IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

CIVIL APPEAL NO. 9 OF 1980

Between:

RAM CHARITRA — APPELLANT

-and-

MARLOWS LIMITED — RESPONDENT

S.M. Koya for the Appellant.
P.I. Knight for the Respondent.

Date of Hearing: 8th March, 1982.
Delivery of Judgment: 2 April 1982

JUDGMENT OF THE COURT

Spring, J.A.

In 1970 the appellant was the registered proprietor of a piece of land in Carnarvon Street Suva, upon which was erected a building consisting of 2 shops and 9 flats at the rear; the shops fronted on to Carnarvon Street. The appellant approached one Fintan MacManus a partner in the firm of MacManus Bradley & Associates civil engineers Suva to prepare plans for the erection of a 5 storey building at the rear of the existing structure.

On 17th February, 1971 Suva City Council advised it would not issue a permit for the erection of the building until the fire and egress regulations were complied with.

Mr. MacManus negotiated with the Council regarding an exit way and as a result the Council advised that it would issue the permit provided a temporary second exit way was provided until June 1973 when alterations to one of oppellont' shops would be corried out to allow a permanent exit way to be constructed. The appellant intended to convert the two shops fronting on to Carnarvon Street into one large shop by removing o centre partition and erecting a new wall to become the northern wall of the shop and to permit an exit way to the street; he was unable ta do this as o tenant had, until May 1973, a lease of the shop through which the exit way or passage would pass.

The plons submitted by Mr. MacManus consisted of a single or one sheet plan which hod been prepared some years before by Mr. Ralph Marlow, and a set of 7 plans. The Suva City Council made a number of amendments to the drowings submitted, but the only ones that are relevant in this action are those relating to the temporary and permonent exit ways. As a result of the Council's requirements the single sheet plan was amended by adding o portition in the shop occupied by the tenont whose leose expired in May 1973 and the following notation was written in ink on the plan.

> "New wall to be erected and exit way to be provided ofter 31/5/73."

The exit way to be provided was on the northern side of the building. A stamp reading "S.C.C." was placed over this alterotion and initialled. On this single sheet plan a further nototion appears which reads "Temporary exit way until June 1973"; the stamp S.C.C. was likewise placed over this olterotion and initiolled. The temporary exit way was on the northern side of the existing building and adjoined land used by Piccodily Taxis.

On the single sheet plon oppears a statement

"conversion of flats to offices Carnarvon Street, for Mr. Ram Charitra, Plan of Building as existing".

The set of 7 plans prepared by Messrs. MacManus Bradley & Associates were plans for the erection of a 5 storey building (varied by agreement later to 6 stories) at the back of the existing building; sheet 1 of the set is marked "Office extension to existing building for Mr. Ram Charitra Carnarvon Street Suva". Sheet No.1 and sheet No.2 of this set of plans have written on a site plan in ink the word "entrance" with an arrow pointing to an exit way to Carnarvon Street on the northern side of the existing building and the words (in different writing and ink) "to be formed by June 1973". Another notation shows the position of a temporary exit on the northern side of the existing building and the words written in ink on the plan state "Temporary Exit until June 1973". Both notations are stamped with the Suva City Council stamp and initialled. The site plan on sheet 1 does not show 2 shops but has on it where the shops are located the words "existing shop". In this shop area an amendment has been made by providing a line running from Carnarvon Street in an east to west direction the full depth of the shop and parallel with the northern wall but set back therefrom to allow for the construction of a passage way or exit way to Carnarvon Street.

No construction details, nor any doors to the exit way or passage appear on the single sheet plan or sheet No. 1 or sheet No. 2. The single sheet plan and the set of 7 plans were approved by the Council on 4th May, 1971. Each sheet of the set of 7 plans and the single sheet plan and the first page of the specifications bear the signatures of the parties and that of the engineer Mr. MacManus.

The Specifications which are headed - Specification of materials to be used and work to be done in the construction

and completion of a 5 storey office block Carnarvon Street Suva - are signed by the parties and Mr. MacManus.

On 17th June, 1971 the respondent tendered for the contract in the following terms :

> "We quote the sum of $30,360.00 (Thirty thousand, three hundred & sixty dollars) to erect 5 storey addition to Carnarvon Street Building, all according to plans and Specification prepared by MacManus Bradley & Associates."

On 16th September 1971 (Ex.G) MacManus Bradley & Associates on behalf of appellant accepted the tender and their letter reads :

> "The Manager,
> Marlows Limited,
> P.O. Box 3,
> SUVA.
>
> Dear Sir,
>
> re: New Offices - Ram Charitra - Carnarvon Street
>
> We have been directed by our Client to accept your tender in the sum of $30,000 to erect and complete the above building within the time of 30 weeks.
>
> Two sets of the plans and specifications are with us for uplifting now.
>
> The Building Permit is with us and you will receive this on signing the Agreement.
>
> Three copies of the Agreement and the Approval Plans and Specifications are ready for signature.
>
> The Penalty/Bonus Clause is now omitted from the Contract and does not apply.
>
> Yours faithfully,
> MACMANUS BRADLEY & ASSOCIATES
> (sgd) (E.W. Bradley)"

The tender was for $30,360 and the acceptance was for $30,000 but nothing turns on this point as a formal contract was entered into between the parties providing for the erection of the 5 storey building at a cost of $30,000.

The contract concluded between the parties and dated 16th September 1971 reads :

"THIS AGREEMENT is made the 16th day of Sept. One thousand nine hundred and seventy-one BETWEEN RAM CHARITRA (hereinafter called "The Employer") of the one part and MARLOWS LIMITED (hereinafter called "The Contractor") of the other part and Whereas the Employer is desirous of having carried out and completed the works and things hereinafter mentioned and has caused drawings and specifications describing such works and things to be prepared by

MAC MANUS BRADLEY & ASSOCIATES

(hereinafter called "The Engineer") And whereas the Contractor has agreed to execute and fully complete (subject to the Conditions of Contract hereto attached which Conditions are hereinafter referred to as "the Conditions") the said works and things shown upon the said drawings and described in the said specifications for the sum of $30,000 (hereinafter called the "Contract Sum") Thirty thousand dollars.

NOW THEREFORE IT IS HEREBY AGREED AS FOLLOWS :

1. In consideration of the Contract Sum to be paid at the times and in the manner set forth in the said Conditions, the Contractor will subject to the said Conditions, execute and complete the works and things and supply all the materials shown upon the said Drawings and described in the said Specification unless otherwise therein stated. Condition of Contract are the 4th Edition 1955 (January) Inst. of Civil Engineers U.K.

2. The Employer will pay to the Contractor the said Contract Sum or such other sum as shall become payable hereunder at the times and in the manner specified in the said Conditions.

3. The term "The Engineer" in the said Conditions shall mean the Engineer before mentioned, or in the event of his death or properly ceasing to be the Engineer for the purpose of this Contract, such other Engineer as shall be appointed to be Engineer under this Contract.

4. The said Conditions shall be read and forming part of

this Agreement and the parties hereto will respectively abide by and submit themselves to the Conditions and perform the Agreement on their ports respectively in such Conditions contained.

5. The Employer hereby confirms the appointment of the Engineer before mentioned as the Engineer in connection with the works referred to herein and authorises him to exercise all the powers and authorities necessary to be exercised by him as Engineer under this Contract and agrees that all plans, drawings, specifications and documents prepared by the said Engineer shall be the Engineer's property subject only to their being used in completing the work before referred to.

6. The Contract period is to be 30 weeks.

As witness our hand this 16th day of September, 1971.

Signed by the said Employer) (sgd) R. Charitra
in the presence of) (sgd) ? Bradley

Signed by the said Contractor)
in the presence of) (sgd) Ralph Marlow
)

I/We the Engineer above mentioned do hereby accept appointment as above mentioned and agree duly, faithfully and impartially to exercise all the powers and authorities by the Agreement conferred on me/us.

Signed by the said Engineer)
in the presence of) (sgd) F. MacManus "

Messrs. MacManus Bradley & Associates were appointed by the appellant as his engineers.

The specifications were for the erection of a 5 storey building and not for the conversion of flats into offices as mentioned on the single sheet plan; the acceptance of tender referred to "new offices". Nowhere in the specifications is there any reference to the conversion of

flots into offices, nor is there any reference to completion of exit ways shown on the plans.

Time for completion of the contract was 30 weeks - from 16th September 1971; the works were to be completed by 20th April 1972 - more than a year before the exit way shown on the plans was to be constructed.

The respondent admitted constructing the temporary exit way onto the land of Piccadily Taxis but claimed that there was no obligation under the contract to construct the permanent exit way as the shop was leased until May 1973 and further there were no details of quantities of materials or dimensions mentioned on any of the plans or in the specifications.

The engineer Mr. MacManus supervised the erection of the building on behalf of appellant and had issued 13 certificates authorising progress payments during its construction and on 13th November, 1973 he issued his final certificate showing the sum of $6,760.24 as being the balance "fairly due to Marlows Limited". Appellant did not pay this amount; on or about 7th May 1974 proceedings were issued by the respondent claiming the sum of $6,760.24. On 19th June 1974 a statement of defence was delivered denying liability for the amount claimed but alleging that credits of $5,668.34 were due to appellant leaving a balance of $1,091.90 which amount appellant admitted was owing to respondent.

On 10th November, 1979, an amended statement of defence with set off and counterclaim was filed and served showing a debit balance of $1,091.90 due to respondent; appellant alleged for the first time that as a result of respondent's breach of contract in failing to construct the permanent exit way the appellant had lost rentals amounting to $46,000. After allowing credit for the sum of $1,091.90

the appellant sought judgment for the sum of $44,908.10. At the trial in the Supreme Court the respondent company called one of its directors Keith Alfred Edward Marlow; the Suva City Council Engineer Arvind Parma, and the engineer Mr. Finton MacManus.

Appellant gave evidence - called no other witnesses - and closed his case. The Supreme Court gave judgment for the respondent in the sum of $6,760.24; disallowed any set off in favour of appellant and dismissed the respondent's counterclaim.

Appellant now appeals to this Court and although his notice of appeal is silent as to the relief sought it was established that counsel for appellant seeks to have the judgment of the Supreme Court set aside and judgment for the sum of $1,091.90 entered for the respondent; on the counterclaim appellant asks for judgment for the sum of $46,000.00 for loss of income, or such lesser sum as this Court deems fit.

The grounds of appeal are lengthy, interwoven and overlapping but they may be conveniently summarised as follows:

(1) The permanent and temporary exit ways on the northern side of the building were work which the respondent had to carry out under the contract dated 16th September 1971.

(2) Whether appellant was entitled to set off the sums claimed.

(3) Appellant should have been credited with $182.50 for use of telephone, water and electricity used by respondent on the basis of an implied contract or quantum meruit.

(4) That the learned trial Judge erred in disallowing appellant's claim for the cost of constructing the permanent exit way and for loss of income for breach of contract.

(5) That the appellant was not bound to mitigate his loss until such time os he was made aware by respondent that the respondent did not propose to construct the permanent exit way.

(6) That the leorned trial Judge erred in accepting the evidence of Fintan MacMonus that the construction of the permanent exit way was not within the contract.

(7) That the learned trial Judge erred in refusing to accept appellant's evidence and misdirected himself when dealing with the question of conversion of flats into offices.

The first ground of appeal raised the principal issue in this appeal; namely that the construction of the permanent access way was included in the contract signed on 16th September 1971.

Considerable reference wos made by counsel for appellant in his argument to the earlier negotiations between appellant and Ralph Morlow (who died in 1974) ond correspondence between MocMonus and appellant.

It is necessary to examine briefly the law on the subject as to whether prior negotiations of the parties con be looked at os on aid to the construction of a written contract.

In Bank of Australia v. Palmer [1897] A.C. 540 at p.545 it is said :

"Parol testimony cannot be received to contradict, vary, add ta or substract from the terms of written contract or the terms in which the parties have deliberately agreed to record any part of their contract."

In Prenn v. Simmonds /1971/ 3 All E.R. 237 the following part of the headnote is apposite.

"Per Curiam. Although in construing a written agreement the court is entitled to take account of the surrounding circumstances with reference to which the words of the agreement were used and the object, appearing from those circumstances, which the person using them had in view, the court ought not to look at the prior negotiations of the parties as an aid to the construction of the written contract resulting from those negotiations. Evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and, objectively, the 'aim' of the tronsaction."

The express words of the contract must first be construed in the surrounding circumstances but not on the basis of what the parties may have said was their intention at the time.

In Prenn v. Simmonds (supra) Lord Wilberforce ot p.240 said :

"The reason for not admitting evidence of these exchanges is not a technical one or even mainly one of convenience..... It is simply that such evidence is unhelpful. By the nature of things, where negotiations are difficult, the parties' positions with each possing letter, are changing ond until the final agreement, although converging, still divergent. It is only the final document which records o consensus. If the previous documents use different expressions, how does construction of those expressions, itself a doubtful process, help on the construction of the contractual words?".

In Reardon Smith Line v. Hansen-Tangen (1976) 1 W.L.R. 989 at p.995 Lord Wilberforce states:

> " It is less easy to define what evidence may be used in order to enable a term to be construed. ..... But it does not follow that, renouncing this evidence, one must be confined within the four corners of the document. No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as 'the surrounding circumstances' but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating..... What the court must do must be to place itself in thought in the same factual matrix as that in which the parties were. All of these opinions seem to me implicitly to recognise that, in the search for the relevant background, there may be facts which form part of the circumstances in which the parties contract in which one, or both, may take no particular interest, their minds being addressed to or concentrated on other facts so that if asked they would assert that they did not have these facts in the forefront of their mind, but that will not prevent those facts from forming part of an objective setting in which the contract is to be construed."

The paramount task of the Court is to consider the express words used considering them of course in the context of the whole of the provisions of the contract and the relevant background. It is beside the point that the parties may consider their obligations to be different from the express words of the contract. That can only be a matter of rectification or perhaps estoppel. If the written words are capable of being given a meaning then that is the intention and obligation in accordance with the contract.

We pass now to consider whether subsequent conduct of the parties can be used as an aid in the construction of a contract.

In James Miller v. Whitworth Estates [1970] 1 All E.R. 796 Lord Reid at p. 798 said :

> " I must say that I had thought that it is now well settled thot it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later."

In Schuler A.G. v. Wickman Ltd. [1973] 2 All E.R. 39 the headnote states :

> "Per Curiam. In construing a contract, whether to resolve an ambiguity or for any other purpose, the court is not entitled to take into account the conduct of the parties subsequent to the execution of the contract as throwing light an the meaning to be given to it."

We respectfully adopt the principles, enunciated above, that in construing a contract the Court is not entitled to take into account the subsequent conduct of the porties as an aid to interpretation of a contract.

It is necessory now to determine the various documents which comprise the written contract between the parties. They are :

(a) The contract in writing dated 16th September 1971 between appellant as employer and respondent as contractor.

(b) The General Conditions of Contract.

(c) The drawings consisting of the set of 7 drawings prepared by MacManus Bradley & Associates and the single sheet plan; this latter plan was prepared by

Ralph Marlow some years before. It is pertinent to set out the evidence of Mr. MacManus as to why this plan was adopted by him. He says :

> "Ralph Marlow prepared small sheet No.1 City Council made provision for exit way on that plan. I adopted that sheet as part of the drawings. Need for alternative passage way was vital. There was no permanent fire exit Piccadily side before 4/5/71. Ralph Marlow did not in his plan originally provide for permanent exit way but it had to go through the shop. There was temporary exit way opening into Piccadily area. Client wanted one shop so intermediate partition would have to be removed. I knew this when I was drawing plans but there was a tenant in the shop at the time. Suva City Council allowed temporary exit way because it knew tenant vacating after 31/5/73."

(d) The Specifications.

(e) The tender (although not strictly speaking one of the contract documents as it merges in the written contract) - is referred to in the definition of "Contract" in the General Conditions.

The General Conditions of Contract contain a comprehensive set of terms and amplify the written contract. Clause 1 provides :

> "1.(1) In the Contract (as hereinofter defined the following words and expressions shall have the meaning hereby assigned to them except where the context otherwise requires.....

(f) 'Contract' means the General Conditions Specification Drawings priced Bill of Quantities Schedules of Rates and Prices (if any) Tender and the Contract Agreement.

(g) 'Drawings' means the drawings referred to in the Specification and any modification of such drawings approved in writing by the engineer and such other drawings as may from time to time be furnished or approved in writing by the engineer.

The General Conditions of Contract clearly provide that in the case of ambiguities the same sholl be explained ond adjusted by the engineer who shall issue instructions to the contractor directing in what monner the work is to be carried out; section 6 provides :

> "The several documents forming the Contract are to be taken as mutually explonotory of one another and in case of ambiguities or discrepancies the same shall be explained and adjusted by the Engineer who shall thereupon issue to the Contractor instructions directing in what monner the work is to be carried out. Provided alwoys that if in the opinion of the Engineer compliance with any such instructions shall involve the Contractor in ony expense which by reason of any such ambiguity or discrepancy the Contractor did not ond had reason not to anticipate the Engineer shall certify and the Employer shall pay such additional sum os moy be reosonoble to cover such expense."

The Generol Conditions also provide for the alterotions, additions ond omissions to the contract which may be necessary during the term of the contract; no variation to the contract con be mode without an order in writing from the Engineer. Clause 51 of the General Conditions provide :

> "51(1) The Engineers shall moke ony voriation of the form, quality or quantity of the works or any port thereof that may in his opinion be necessary and for that purpose or if for ony other reason it shall in his opinion be desirable shall have power to order the Contractor to do and the Contractor shall do ony of the following :
>
> (a) increase or decreose the quantity of any work included in the Contract.
>
> (b) omit any such work.
>
> (c) chonge the chorocter or quolity or kind of any such work.
>
> (d) change the levels lines position ond dimensions of any part of the works; and
>
> (e) execute additional work of ony kind necessary for the completion of the works
>
> and no such voriotion shall in ony woy vitiate or involidote the Contract but the volue (if ony)

of all such variations shall be taken into account in ascertaining the amount of the Contract Price.

(2) No such variation shall be made by the Contractor without an order in writing of the Engineer."

Under Clause 52 of the General Conditions the engineer shall determine the amount (if any) to be added to or deducted from the sum named in the tender in respect of any extra or additional work done or work omitted by his order. All such work shall be valued at the rates set out in the contract if in the opinion of the engineer the same shall be applicable. If the contract shall not contain any rates applicable to the extra or additional work then reasonable prices shall be fixed by the engineer. The clause is indicative of the powers vested in the engineer.

If disputes or differences arise between the employer and the engineer and the contractor, the same are to be referred to the engineer for determination in accordance with the provisions of clause 66 of the General Conditions; the relevant portion thereof reads :

"66. If any dispute or difference of any kind whatsoever shall arise between the Employer or the Engineer and the Contractor in connection with or arising out of the Contract or the carrying out of the Works (whether during the progress of the Works or after their completion and whether before or after the determination abandonment or breach of the Contract) it shall be referred to and settled by the Engineer who shall state his decision in writing and give notice of the same to the Employer and the Contractor. Such decision in respect of every matter so referred shall be final and binding upon the Employer and the Contractor until the completion of the work and shall forthwith be given effect to by the Contractor who shall proceed with the Works with all due diligence whether notice of dissatisfaction is given by him or by the Employer as hereinafter provided or not....."

The specifications are expressly made part of the contract by virtue of the contract dated 16th September, 1971. The specifications relate only to the construction of the new office block and are the only specifications which relate to the concluded contract. No specifications were provided for the construction of the permanent exit woy nor for the alterations to the shops fronting Carnarvon Street. The specifications provide :

> "Specification of materials to be used and work to be done in the construction and completion of a five storey office block Carnarvon Street, Suva, C.T. 3246."

Clause 1.01 states :

> "Conditions of Contract:
>
> The Conditions of Cantract shall be those as laid down by the Landon Institute of Civil Engineers, 4th Edition 1955 and sholl be read in conjunction with this Specification."

Clause 1.03 deals with the drawings and states:

> "The drawings are to be considered solely as instruments of service and shall be returned to the Engineer at completion of the works. Figured dimensions take preference over scaled and large scale dimensions in preference to small. Should there be any doubt or ambiguity as to the meaning of any portion of the plans ar specification, the Contractor shall set out such in writing with his tender so that any such matter may be provided for before the occeptance of his tender. Otherwise the plans and specifications shall bear the interpretation placed on them by the Engineer."

Where there is any doubt or ambiguity in the drawings the contractor is obliged to mention these matters in his tender otherwise the plans and specifications bear the interpretation placed on them by the engineer. When the work is completed the engineer is to supply a certificate to that effect.

Clause 1.17 states :

"Completion of Work:

When the Contractor shall have completely performed the work in accordance with the Contract, he shall be entitled to receive a certificote by the Engineer that such work has been completed. The period of maintenance shall commence from the date on which the certificate of completion is issued."

Clause 1.26 deals with disputes or differences touching the interpretation of the drawings and vests the sole discretion in the engineer. The relevant portion of Clause 1.26 states :

"Arbitration. Any dispute or difference arising between the Employer or the Engineer on the one hand and the Contractor on the other touching the interpretation of drawings or specifications the rate of progress of the work, or the quality of work performed or materials employed, shall be at the sole discretion of the Engineer."

It is desirable to bear in mind the powers and procedures in cases where an oppellate court is invited to reverse on a question of fact the judgment of the trial Judge.

From the various authorities the following principles can be distilled. It has long beensettled law that when the decision of a trial Judge is bosed substontiolly on his assessment of the quality and credibility of witnesses an appellate Court must in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong, and that is so irrespective of whether or not the trial Judge made any observotion with regard to credibility. If the trial Judge's estimate of o witness forms ony substontial part of his reasons for his judgment the trial Judge's conclusions of fact should

be let alone. A Court of Appeal has no right to ignore what facts the Judge has found on his impression of the credibility of witnesses and proceed to try the case on paper on its own view of the probabilities as if there had been no oral hearing. The Hontestroom /T9277 A.C. 37 Clarke v. Edinburgh Tramways Corporation /1919/ S.C. H.L. 35 Powell v. Streatham Manor Nursing Home /1935/ A.C. 243.

We turn now to consider the arguments.

Mr. Koyo submitted that before the contract was signed all parties knew of the requirements of the Council that a permanent exit way had to be constructed on the northern side of the building to give access to Carnarvon Street; that as the exit way was shown on the plan it necessarily followed that the obligation to construct it must form part of the contract; the obligation to construct it was cast upon respondent; that the single sheet plan prepared by Ralph Marlow was adopted by MacManus, signed by the parties and become part of the contract documents; that MacManus wrote to appellant on 17th May, 1971, mentioning that the Council had made changes to the plans as a prerequisite to the issue of a building permit and recommending to appellant that "these changes" should be made and that the letter formed part of the contract. Mr. Koya further submitted that the learned trial Judge had taken into account many irrelevant matters which had influenced him in concluding that the exit way did not form part of the contract. The learned trial Judge had paid an undue regard to the fact that in August 1973 plans had been prepared for alterations to the shops fronting Carnarvon Street and the removal of a dividing partition therefrom and the erection of a partition on the northern side of the shop to permit construction of exit way to

Carnarvon Street.

Counsel also submitted that although the contract called for completion of the work by April 1972, there was no ambiguity in the notation on the plans that the permanent exit way had to be completed by June 1973 - over 14 months later. That the respondent had constructed the temporary exit way and accordingly it was respondent's obligation to construct the permanent exit way.

Mr. Knight for respondent submitted that it did not follow that because there were notations regarding exit way on the single sheet plan and sheets 1 and 2 of the set of plans that it necessorily followed that the respondent was obligated to construct the permanent exit way for the following reasons :

(a) No details shown on the plans regarding either the construction of or materials to be used in the permanent exit way.

(b) The written contract makes it clear that the construction of the 5 storey building to be completed by April 1972. The notation on the plans show permanent exit way to be constructed by June 1973.

(c) The tender, the written contract, the specifications and the 7 sheets of plan (treating them separately from the single sheet plan) refer only to the construction of a 5 storey building and no reference is made therein to conversion of existing structure and the construction of permanent exit way.

(d) The evidence of Mr. MacManus, the engineer appointed by appellant, confirmed that the construction of permanent exit way was not port of the contract.

(e) The notations regarding exit ways on the plans do not form part of the working drawings; they were made merely to comply with Council fire and egress requirements and to enable a building permit to issue. Council was prepared to issue a permit providing permanent exit way constructed by June 1973 when the lease held by the tenant of the shop had expired.

It is clear that the question as to whether the construction of the permanent exit way formed part of the contract dated 16th September 1971 lies at the heart of the whole case for the appellant.

Mr. Koya maintains that the obligation to construct the exit way rested with the respondent while Mr. Knight orgues to the contrary.

From a study of the evidence in the lower Court the following points emerge :

(1) The contract doted 16/9/71 refers to the construction of a 5 storey building at the reor of the existing structure owned by appellant and fronting Carnorvon Street.

(2) The tender and its acceptance referred only to the construction of a 5 storey building.

(3) That the working drawings contained no detoils as to the mode of construction of or the materials to be used in the permanent exit way. It would be an affront to common sense that a contractor would in the obsence of such detoils undertoke to be obligated to perform such works. As the witness Keith Alfred Edward Marlow said and we quote :

"Sheet 1 of exhibit A. I see reference to second exit way. There is no detail at all. In no way could one quote for construction of exit way on basis of that plan."

(4) No reference was made in the specifications as to the materials to be used in the construction of the wall of the permanent exit way. The specifications related only to the construction of the 5 storey office block. On the single sheet plan no details were provided for the exit way or for any conversion of flats into offices. The learned trial Judge said :

"The single sheet plan covered conversion of existing flats into offices and on that plan appears the exit way through the shops. No details were provided. No specifications for such conversion and exit way have been produced.

The set of plans show ground plans of existing building in which appears this exit way and also show details of the 5 storey new office block. The specifications relate only to construction of that new office block and are the only specifications which relate to the contract the parties entered into.

The plaintiff tendered only for construction of the new office block not for the conversion of the existing flats into office or construction of the exit way."

(5) The contract called for completion of the work by April 1972 and the exit way was to be completed by June 1973; the contractor would have been required to leave the site and return 14 months later and construct the exit way - not knowing details of and materials required for the construction thereof nor what the costs of construction might be 21 months after the contract had been signed.

(6) There were no notations regarding the exit ways on the plans when they were submitted to the Council and the evidence of Mr. MacManus therein clearly reveals that he negotiated with Council to obtain the issue of building permit for a 5 storey office block upon the basis that a temporary exit way would be constructed into Piccadily Taxi's land and the permanent exit way would be formed by June 1973 when the lease held by tenant of the shop had expired.

Mr. MacManus said :

"I see notations by City Council on plans. Were not on plans when submitted to Suva City Council. On old sheet No.1 shows temporary exit until June 1973. Other one says new wall to be erected and exit way to be provided after 31/5/73. On other sheet are similar notations. Fire requirement requires two exits. Plans originally lodged did not need these requirements. I negotiated with Suva City Council for temporary exit way into vacant lot as a second means of exit on a temporary basis. At time contract was entered into not possible to construct wall as tenant in the shop and we had made no provision for it in the way of providing any detail. There are no details on either sheet either for the wall or exit way."

Arvind Parma, the Suva City Council Engineer said

"Changes to plans made because of fire regulations. In our plan partition was to be removed and partition put up in passage way on small plan there is dotted line means to be built <u>in future.</u>" (emphasis is ours)

(7) The tender and its acceptance, the written contract, the specifications clearly relate to the construction of a 5 storey office block and make no reference to the conversion work or the exit way. Under 6 of the General Conditions of Contract the engineer - Mr. MacManus - is given full powers to explain and adjust any ambiguities or discrepancies. The contractor was contractually bound to follow the

engineer's directions in all these matters.

(8) The letter dated 17th May, 1971, and sent by the firm of MacManus Bradley & Associates to oppellont did not form part of the contract.

The building permit had already been issued by the Council on 5th May, 1971.

Under the specifications the drawings are stated to be considered solely as instruments of service. Where there is any doubt or ambiguity in the drawings the contractor is obliged to mention these matters in his tender otherwise the plans and specifications beor the interpretation placed on them by the engineer.

The learned Judge said :

> "It is perfectly clear from the evidence thot the engineer's interpretation of the exit way was not work the plaintiff had to execute in building the new office block. He would not otherwise have certified that the plaintiff had completed the work he contracted to execute. He was alsa the person who prepared the plans and had the task of interpreting them."

We have considered the transcript of the evidence in the Court below, examined the plans, the written contract, the general conditions of contract ond the specifications and are satisfied that the construction af the permanent exit way to Carnarvon Street did not form part of the contract. We agree with the learned trial Judge when he said:

> "I find as a fact that the exit way through the shop was not part of the work which the plaintiff contracted to execute for the sum af $30,000."

Accordingly Ground 1 fails.

Having considered and determined the question whether the permonent exit way formed part of the contract executed on 16th September 1971 we turn now to consider whether the respondent had fully performed his obligations

under the contract; in so doing it is necessary to deal with the claim by appellant that the learned trial Judge was in error in refusing to allow the appellant larger credits in respect of the matters raised in poragraphs 9 to 14 of the amended statement of defence, set off and counterclaim.

During the course of the trial in the lower Court the question of appellant's credibility arose. In September 1973 applicotion was made by the engineer Mr. MacManus to the Council, on behalf of appellant, for a separate building permit for olterations to the shops fronting Carnarvan Street ond construction of an exit way to Carnarvon Street. Appellont denied on oath thot he had instructed MacManus in or about August or September 1973 to prepare plans for the construction of the permanent exit way.

The learned Judge said :

> "The defendont stated he did not know that on 4th September 1973 applicotion was made for a permit to construct the permanent exit way and that plans were lodged. He knew of Council's approval on the 13th September 1973 for construction of the centrol doors in the shop. On being re-examined he stated he hod a copy of the plan prepared by Mr. MacMonus which Mr. MocMonus gave him relating to construction of the shop door. He produced that plan (Exhibit L) which is o copy of Exhibit N except for the amendments made by the Suva City Council. Both Exhibit N and Exhibit L have details clearly indicating the construction of the exit way.....
> The defendant's evidence referred to above indicates thot he never instructed Mr. MacMonus to draw plans for the exit way but only for the doors. I do not believe him. Mr. MacManus is a highly qualified engineer with 28 yeors experience in Fiji.I believe he did discuss the exit with the defendant and on receiving instructions prepared a detoiled plan and lodged it with an application for permission to build ond there was no mention ot the time os to who was to do the work."

Appellant stated in evidence that the sum of $3,343.82 for electrical installations was excessive and that the allowances made in appellant's favour were unreasonable.

The appellant said in evidence :

> "I think fair sum is $1,100. P.C. sum was $550. I would agree to figure if I authorised it and had it in writing I say $1,100 out of goodness of heart. I doubled P.C. of $550. Perhaps it may have cost $3,000. I agreed to P.C. $550. I would not say whether work carried out and costs thereof was fair. I picked $1,100 because it was double P.C. sum."

The learned trial Judge concluded that appellant's evidence amounted to his own opinion unsupported by any expert evidence as to the cost of such work.

The engineer was empowered under the contract to certify the accounts and we agree with the learned Judge when he said :

> "It is the duty of the engineer to value the work to which the P.C. Sums relate and either reduce or increase the contract price. Mr. MacManus performed this duty and as regards electrical installations approved and certified the sum of $3,343.82."

So far as the claim for $182.50 for use of telephone, water and electricity was concerned, Mr. Koya submitted that an allowance should have been made on a quantum meruit; however, this claim was not pleaded on the basis of a quantum meruit and the learned triol Judge questioned the claim when he said :

> "If there is any basis for the claim for use of telephone or electricity it can only be on an agreement to be inferred that the plaintiff would pay for the use of telephone, water and electricity."

In our view the learned trial Judge was correct in disallowing this claim.

So far as the other items are concerned, the learned Judge evaluated the evidence and reminded himself that under the contract documents the engineer was empowered to certify the accounts as between appellant and respondent.

The learned trial Judge had seen and heard the witnesses and concluded that appellant's evidence was sketchy and of little probative value on the issues that he was called upon to decide. In our opinion he was correct in rejecting the appellant's claim in respect of the other items which appellant sought to set off. Therefore we are in agreement with the comments of the learned trial Judge when he said :

> "I do not find it necessary to consider in detail all the other items the defendant seeks to set off. Apart from the fact that engineer certified the plaintiff's accounts for the work relating to such items the defendant's evidence fell far short of establishing what the proper charges should have been His evidence amounted to opinion evidence only. No attempt was made by him to establish what such work should have cost. The engineer's evidence that he certified the plaintiff's accounts disposes of the claim to set off items which he has so certified."

The respondent completed all structural work on the building in or about June or July 1973. On 5th July 1973 the engineer wrote to the appellant advising :

> "We wish to advise that we have today examined the new and existing buildings from top to bottom and, advise that in so far as Marlows Limited are concerned, we have accepted that the Contract has been completed and will seek final certificate from Suva City Council tomorrow."

The reference to seeking "final certificate from Suva City Council tomorrow" could not possibly apply to the certificate

of completion of building as the permanent exit way had not yet been completed, a fact which was of course known to the engineer and the appellant. While it may not be praper to speculate thereon the reference in the Council's letter may well have been to a certificate to occupy the building.

In fact on the 27th July 1973 the Building Surveyor of the Suva City Council wrote to appellant in the following terms :

"Mr. Ram Choritra,
G.P.O. Box 693,
SUVA.

Dear Sir,

Alterations and Additions - Carnarvon St.
CT. 3246

As the outstanding items hove now been given attention, permission to occupy is granted.

A Completion Certificate will be issued when the second entrance where shown on the plan is satisfactorily completed.

Yours foithfully,

(sgd) M.J. Ballantyne
BUILDING SURVEYOR "

On 2nd October 1973 the engineer wrote to respondent drawing attention to a number of items that required their attention under the terms of the contract; a copy of this letter was sent to appellant.

On 25th October 1973 respondent replied (with a copy of letter of appellont) advising that all the matters had been duly completed and seeking the engineer's confirmation thereof, and the release to them of the retention monies held under the contract.

On 8th November the engineer wrote to appellant enclosing a final certificate. The letter reads :

"Mr. Ram Charitra,
Carnarvon Street,
SUVA.

Dear Sir,

re: Marlows Limited Contract
Carnarvon Street

Enclosed herewith please find the Final Certificate on the above contract. I have examined all the works arising out of an inspection on 6th November and am satisfied that the Contractors have carried out all details in accordonce with the Contract terms.

Marlows have also supplied us with the breakdown of materials and labour and transport for the electrical work and we are satisfied that the materials used are correct to the best of our knowledge. We are also satisfied with the 10% mark-up as listed. We take the liberty of enclosing a copy of this for you together with the copy of the Certificate as mentioned above.....

Yours faithfully,
MACMANUS BRADLEY & ASSOCIATES
(sgd) F. MacManus."

It is clear from the evidence, and we are so satisfied, that the respondent had fully performed the contract within the terms thereof.

Accordingly Ground 2 fails.

Having found against appellant on Ground 1, it is unnecessary for us to consider any of the remaining grounds of appeal all of which fail including the appeal on the counterclaim.

The appeal (which includes both claim and counterclaim) therefore fails on all grounds and is dismissed accordingly. The judgment in the Supreme Court is affirmed. Appellant will poy costs of the appeal (both as to claim and countercloim) to be taxed, if not agreed.

.....
(Vice President)

.....
(Judge of Appeal)

.....
(Judge of Appeal)