge allowed a set-off for certain items amounting to $650. Judgment was given for the unpaid portion of the contract price less $650, namely the sum of $46,436. Interest was allowed. The counterclaim was dismissed. Costs were awarded to respondent. It should be noted that in respect of appellant's allegation of fraud by respondent in obtaining the certificate from the Lautoka City Council the learned judge said appellant failed to convince him of any impropriety. This finding is not unimportant later when the reasonableness of appellant's action in terminating the contract is under consideration.

Counsel for appellant argued that compliance with the directions given and approval of the work was a condition precedent to the right of respondent to recover any further moneys under the contract. The argument is based on clause 1 which reads :

> "1. The Builder for the consideration herein mentioned shall at his own proper costs and charges forthwith erect and build in a substantial and workmanlike manner upon the aforesaid land of the Owner and building inclusive of all electrical installation and wiring, joinery, fitting fencing and gates and car park according to the plans and specifications referred to hereinbefore subject to the directions and approval of the Managing Director of the Owner or his architect Mr Krishna Nair or any other architect for the time being employed by the owner for supervising or certifying the said work."

This clause makes the work subject to direction and approval of the Managing Director of appellant, or the named architect or any other architect employed by appellant. Appellant is a company which must act through an agent. The Managing Director is clearly the alter ego of appellant. The following passage in Keating on Building Contracts 4th Edition p.74 are apposite :

> "1. Construction against employer
>
> A contract may provide that work must be completed to the approval of the employer. Such a provision if construed in the employer's favour would be very onerous.
>
> (a) Not a condition precedent
>
> The court leans against a construction making the approval of the employer a condition precedent to payment, and prefers a construction making the promise to complete according to the employer's approval, and the promise to pay independent of one another. In such a case if the work does not meet with the employer's approval he cannot refuse to pay under the contract, but can only seek a reduction in the contract price by way of set-off, or counterclaim for damages."

Neither compliance with a direction nor the approval of the Managing Director is, in our opinion, a condition precedent to payment for the work. The directions and approval of the architect must receive the same construction. Any other result, unless clear words were used, would be absurd. Moreover, the wide power of appellant to appoint any other architect without the concurrence of respondent lends further weight against construing the provisions as a condition precedent. We, conclude accordingly that clause 1 should not be construed as a condition precedent. The cases cited are all cases where there was an express provision for the architect's certificate to be a condition precedent. They do not apply.

We turn now to the question whether the contract has been validly terminated. The observations in the letters of November 3 and November 21 are not

directions coming within clause 1. They are not clothed in sufficiently peremptory language. They are certainly matters requiring discussion and attention but they have not reached the stage when they can be termed directions required to be carried out before the work will be done to his approval. No question of determining the contract could possibly be supported by a mere sending of these letters. The architect had no power to determine the contract - that was vested solely in appellant. The solicitors for appellant wrote to respondent on December 1. The following passage is sufficient to convey the contents and intention of that letter. It read :

> "We are also instructed that you have failed to supply and install the light fittings and you have also shown unwillingness to refer the matter to Arbitration.
>
> Under the circumstances, we are instructed to notify you that unless you give your undertaking and writing within seven (7) days to remedy the defects and to supply and install the light fittings our clients will determine the Contract under Clause 15 of the Agreement and will employ another Builder for the purpose of the completion of the Building and hold you responsible for expenses incurred."

This was a direction given on behalf of appellant and not on behalf of the architect. Under clause 1 appellant was entitled to do so, but it is important to note that the power was exercised by appellant and not by the architect. In our view this direction superseded the observations of the architect.

The Solicitors for respondent replied on December 5 as follows :

> " re: Building Contract - Pacific Gas Co. Ltd. and Reddy Construction Co. Ltd.
>
> Your letter of 1st instant refers.
>
> Our client does not accept your contention in the second paragraph and we are to point out that Messrs Lautoka Planning & Draughting Company's letter of 3rd November has been replied by letter dated 24th November. Likewise letter dated 21st November has been replied by letter dated 1st December, 1978.

As regards light fittings you are fully aware that this matter is to be referred to Arbitration once the Terms of Reference is agreed between the parties. We refute your claim that our client has shown unwillingness to submit to Arbitration and would like to remind you that we were the first to request Arbitration. But you then maintained there was no dispute.

We cannot see how you can determine the Building Contract under Clause 15. But should you attempt to do so we will regard that as a breach committed by your client and take appropriate action.

We enclose photocopies of letters dated 20th November 1978 and 23rd November 1978 written by the Lautoka City Council.

You will note that except for the light fittings, where a dispute exists, the building is complete for all purposes.

However, if your client insists on a Completion Certificate we suggest you comply with the Council's requirement of an amended plan. This can be done without prejudice to either party's liability for those fittings pending outcome of the Arbitration.

We may add that we feel the Council is wrong in withholding Completion Certificate.

Finally we would point out that the delay in submitting to Arbitration is caused by yourselves in not agreeing to the Terms of Reference. We do not see any logic in your statement to Mr Y.P. Reddy that the matter of Bill of Quantities be left out of the Reference but the Arbitrators be given the option of referring to it."

The letter then went on to outline a way out of the impasse in respect of light fittings and suggested a method of obtaining, without prejudice, the certificate of completion from the Lautoka City Council. The parties were still negotiating in respect of the matters raised and arbitration was available nevertheless with dramatic suddeness appellant by its solicitors purported to terminate the contract immediately upon delivery of the letter of December 12.

A perusal of the correspondence, and, in particular, that which has just been cited, discloses that after the "observations" of the architect conveyed by his letters of November 3 and November 21, appellant, through its solicitors, took up the question of installation of light fittings and the remedying of defects. Appellant gave the notice of December 1 and quickly followed it up with a peremptory termination of the contract on December 12. The architect, Mr Nair took no part in this and the explanation given on his behalf in evidence at the trial will be referred to later. Suffice it to say he did not support the action of appellant. The only right to terminate the contract was vested in appellant and this right was, as has been set out, purported to be exercised on appellant's behalf by its Solicitors. The relevant law now to be considered is stated concisely in Halsbury Laws of England 4th Edition Vol.4 para 1240 where the following passage appears :

> "Where the contract provides that the employer himself is to decide whether the contractual power to determine the contractor's employment has arisen, the employer must act reasonably, but the terms of the contract may make it clear that the decision of the employer is to be final."

The grounds, upon which such determination of the contract was based, are clearly to be gathered from the statement of defence. The letter of December 12 is vague in that it refers to "your refusal and neglect to carry out the works". It then goes on to refer to "your failure in due performance of the work as directed by the architect under clause 1". The directions were mere observations and nothing in the nature of specific directions had at this stage been given by the architect. It was appellant, through its solicitors, who required respondent to give an undertaking in writing within 7 days to remedy the defects and to supply and install the light fittings. Para 11 of the statement of defence claimed that the reason for termination of the contract

was 'neglect and refusal and/or inability to carry out the work in accordance with the direction of the architect". No particulars are given on this vital pleading. However, the position becomes clear when the claim for set-off is made in paras 20 and 21 of the statement of defence. The grounds of determination are :

(1) failure to provide and install light fittings.

(2) failure to remedy the defects set out in the architect's letters of "observations" of November 3 and November 21.

Whether there was a failure to provide and install light fittings can be dealt with at once. Clause 1 in its material part provides :

> "The Builder ... shall at his own proper costs and charges forthwith erect and build ... the building inclusive of all electrical installation and wiring ... according to the plans and specifications..."
>
> (emphasis supplied)

Clause 2 puts an obligation on respondent to provide (inter alia) all materials necessary for the purpose of completing the building. The specifications deal with electrical installation and wiring in a section under the title "Electrician". The following passages are relevant :

> "General
>
> The contractor is required to supply and install the materials and equipment described in the specification unless otherwise stated.
>
> Light Fitting
>
> Arrange circuits of fittings shown on the schedule. Light fittings shall be supplied by the owner."

These provisions make it clear that according to the specifications light fittings shall be supplied by appellant. Since appellant must supply such fittings

they are not items necessary for the respondent for the purpose of completing the building. Respondent does not have to supply them - appellant must make such items available to respondent at the appropriate time. There is no conflict between clauses 1, 2 and the provision in the specification. Appellant, not respondent, was in default under the contract. As early as May 10 respondent requested appellant to supply the fittings. No reply was received until a letter from appellant's solicitors was sent on June 15, claiming, quite wrongly in our view, that there were specific provisions making the supply an obligation on respondent. Appellant cannot rely upon this alleged failure as a ground for determining the contract. The default in supply was that of appellant.

The sole ground upon which appellant can rely then is the alleged failure of respondent to remedy the defects set out in the letters of observations of November 3 and 21 coupled with the 7 days notice given on behalf of appellant. The question is whether appellant acted reasonably in determining the contract. In our opinion it did not. The facts have already been set out and need not be repeated. There was no default in respect of light fittings and findings later made in respect of the alleged defects are also of importance on this question and also particularly the evidence of Mr. Naicker which will be dealt with later.

According to the statement of defence (para 14) appellant relied only on clause 14 when determining the contract but by para 15 of the statement of defence it was claimed that the fact of respondent giving possession on December 20 affirmed that the contract had been terminated in accordance with clauses 14 and 15. We do not agree that this was an act of affirmation. No argument was advanced on this point and it need not be considered further. However it is necessary to discuss clauses 14 and 15. They provide :

"14. If the Builder shall go into voluntary or forced liquidation or enter into any arrangement with or for benefit of its creditors or goes in receivership or become unable or refuse or neglect to carry out the work the Owner by notice in writing sent to builder by registered post or left on the site of the said land may determine this contract. Upon the service of such notice all claims of the Builder under this contract shall cease.

15. Should the builder fail in the due performance of the works of any part thereof the Owner may by notice in writing determine the contract so far as regards the performance or completion of the same by the Builder but without thereby affecting in other respects the obligations and liabilities of the Builder. On such determination of the contract as aforesaid the further use by the Contractor of the plant implements and materials then upon the ground shall cease and the owner may employ other contractors or workmen either by contract by measure and value or by day work to perform the same and the costs charges and expenses of such completion shall be paid to the Owner by the Builder or may be deducted by the Owner from any moneys due or to become due to the Builder."

Clauses 11 and 12 required respondent to commence work on April 24 and to proceed continuously with all speed and diligence so that the building would be completed by December 31, which was the deadline for getting the benefit of the special tax allowance. The intention of clause 14 is to ensure that, if events happen which might affect the time of completion the appellant can determine the contract and take over the work to ensure due completion and be relieved from further liability to respondent. The events first referred to in clause 14 namely, liquidation, arrangements with creditors and receivership can create problems of completion within time which are only too well known. Clause 14 goes on "or become unable or refuse or neglect to carry out the work". In the context these words mean a substantial cessation of work or conduct that causes a substantial impeding of progress of the work and, in particular as required under clauses 11 and 12. To construe this clause

otherwise would mean appellant was entitled to terminate the contract for any breach however trivial in the due performance of any part of the contract and be relieved of all liability for work done to the contract up to that time and leave respondent without payment for work done not then covered by progress payments. In our opinion there has been no refusal or neglect to carry out the work within the meaning of clause 14. In any event it is in our opinion an unreasonable exercise of the power by appellant in the circumstances already set out.

Although appellant purported to terminate the contract under clauses 14 and 15 it seems that appellant was according to its pleading and in fact, proceeding under clause 15, namely completing the contract and claiming the cost against the price. Since we have held appellant could not avail itself of the provisions of Clause 14 then it follows that Clause 15, is the only provision available to support the purported determination of the contract by appellant.

The architect did not give evidence because, so it was said, he was in ill-health. His partner, Mr Naicker, a structural engineer, gave the evidence which normally would have been given by the architect, Mr Nair. It seems that Mr Naicker took part in necessary inspections. He drafted the letters of November 3 and November 21 and signed them in conjunction with the architect. He said in evidence :

> "We did not ask the owner to cancel the contract. We did not ask defendant's solicitors to cancel on grounds that builder had not complied with-out instructions. We would not have done so since builder had until 31st December, 1978 to comply and complete contract. We were not consulted before owner cancelled contract. When I wrote letters I was primarily concerned with getting contractor to carry out rectification. If he had done so we would have been satisfied. If contractor agreed to do work it would have made no difference if it was done before 31st December, 1978. Some of them were substantial. The cracks in the carpark area. The

> front mosaic tiles were substantial, because it would take time to take them out and replace them."

Under cross-examination Mr Naicker agreed that his main complaint with most of the items was with the finish, the appearance of the building and not the substance of the work. It seems, therefore, that basically the legal advisers of appellant terminated the contract summarily because time was running out for getting the consent of the Lautoka City Council and the dispute about the light fittings was still unsettled. Appellant was prepared to terminate the contract despite the clear words of the specifications. Appellant relied on its solicitors interpretation of general words in the contract despite the fact that the contract qualified this obligation by making it according to the specifications. The specifications used clear language to the contrary on this special subject. There is a Latin Tag Generalia Specialibus non derogant which refers to general and special provisions which appellant's solicitors ought to have known was worthy of some consideration. The architect must have realised that clause 9 was available to respondent for remedying "defects" hence the above evidence that he did not advise termination. Accordingly for these reasons, and reasons given earlier in respect of clause 14, we are also of opinion that the purported exercise of the power by appellant under Clause 15 was unreasonable. The contract still had time to run and the provisions of clause 9, as to defects, is also of importance. Clause 9 reads :-

> "The balance of the five per cent (5%) of the contract price shall be paid by the Owner to the Builder after 90 days of issue of completion certificate by the Lautoka City Council and if there shall be latent or patent defects in the said building before the expiry of the said 90 days the Builder shall make good such defects without any extra charges to the Owner, and should the Builder fail to make good such defects for 21 days after notice in writing by the Owner to the Builder stating the

> defects requiring attention then the Owner may utilize the said balance of five per cent (5%) towards making good such defects and the Builder shall pay to the Owner the cost of making good such defects should the said five per cent (5%) not suffice for such purposes."

The learned judge found that the work was substantially performed and we respectfully adopt his reasons and conclusion. The pleadings (omitting the unsuccessful claim for light fittings) disclose that the building was completed except for "defects" which required remedying. The law, when a contract is substantially performed, is summarised in Halsbury Laws of England 4th Edition Vol.4 para 1153 which reads :

> "1153. Effect of substantial completion. Where a contract provides for a specific sum to be paid on the completion of specified work, the courts lean against a construction of the contract which would deprive the contractor of any payment at all simply because there are some defects or omissions. In the absence of a very clear stipulation that entire completion is a condition precedent to the contractor's right to payment, the contractor can claim the contract price if he can show that he has substantially completed the contract. In such a case, the contractor can recover the price subject to the deduction of the reasonable cost of completing the defective or unfinished work. Whether or not the contractor has substantially completed the work is a question of fact in each case."

Accordingly it follows that respondent is entitled to the contract price less the reasonable cost of completing the defective work.

Counsel for appellant argued that no further moneys were payable under the contract without a certificate from the architect (a) that the work was done to his approval, and (b) that the architect had certified that the moneys claimed were due and payable. It was claimed that both were conditions precedent. We have already dealt with (a). In respect of (b) there is no pleading to support the claim. However, we will deal with it. The relevant provisions are

clauses 7, 8 and 9 of the contract.

Clause 7 has been earlier set out. It provides for valuation each month by the architect and for payment up to 90% of that value. Clauses 8 and 9 then provide for the payment of the remaining 10% in two instalments of 5% each at times related to the granting of the certificate of completion by the Lautoka City Council.

The object of clause 7 is, as just stated, to enable respondent to obtain progress payments up to a total of 90% of the price according to the architect's valuation of the work at the end of each month. Whether the certificate of the architect is a condition precedent or not is not in issue. Respondent did not in the action seek any progress payment in terms of clause 7. Respondent claimed that the whole price was payable by reason of the completion of the contract and the fulfilment of the only condition relevant thereto, namely, the issue of a certificate of completion by the Lautoka City Council. The claim was that the whole sum was due and payable except as to 5% which was payable but not due for payment until the period provided for in clause 9 had expired. At the time of trial this period had expired. The intention of the contract is that the balance of the price is payable with reference to two dates fixed in relation to the certificate of completion to be given by the Lautoka City Council. The total price is so payable in terms of that provision irrespective of the manner in which the right to progress payments may have been exercised in the meantime. Progress payments release appellant pro tanto in respect of the price which was payable in full upon the issue of the certificate of completion by the Lautoka City Council, although a part was to be held for the period of 90 days provided for remedying defects in accordance with clause 9. The necessity for the architect's certificate was confined to the making of progress payments.

In the present action no question of entitlement to a progress payment or payments is in issue. In any event it is a provision which respondent could waive without losing the right to claim for the total price on the completion of the contract. The architect was obliged to make a valuation at the end of each month. He wrongly refused one payment on the ground that it would amount to 74% of the price. He was bound to value up to 90% if that value of work had been done: vide F.R. Absalom Ltd v Great Western (London) Garden Village Society [1933] AC 592, 611. The architect failed in his duty to value the work at the end of November and appellant unreasonably purported to cancel the contract before a valuation could be made at the end of December, if there was at that time a shortfall in payment of 90% of the price. Long before this stage respondent had claimed the work had been completed. The sole question was whether or not respondent was entitled to the total price subject, of course, to any claim which appellant might have by way of set-off or counter-claim. There is no merit in this defence. The cases cited all refer to an unfulfilled condition in relation to the actual sum claimed. In the instant case the condition for the final payment has been fulfilled and no claim for a progress payment is involved.

Counsel for appellant argued at some length that the provisions of the New Zealand Standard Specification No.623 form of contract applied. This was on the basis that the specifications stated :

> "Preliminary and General Conditions of Contract:
>
> Shall be those laid down by the NZSS 623 Form of Contract."

Under the contract entered into between appellant and respondent by clause 20 the specifications are deemed to be part of the agreement. In our opinion the above extract from the specifications is no more than a general indication of the form of contract which the successful tenderer would be required to enter into. In the event this did not happen. Moreover a perusal

of the NZ Standard Specification No.623 form of contract shows that considerable alteration and modification would be necessary before it could be adapted to and reconciled with the contract actually entered into. In particular all powers and authority are vested in an Engineer with no reference to an Architect. Further the form of contract set out in the said Standard Specifications was left blank and a new and different form of contract was adopted and signed. We do not accept the contention that, by clause 20, the parties intended to include this conflicting document as part of the contract which was later concluded. Any argument on this document must fail.

We turn now to consider the claim for a set-off in respect of the items set out in the letters of November 3 and November 21.

Mr Koya submitted that the learned trial judge in dealing with the defects set out in paragraphs 20(a) and 21 of the amended statement of defence failed to make a proper evaluation of the evidence called by appellant resulting in the claim of appellant being substantially rejected.

Mr Patel for the respondent, submitted that the learned trial judge dealt fully with the issues raised in this ground of appeal; that he saw and heard all the witnesses; that he carefully considered their evidence; and accordingly his findings thereon should not be disturbed.

Before proceeding to consider counsel for appellant's submissions it is desirable to have in mind the powers and procedures in cases where an appellate court is invited to reverse on a question of fact the judgment of the trial judge. In "The Hontestroom" [1927] A.C. 37 Lord Sumner said at p.47:

> "None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advan-

tage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case."

Lord Shaw in Clarke v Edinburgh Tramways Corporation /T1917 S.C. (H.L.) 35 in considering the advantages enjoyed by a judge who sees and hears witnesses said :

"... In my opinion, the duty of an appellate Court in those circumstances is for each Judge of it to put to himself, as I now do in this case, the question, Am I - who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case - in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment."

See also Watt v Thomas /T1947 A.C. 484

However, when the question at issue is the proper inference to be drawn facts which are not in doubt the appellate court is in as good a position to decide as the judge sitting at first instance. Powell v Streatham Manor Nursing Home /T1935 A.C. 243.

Mr Koya in his submission urged upon this Court that the total amount of $650.00 allowed by way of set-off for rectification of defects in the building was abysmally low. In his attack upon the findings of fact by the learned trial judge Mr Koya referred to the witnesses called by appellant and the various invoices detailing work done by other contractors, but he did not point to any specific matter or matters, and demonstrate on the evidence where the learned trial judge had gone wrong.

Mr Koya submitted that the learned trial judge had wrongly rejected the evidence of Karivardan Naicker who was acting as the appellant's architect

and that the learned judge's reference to him as a "petty tyrant" indicated that the trial judge had rejected evidence of this witness without making a proper assessment thereof.

Turning now to the facts the letters of November 3 and 21 comprise the "defects" in the building and formed the basis of appellant's claim, in paras 21 and 22 of the statement of defence. The learned judge dealt exhaustively with each item; he considered and reviewed at length the evidence called by appellant and the evidence called by respondent and in so doing formed very definite views as to the credibility of the various witnesses. The letter of 3rd November, 1978, dealt principally with the light fittings, ceiling fans and grille shutters as the learned judge commented :

> "As I said the questions of light fittings and ceiling fans and of the grille shutters were the main areas of dispute between the plaintiff and the defendant. All the other matters raised questions of finish."

The question of light fittings is not a responsibility of respondent but turning to the grille shutters, the learned judge dealt with the matter in this way :

> "However, when tendering Wormald said that a single grille per opening would be too long and recommended two grilles per opening, one about twice as long as the other. The plaintiff not unnaturally accepted Wormald's recommendation and installed the grilles according to the manufacturers' instructions. A certain amount of sag from the longer grilles has resulted, because of their weight. This could hardly be blamed on the plaintiff. In fact Mr Robert Hay of Wormald gave evidence and said that he found nothing wrong with the way the grilles had been installed and said that each grille operated properly. He also said that this form of grille (i.e. two similar grilles of unequal length) was quite commonly used in other premises. Presumably a certain amount of sag is to be expected with longer grilles. But the owner now complains that the plaintiff should have installed three grilles per opening and not two... Mr Graham Walker, an experienced architect said that he and his firm always stipulate the number of grilles required per opening. And after all security shutters were required

> and security shutters have been provided which seem to have worked perfectly well for the last two years. Perhaps it might, as it turns out, have been wiser if the plaintiff had gone back to the architect and shown him exactly what was being provided, but I don't think it was at all unreasonable for the plaintiff to have proceeded as he did, on the recommendation of Wormald. There is evidence that Wormald's catalogue was sent on to the architect by Mr Gopalan, but the architect took no action till the grilles were already fitted. Mr Naicker said he saw the grilles being stored on site and spoke to the foreman about it. Whether that was true or not, and Mr Naicker was such a poor and unreliable witness that this must be doubtful, Mr Naicker took no steps, as he should have done, to make sure that the whole matter was thrashed out with Mr Y.P. Reddy or Mr Gopalan, and if necessary making an adjustment to the contract price (because three grilles per opening would certainly have cost more than two grilles per opening)."

The learned judge dealt with the claim that the edges of the concrete columns were wavy - and required smoothing and painting. Mr Chet Ram the Manager of Sami Naidu Construction Ltd. which company carried out the alleged remedial work - gave evidence and the learned judge said :

> "Mr Chet Ram gave evidence that his company had done work on them, but not only did he make a very poor showing in the witness box under cross-examination, but also in spite of being requested by the plaintiff's solicitors to produce documentary evidence, such as work sheets or pay sheets to support his claim to have done the work he failed or was unable to do so or in any way to substantiate his very shaky testimony. And he was far from clear in explaining exactly what work was done."

The learned judge concluded his treatment of this topic by saying :

> "This leaves the Court in a position where it cannot give any weight to the defence allegations that there was anything defective with the column edges that had to be rectified and unable to accept that any rectification work had to be done on them or had in fact been done on them."

317

Dealing with the claim that the external front tiling was very uneven, the learned trial judge stated :

> "Mr Naicker when pressed for details of his complaint said that there were a total of tiles amounting to a total of about twelve sheets that were uneven. Since the total number of tiles used on the walls amounted to about 3,600 sheets it will be seen that twelve sheets represents a very small fraction of the work which could be complained about, less than 0.5%."

Mr Chet Ram gave evidence and the judge summarised his evidence :

> "Mr Chet Ram's evidence as to the work done on these tiles was as unsatisfactory as the rest of his evidence and again was unsupported by documentary proof that any work was carried out."

The learned judge concluded :

> "So once again there is considerable doubt whether any rectification work on the mosaic tiling was necessary under the contract, or that any rectification work was done. And once again I repeat that the plaintiff had not neglected or refused to do the work. He had said he couldn't see anything wrong and in effect asked the architect to indicate tiles that needed to be replaced, which the architect did not do."

Turning to the complaint re quarry tiles the learned judge said :

> "The plaintiff did not neglect or refuse to do the work, but asked to have the exact locations pointed out. Apparently when Mr Naicker showed Naidu Construction and Western Builders the work to be done on the building the tiles complained of had by then been marked. In his evidence Mr Naicker said that he found about sixty quarry tiles faulty or uneven out of about 11,000, which it is a very small percentage. Mr Murray Colburn's opinion was that the tiles were within acceptable standards for Fiji, but that does not seem to be good enough for Mr Naicker. Oddly enough Western Builders' quotation for this work was $1,000 whilst that of Naidu Construction was $313, a surprisingly big variation. Again Mr Graham Walker said he saw no evidence - such as unmatched pointing - to indicate that any rectification work had been done on the quarry tiles."

Dealing with the complaints regarding the front yaka - shiplap lining, the learned judge reviewed the evidence called by both sides and concluded by saying :

> "Photographs produced in evidence show some of the shiplap, which certainly in the photograph looks alright, though Mr Naicker purported to see and mark places where he said it was not straight. Mr Murray Colburn said the shiplap was within acceptable standards, and Mr Graham Walker said he saw no signs that any of the shiplap had been taken off and nailed on again. So once again not only is there considerable doubt whether there was any fault with the plaintiff's work - or at least fault that would be outside acceptable standards for the contract in Fiji, but there is considerable doubt whether any rectification work was in fact carried out."

The remaining matters complained of in the letters of 3rd November and 21st November 1978, were of a minor nature and while counsel for appellant did not specify any particular instance as being one where it was claimed that the learned judge in the Court below, had gone wrong or misdirected himself, we are satisfied that the evidence bearing upon these remaining various matters was carefully considered and distilled by the learned judge and we agree with his findings and conclusions thereon.

Mr Koya urged that this Court should make its own assessment of the oral and documentary evidence and in so doing ascertain if the learned trial judge had failed to correctly evaluate the evidence and the invoices relating to remedial work carried out by other contractors. Mr Niranjan the Managing Director of the appellant said :

> "Defects were not corrected by the builders. I instructed solicitors to give seven days notice to rectify defects. If they were not rectified I instructed solicitor to cancel contract.
>
> Architects never influenced me in my decision in any way. I was satisfied that defendants were in breach of contract. I

never instructed architects not to issue a certificate of payment. Contract was finally determined on 12th December, 1978.

I instructed architects to get quotations for rectification of various defects.

I received certain quotations from Sami Naidu Construction Company. Exhibit E - 46, annexure. Eventually work was completed for $6652.50."

The quotation from Sami Naidu Construction Co. and Western Builders were dated 21st June, 1979, and were received after the pleadings had been filed in this case and the claim formulated by the appellant in respect of the defects. Mr Naicker in his evidence said :

"Exhibit E. 46 Annex. Something like that I gave to them. It was exactly the same as that. I gave them that sometime in April or March if I remember correctly. I think we wrote a letter to both of them around that time. I showed them the site sometime in May or June. Not together. I can't be very sure of the date. I am not sure if I rang them for quotation on 21st June, 1979. I can't remember. I can't remember if I rang Sami Naidu after showing them the site. I may have done, I can't remember. Same with Western Builders. Owner asked us to get quotation - it was getting late. I don't know when."

It is also interesting to note that the building was let from 1st May, 1979, to Niranjan's Autoport Ltd. at $6,000 per month; and the 2nd floor was let to Fiji Electricity Authority at $882 per month from 1st June, 1979 - well before the quotes for defects were sought from Sami Naidu Construction Co. and Western Builders.

Dealing with the estimated cost of the defects Mr Naicker said :

"I can't remember when I estimated cost of defects. In December 1978 I could have estimated roughly - about $25,000 - allowing $10,000 for light fittings, about $15,000 replacement for grille, and rest for other defects."

As we have stated, the lights and the grilles were the principal matters complained of. The learned trial judge said :

> "Mr Maicker had to admit that his main complaint with most of the items was with the finish, the appearance of the building and not the substance of the work."

The weighing of the evidence; the balancing of the probabilities was a matter for the trial judge; it was his task to evaluate the weight of the evidence on either side and having regard to these matters to decide where the truth lay. As was said earlier a trial judge has a great advantage over an appellate court; evidence of a witness seen and heard is of much greater importance in evaluating the credibility of a witness than reading a transcript of that evidence; this court should not interfere unless satisfied both, that the judgment ought not to stand and that the divergence of view between the trial judge and the appellate court has not been occasioned by any demeanour of the witnesses or truer atmosphere of the trial (which may elude an appellate court) or by any other of those advantages which the trial judge undoubtedly possesses.

The learned trial judge dealt fully with the matters raised in the letters of 3rd November, 1978 and 21 November, 1978 and considered in depth the evidence of the various witnesses. It would be fair to say that on balance he found the witnesses called by respondent much more credible and reliable. For instance in dealing with Maicker's evidence the learned judge said :

> "He was also an extremely bad witness with what could perhaps be termed a convenient memory. There were so many 'Can't remembers' or 'I don't know's' among his answers as to throw a serious doubt over his few positive assertions or recollections where they were relevant. And he seemed to be rather ignorant of the requirement that in a situation such as this an architect has a duty to act impartially and in an unbiased manner between the owner and the contractor. Although when pressed he said he was being fair to the contractor, he otherwise made it clear that he expected the contractor to accept his judgment or his decision without question. There were other matters which rendered his quality as a witness trying to speak as an architect questionable."

The comments of the learned judge as to the credibility of Mr. Chet Ram are stated earlier.

The credibility of a witness was discussed by Lord Pearce in Onassis and Anor. v. Vergottis [1968] 2 Lloyd's Reports 403 at p.431 where he said :

> "'Credibility' involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he now believes to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue, or, though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so, has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by overmuch discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist..... All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process."

The learned judge in the court below after carefully evaluating the evidence; examining the documentary evidence led in support reached the conclusion that a total sum of $650 be allowed to cover all the rectification work. The learned judge went on and said :

> "It follows from what I have said above that the set-offs belatedly claimed by the defendant under paragraphs 20, 21 and 22 are dismissed except to the extent that I have reduced the plaintiff's claim to allow for rectification work that might have been necessary or the plaintiff was prepared to do under the terms of the contract."

The task of the appellant was a laborious and uphill one and the onus was upon him to satisfy this court that the learned judge was wrong in his assessment of the amount deductible for "justifiable rectification work" and that this court should reverse, vary or amend his findings on the issue of defects. Remembering the great advantage which the trial judge has in seeing and hearing the witnesses and after carefully reviewing all the evidence it has not been demonstrated that the learned trial judge was wrong and therefore his decision ought not to be interfered with.

Accordingly this ground of appeal fails.

The remaining question is the appeal against the dismissal of the counterclaim. The extent to which respondent failed to complete the contract has been settled by findings on the claim for a set-off. Appellant by the giving of an unreasonable notice of termination deprived respondent of an opportunity to remedy defects under clause 9 of the contract. The interminable delay in settling the question of light fittings was the fault of appellant because appellant had no right to deprive respondent of the supply of that material. Any question of delay in completion rests on appellant by reason of its unreasonable action in terminating the contract and taking possession of the building before respondent was able to avail itself of the time up to December 31 and the provisions of clause 9 in respect of defects. Since appellant acted unreasonably in terminating the contract and deprived respondent of its right to remedy the defects it cannot now visit the consequences of its so acting upon respondent.

We dismiss the appeal with costs to be fixed for respondent to be paid by appellant. For the reasons we have given and for the reasons given by the learned

judge, with which we respectfully agree, the appeal against the judgment in respect of the counterclaim is also dismissed.

.....
Vice President

.....
Judge of Appeal

.....
Judge of Appeal