IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 33 OF 1993
(High Court Civil Action No. 228 of 1990)

BETWEEN

JOHN EDWARD BYRNE
JUNE KIM BYRNE — APPELLANTS

-and-

J S HILL & ASSOCIATES LTD — RESPONDENT

Mr. R. A. Johnson and Mr. H. Nagin for the Appellants
Mr. M. Daubney for the Respondent

Dates and Place of Hearing : 8th and 9th July 1994, Suva
Delivery of Judgment : 18th August, 1994

JUDGMENT OF THE COURT

The appeal in this case concerns a dispute over building work done in the latter part of 1989. The trial in the High Court commenced in May 1991, required 22 hearing days and was concluded in February 1992. After amendments to the pleadings by both parties and the provision of written submissions, judgment was delivered in June 1993. The record of the proceedings extends to 1931 pages of which approximately 1400 pages contain the learned judge's notes of the evidence given by 21 witnesses and 181 pages contain copies of documentary exhibits. It was a long hard-fought trial. Its length is out of all reasonable proportion to the issues and the amount involved.

The work in dispute was by way of alterations and extensions to, and redecoration of, a dwelling house belonging to and occupied by the appellants. They are respectively a High Court judge and his wife. The respondent is a company which undertakes building and construction work of both major and minor types. The work which it undertook to perform for the appellants was assigned by it to its Small Works department to carry out.

The contract between the parties came into existence as the result of the acceptance by the appellants of two quotations given by the defendant for work which had been the subject of discussion between the appellants and officers and employees of the defendant. The total amount of the two quotations was $17,481.03. Subsequently the contract was varied by oral agreement so as to extend to additional work.

In their Statement of Claim and the further particulars of the claim the appellants alleged that the defendant had failed to do and complete the work satisfactorily and had in addition caused damage to roof tiles of the house. They claimed damages for both and for distress and inconvenience, and also sought exemplary damages. They detailed work done and how, they alleged, the defendant had failed to discharge its obligations in respect of some of that work. In its original Statement of Defence the defendant, in effect, denied those allegations simpliciter. However, in an amended Statement of Defence, served only on the day on which the appellants' witnesses

completed their evidence, the defendant dealt with them seriatim in more detail. In respect of some it asserted that the work had been done satisfactorily. In respect of others it said that the defects were minor and that it would have made them good at the end of the normal maintenance period. In respect of some of the work it said that defects were the result of the second appellant interfering in the work by giving instructions directly to the defendant's workmen. Finally, it said that the appellants had failed to mitigate their loss and had incurred unnecessary expenditure in remedying defects. It counter-claimed "approximately $11,027.25" as the balance of moneys not paid to it by the appellant in accordance with the contract and general damages.

In a necessarily lengthy judgment the learned trial judge decided that several parts of the work, which he specified, had been performed incompetently and had resulted in defects. In respect of the defects alleged to have resulted from the second appellant's interference, he found for the defendant in respect of only one, albeit substantial, defect. He found also that the defendant's workmen had caused extensive damage to the tiles of two sections of the roof of the house and that the defendant had caused the appellants some distress and more inconvenience than the nature of the work necessitated. He concluded that expenditure had to be incurred by the appellants to remedy some of the defects. He awarded the appellant's damages totalling $52,490. However, he also allowed the counterclaim on the basis of the doctrine of substantial

performance and awarded the respondent $10,027.25. He then ordered the respondent to pay the appellants interest on the nett award of $42,468.75 at the rate of 10% per annum from the date of the judgment. He also ordered the respondent to pay the appellants' costs.

Just as the trial was of inordinate length, so the grounds of appeal ranged far and wide and totalled 12. They were as follows:-

"1. THE Learned Trial Judge erred in Law and in fact in allowing the Respondent to adduce evidence on matters which were not put to the Appellants in Cross Examination and giving weight to the said evidence and not properly directing himself in respect of the same.

2. THE Learned Trial Judge erred in law and in fact in not allowing the Appellants to adduce rebuttal evidence.

3. THE Learned Trial Judge erred in Law and in fact publishing in his judgement irrelevant matters about the Second Appellant as to her character when there was no evidence as to the same.

4. THE Learned Trial Judge erred in Law and in fact in not holding that the amendments by the Respondent to its Statement of Defence showed that it was not honest in its defence and kept changing positions.

5. THE Learned Trial Judge erred in Law and in fact in not properly taking into account inflation in the building industry.

6. THE Learned Trial Judge erred in law and in fact in not awarding greater damages for damage to the roof.

7. THE Learned Trial Judge erred in law and in fact in not awarding greater damages for the shutters.

8. THE Learned Trial Judge erred in law and in fact in dismissing the Appellants' claim for breach of Cyclone Shutter Erection Agreement.

9. THE Learned Trial Judge erred in law and in fact in dismissing the Appellants' claim in respect of the Defective Hot Water Service.

10. THE Learned Trial Judge erred in law and in fact in dismissing the Appellants' claim in respect of the Staff Room.

11. THE Learned Trial Judge erred in law and in fact in holding that the window in the Visitor's room was independently commissioned by the Second Appellant and installed by an unrelated contractor and dismissing the claim.

12. THE Learned Trial Judge erred in law and in fact in not accepting the following:-

(i) Quotation of Ambe Construction Limited;

(ii) Evidence of Sugrim Prasad;

(iii) All the payments to Larsen Holtom Maybin Limited;

(iv) Colourmarket expense;

(v) Full amount of Viti Carpets Limited's account;

(iv) Wormald Security's account in relation to the Visitor's room;

13. THE Learned Trial Judge erred in law and in fact in allowing only $1,000.00 in general damages for inconvenience and disruption.

14. THE Learned Trial Judge erred in law and in fact in not allowing damages for use and supply of inferior materials in the building works and for stolen items.

15. THE Learned Trial Judge erred in law and in fact in allowing $10,027.25 by way of counterclaim of the Respondent on the basis of doctrine of substantial performance.

16. THE Learned Trial Judge erred in law and in fact in not awarding costs to the Appellants on a Solicitor-client basis especially when he allowed the Respondent to unnecessarily prolong

the trial by introducing irrelevant matters which were not in issue.

17. THE Learned Trial Judge erred in law and in fact in not allowing the Appellants interest at the rate of 13.5% from the date of the issuance of the Writ to the date of Settlement.

18. THE Learned Trial Judge erred in law and in fact in misquoting in his judgment the evidence adduced at the trial.

19. THE Learned Trial Judge erred in law and in fact in not giving the Appellants a fair trial."

Grounds 3, 4, 14, 18 and 19 were abandoned at or before the commencement of the hearing of the appeal.

It was, in our view, most unfortunate that the action proceeded to trial in the High Court. In view of the nature of the dispute, arbitration by an appropriately qualified arbitrator was the course that should have been adopted. That might have been expected to result in concentration on, and speedy determination of, the real issues and avoidance of the unpleasant recriminatory aspects of the trial as it was conducted. The desirability of avoiding a trial with such aspects was particularly strong because the litigation was in the Court of which the first appellant was a judge. We considered that, even at the stage of the commencement of the hearing of the appeal, the parties would have been well advised and we granted an adjournment of half a day to give them the opportunity to settle their remaining differences rather than pursuing the appeal to its bitter end. For the appellants, that meant having the allegations about their conduct withdrawn or struck out. For the respondent, a company of some standing in

Fiji, it meant that attention was again focussed on some appallingly incompetent work performed by its employees. Unfortunately after the adjournment both counsel informed the Court that the parties were unable to resolve the matter themselves.

Ground 1

Allegations of interference by the second appellant in the performance by the defendant's workmen of parts of the work were not put to her in cross-examination. The amended Statement of Defence had not been served when she gave evidence. However, counsel for the appellants did not object at the trial to the admission of the evidence of such interference when it was given by defence witnesses. In the absence of such objection, the trial judge had no obligation to take any initiative in the matter, particularly as the evidence accorded with the pleadings, as they had been amended by then.

In stating the reasons for his findings in the judgment the trial judge referred to the evidence of alleged interference, noted that the appellants' counsel had objected to it in his written submission after completion of the evidence and made relevant findings. In respect of the Staff Room he found that there had been interference and disallowed the claim in respect of that room because of that interference. In respect of other work he found for the appellants in spite

of the allegation of interference. We can find no error in what His Lordship did.

Ground 2

There is nothing in the appeal book to show that the appellants' counsel sought to adduce evidence in rebuttal when counsel for the respondent closed his defence. Accordingly the appellants cannot succeed on this ground.

Ground 5

The appellants' complaint here is that His Lordship did not take into account any increases in building costs which occurred between the time of the trial and the date of judgment. Damages awarded for remedial work that still needed to be done at the time of the trial accorded with documentary evidence of a quoted price which included an anticipated rise in building expenses between March 1991 and October 1991. However, there was no evidence before the Court of actual or anticipated increases after that. It was unfortunate that judgment was not delivered until fifteen months after the trial was concluded. However, the parties substantially contributed to that long delay by the sheer volume of evidence which they had adduced and by delay on the respondent's part in lodging his written submissions. In the circumstances we do not criticise His Lordship for the delay. Nevertheless, its

unfortunate consequence was that the prices on which he based his award of damages were probably out-of-date.

However, we cannot see how the appellants can succeed on this ground in the absence of any initiative having been taken to reopen the trial for the purpose of adducing evidence of price increases, if they had occurred. Further, we note that it is a problem that would probably not have arisen if the parties had taken their dispute to arbitration or even if they had kept their respective cases at the trial within more reasonable bounds.

Ground 6

The damage was done to two sections of the roof, at a lower level than the main roof. The trial judge awarded as damages the cost of replacing the whole of those sections, not only the individual tiles that were damaged. He said that otherwise the roof would be a patchwork of new and old tiles.

In his written submission before the judgment was given, counsel for the appellants asked for the damages to include the cost of replacing all the roof, at all levels. He described them as "three roofs". However, there is no clear evidence in the appeal book that, if the two lower sections were totally replaced with new tiles, there would be any significant contrast between that section and the main top section. There is evidence that the original tiles are no longer sold in Fiji.

Another apparently similar tile, but better wearing, is sold instead. If exact colour match is now not possible, there is no evidence to that effect.

Mr P.J. Maybin, a civil engineer, who gave evidence for the appellants said that he would advise changing the whole section. A firm of architects and civil engineers of which Mr Maybin was a director examined the damaged roof at the request of the first appellant in March 1990. It advised that the lower sections needed to be totally replaced but did not suggest replacing the main roof.

Mr P. Chang, whose company imports and distributes roof tiles and who was called by the appellants to give evidence, provided a quotation for replacing two sections of the roof but not the main roof. In reexamination the appellant's counsel put to Mr Chang that, if the top level was not changed, "there would be a difference in the state of the house" and Mr Chang agreed. However, he was not asked whether it would be an improvement or a detriment.

Counsel for the appellants submitted also that the amount of the damages awarded in respect of the roof did not take into account increases in building costs between the trial and the judgment. We have dealt with that submission in our discussion of ground 5 above.

Ground 7

His Lordship found that, after alterations made by the defendant, at the time of the trial the cyclone shutters were of acceptable size and standard of construction and need not be replaced. However, he found also that the paintwork on the plywood shutters was unacceptable and needed to be redone and that some of the wall brackets needed to be repainted. He awarded $1,000 for painting the seven plywood shutters and $670 for painting 67 wall brackets.

A firm, Tassimari Enterprises Ltd, quoted in March 1991 to do remedial work. It quoted for repainting 50 hurricane shutters at a cost of $5,900 and 173 brackets at a price of $1,297.50. However, in March 1990 Mr Maybin's firm had reported to the appellants that the cyclone shutters had "been made good". It did not refer to the brackets. The trial Judge's findings were consistent with that report. We can find no error in them. Accordingly the appellants cannot succeed on this ground.

Ground 8

The learned trial judge found that no concluded contract for shutter erection had been established. However, although the matter was the subject of argument and evidence given at the trial, it was not pleaded. In his written submission to [illegible] from the appellants said that there was a

contract to construct, instal and service the shutters by way of erection and removal from time to time as required for hurricane protection and that it was breached by a fundamental breach, i.e. in respect of the construction and installation. However, not only did the appellants not plead such an omnibus contract, but the documentary evidence in the appeal book discloses a quotation by the respondent to make and instal the shutters in which no reference is made to the provision of any subsequent service. There is also a separate letter from the respondent to the second appellant dealing exclusively with the provision of such service.

The appellants cannot succeed on this ground.

Ground 9

It is not in dispute that the defendant installed a hot water service. It was not included in the original quotation but it is clear that the original contract was varied by the parties from time to time and that the provision of the hot water service was such a variation. The appellants gave evidence that it was rusty and leaking when installed. However, Mr Mavbin's firm reported that it was satisfied that the unit was new. It thought that the leak was probably at a threaded pipe connection and so easily repairable. The judge's findings were consistent with that opinion. However, in apparently finding that it was not established that the unsorf

to have ignored a written report made later by the firm that the switch "is continuously `ON'" and that a competent electrician should check it and rectify the defect.

Mr Daubney submitted that there was no evidence that the installation of the switch was work done by the respondent. There is no written evidence of the agreement for the installation of the hot water system. However, in our view, any such agreement should be taken to have included, at least implicitly, an obligation to ensure that the hot water service, once installed, could be operated properly by the appellants. If there was an existing switch and it was defective, failure to inform the appellants so that it might be replaced, would have been a breach of the agreement. However, we are satisfied that, if the learned trial judge had properly addressed his mind to the matter, he would have found on the balance of probabilities that the respondent installed a defective switch. Although no evidence of the cost of replacing it was adduced at the trial, we consider that, because the installation and replacement of electric switches is a common occurrence in most homes, His Lordship would have been entitled to take judicial notice of the cost and would have awarded damages of $50. We, therefore, allow the appeal on this ground to that extent.

Ground 10

Essentially the trial judge found that the defects, in the

having caused the defendant's workmen to paint the walls before new plaster had "cured". There was undoubtedly evidence before him from which he could have drawn that conclusion. In our view, he made no error in doing so.

However, before discussing the cause of the cracking of the plaster, he had made a finding that the plasterwork in the Staff Room "shows up the picture-frame effect earlier mentioned in relation to the Study". At page 35 of his judgment, he had referred to there being such an effect in the plaster of the wall of the Study. That wall was a common wall with the Staff Room and, on the Staff Room side, was the wall in which the picture frame effect showed up in the plaster. In respect of the Study he had found that the reason for that effect was that a window had been blocked off by a board instead of with blocks (presumably of stone or concrete). He found that it was a major defect and noted that a director of the respondent had given evidence that the sensible way to remedy it was to reblock it and replaster.

When dealing with the Staff Room His Lordship appears to have failed to appreciate that, even if the appellants had not caused the wall to be painted too soon, remedial work to eliminate the picture frame effect would have been needed just as it was in the Study. That caused him, erroneously in our view, to disallow the appellants' claim in respect of the Staff Room. The appellants were entitled to have similar remedial work done to the wall of the Staff Room as His Lordship found

they were entitled to have done to the wall of the Study.

None of the quotations for remedial work contains sufficient detail for any conclusion to be drawn how much of any quotation related to the remedial work to either of the walls. The respondent did provide a break-down of the price for which it agreed to do all of the work for which it quoted. The amount stated as the price of altering the wall of the Staff Room was $700. As that amount was presumably calculated on the basis that the window would be blocked by a board instead of being properly reblocked, the cost would presumably have been higher if it had been for the work as it should have been done.

When His Lordship awarded damages in respect of the remedial work that needed to be done to the Study, they would have included the cost of reblocking. Nevertheless, at least one new piece of plasterboard will have to be fixed to the wall of the Staff Room and some or all of the existing plaster on the rest of the wall removed before replastering. There is evidence in the appeal book that the cost of replastering is higher than the cost of initial plastering. There is also evidence of increases in building costs up to the time of the trial. Taking all those matters into account we consider that, if His Lordship had not erred in overlooking the significance of his finding in respect of the plasterboard, he would have awarded $1,500 damages in respect of remedial work to the wall of the Staff Room.

Consequently, the appeal succeeds on ground 10.

Ground 11

The trial judge held that the window in the Staff Room was put in by one of the defendant's sub-contractors but in performance of a contract directly between it and the appellants. However, even if he had not done so, the appellants would not have been entitled to recover damages in respect of the window because, as noted by His Lordship, the matter was not pleaded in the Statement of Claim or in the Further and Better Particulars.

Ground 12

This ground relates to the cost of five items which the appellants claimed they would have to incur, or had already incurred, in remedying the respondent's defective work and the damage done by its employees.

The first item was a quotation obtained by the first appellant; the second item was oral evidence about the first item; no separate issue is raised by the reference to it. The learned trial judge awarded a lower amount than quoted, basing the award on a quotation from another builder. We can find no error in that.

The third item is expressed in terms of "all payments to" Mr. Maybin's firm. The Judge awarded $720 for fees actually paid; they were paid for advice. What is now in issue is fees which the firm will charge if it supervises the remedial work when it is carried out. The second appellant gave evidence that Mr. Maybin gave an estimate of $4,400 as the fee for such supervision. $1,400 in respect of the roof and $3,000 in respect of the rest of the remedial work. Whether the appellants were entitled to be awarded damages in respect of such fees depended on whether it was reasonable or not to have the remedial work supervised by a civil engineer. The work involving replacement of a section of the roof would, in our view, warrant such supervision as it would affect the structure of the house. The other remedial work still required appears to be of a non-structural nature; in our view such supervision of it would not be warranted.

We find, therefore, that His Lordship erred in not awarding damages for the cost of supervision to the extent of $1,400.

The fourth item relates to paint bought at a cost of $217 for application to the concrete by the swimming pool. Part of the concrete had to be broken in order to remedy a serious defect in the plumbing work in the bathroom installed by the defendant, a defect which had resulted in raw sewage coming up from a drain onto the bathroom floor. The second appellant gave evidence that half the area painted had not been affected

by the remedial work but that the colour of paint used was different. Whether the colour was different or the same as before, it was, in our view, reasonable to paint the whole of the concrete afresh rather than have part newly painted and part with old paint. The appeal succeeds on this item.

The fifth item relates to carpet underlay. The appellants received a quotation of $260.84 for the underlay plus $161.46 for laying it and relaying the carpet over it. The respondent obtained, from the company that had laid the carpet some years before, a quotation of $140 for provision of underlay and relaying. Essentially the quotation obtained by the appellants was for new underlay for the whole room, while that obtained by the respondent was for replacement only of the part damaged. The trial judge considered the latter was all that was required. We can find no error in that.

The sixth item relates to the cost of disconnection and reconnection of the alarm system in the Staff Room, $216. A similar cost in respect of the Study was allowed by His Lordship and it is clear that he would have allowed it in respect of the Staff Room if he had found that the respondent was liable for the defects in that room. He erred in not making that finding (see ground 10 above). The respondent was liable for the defects.

Consequently the appellants succeed in respect of this item.

Ground 13

As the work was protracted over several months and not all defects effectively remedied, the inconvenience and distress caused to the appellants, particularly the second appellant who stayed home most of every day to look after her property, was considerable. If we had been deciding this matter at first instance we would probably have awarded more than $1,000 by way of general damages. However, as counsel for the respondent pointed out, an appellate court should not interfere with an amount awarded as general damages, unless the judge acted on some wrong principle of law, misapprehended the facts or awarded an amount that was wholly erroneous. In actions for breach of contract the quantum of general damages is invariably small. His Lordship did not act on a wrong principle of law nor did he misapprehend the facts. In our view the amount awarded was not so manifestly inadequate that we would be justified in interfering with it.

Ground 15

The respondent sought leave to argue that the award on the counter-claim should be upheld on the basis of quantum meruit. He gave notice of his intention to present that argument, if leave was granted. Leave was required because the notice, although it conformed with rule 19(2) of the Court of Appeal Rules, was not served on the appellants until long after the time limit set by rule 19(1) had expired. We asked counsel to

argue the merits of the matter and said that we would decide later whether or not to grant leave. The argument had considerable merit and, we are satisfied, the appellants were not prejudiced by the lateness of the notice. Accordingly we grant the leave sought. It is convenient to deal with the notice at the same time as we deal with ground 15.

As an annexure to a letter to the first appellant dated 12 February 1990, the respondent provided a reconciliation of the account for the work it had contracted to perform. It showed work to the value of $19,131.25 having been performed with work to the value of only $500 remaining to be done. It also showed $8,104 as having been paid. Subsequently in a letter dated 21 May 1990 and addressed to the appellants' solicitors the respondent said that it would "offer a credit to the unpaid sum of $1,000" to take account of the fact that the appellants "[did] not want us to make good defects". That left an amount of $10,027.25, which was the amount awarded by His Lordship in respect of the counter-claim.

Although the counter-claim was allowed on the basis that the contract had been substantially performed, at the hearing of the appeal Mr. Daubney, although not conceding that the counter-claim could not be upheld on that basis, did not advance any arguments in support of it. In view of the extent of the defects found by the learned trial judge, of which some major ones remained unremedied at the time of the trial in the High Court, we doubt whether the award can be upheld on the

basis of substantial performance. However, in view of our conclusions on the quantum meruit issue, which are set out below, we find it unnecessary to decide whether that is so or not.

The right to recover on a quantum meruit for work performed does not depend on the existence of an implied contract but on a claim to restitution or a claim based on unjust enrichment (Pavey & Matthews Pty Ltd v. Paul (1987) 162 CLR 221). It must be shown that the party sued on the quantum meruit has accepted the work done to his property for which payment is claimed. In the present case the appellants have, albeit unhappily, accepted the work done to their house.

For a claim based on quantum meruit to succeed there must be evidence of the value of the work to the person to whose property it has been done. In this case there was evidence of the amount which the appellants agreed to pay for the work: that presumably was a fair approximation of its value to them. Work not done properly does not, of course, have the same value as work that is done properly. However, the appellants have been awarded damages to remedy the defects in the work. As one purpose of an award made on the basis of quantum meruit is prevention of unjust enrichment, that fact is of significance. In our view, the value of the work done was the amount for which the respondent counterclaimed.

Mr. Johnson submitted, however, that the respondent was prevented from recovering any amount for the work done because doing it was illegal.

Regulation 4(1) of the Towns (Building) Regulations, made under the Public Health Act (Cap.111), provides, so far as is relevant in these proceedings, as follows:-

> "4.-(1) Every person about to erect a building or to add to or repair an existing building shall before commencing so to do make application in the form in the First Schedule and shall file in duplicate with the Council for its approval the plans, elevations, sections and specifications of such building or buildings, additions or alterations. The applicant or his agent shall sign such plans, elevations, sections and specifications."

Regulation 137(2) is as follows:-

> "(2) Any person who neglects to comply with any provision of these Regulations, shall, where a penalty is not elsewhere prescribed, be liable to a fine not exceeding $10 for a first offence or $20 for a second and any subsequent offence; and also in either case a daily fine not exceeding $1 per day for any continuance of the offence."

It is not in dispute that neither the appellants nor the respondent applied for a permit for the work. His Lordship found that the prime responsibility for making the application rested on the respondent. It was the party which had the capacity to prepare plans and specifications and was familiar

4 not to obtain a permit before commencing work. The commencement of the work was, therefore, illegal.

The regulations do not themselves provide, as some statutes do, that claims for work done in breach of them are unrecoverable. It is a rule of public policy applied by the Courts that may have that result. In Vita Food Products Inc. v. Unus Shipping Co [1939] AC 277 Lord Wright said of the rule:-

> "Nor must it be forgotten that the rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious sufficient grounds."

In St. John Shipping Corporation v. Joseph Rank Ltd [1957] 1 QB 267 at pages 288 Devlin J. said:-

> "If a contract has as its whole object the doing of the very act which the statute prohibits, it can be argued that you can hardly make sense of a statute which forbids an act and yet permits to be made a contract to do it; that is a clear implication. But unless you get a clear implication of that sort, I think that a court ought to be very slow to hold that a statute intends to interfere with the rights and remedies given by the ordinary law of contract. Caution in this respect is, I think, especially necessary in these times when so much of commercial life is governed by regulations of one sort or another, which may easily be broken without wicked intent. Persons who deliberately

> be aided in a court of justice, but it is a different matter when the law is unwittingly broken. To nullify a bargain in such circumstances frequently means that in a case-perhaps of such triviality that no authority would have felt it worth while to prosecute-a seller, because he cannot enforce his civil rights, may forfeit a sum vastly in excess of any penalty that a criminal court would impose; and the sum forfeited will not go into the public purse but into the pockets of someone who is lucky enough to pick up the windfall or astute enough to have contrived to get it. It is questionable how far this contributes to public morality."

In the circumstances of the present case it would be unjust to deprive the respondent of its right to recover the value of the work it did. We have decided, therefore, that His Lordship's award on the counter-claim is to be upheld, although on a different basis from the one on which he relied.

Ground 16

The appellants sought costs on an indemnity basis because of the alleged unnecessary prolongation of the proceedings by the respondent and irrelevant vilification of the appellants. By awarding costs in the usual form, His Lordship implicitly rejected that.

The appellants put many facts in issue by their Further and Better Particulars. They called 12 witnesses whose evidence takes up well over 700 pages of the appeal book, that is at least half of the whole record of evidence given by

after late amendment) an assertion that the appellants were themselves to blame for some of the defective work; the trial judge came to the conclusion in one instance that they were. Much of the evidence called by the respondent was directed to making out that part of its case. Nevertheless, the evidence given by Mr Paris was barely relevant and certainly unnecessary in light of all the other evidence given, as was some of the evidence given by other defence witnesses. But the prolongation of the hearing which that caused was not great in relation to the overall length of the hearing, which was fiercely fought over 22 days on every issue by both parties!

The appeal on this ground fails.

Ground 17

The trial judge gave judgment for the payment of $42,468.75 together with interest thereon at the rate of 10%.

The amount of $42,468.75 was the balance of damages of $52,496 less the amount of $10,027.25 allowed on the counterclaim. The judge detailed the items making up the amount of $52,496. The appellants' counsel submitted that His Lordship should have awarded interest from the date of issue of the writ. That submission is, we consider, misconceived. It is based on the fact that costs of goods and services have risen since the issue of the writ. If they have, evidence of [illegible] been presented and it should have been

taken into account in setting the amounts of each of the items of damages. Interest prior to judgment on damages awarded in respect of expenditure can properly be ordered only if the expenditure was actually incurred before judgment.

Counsel for the respondent submits that the rate of interest post-judgment should have been 4%, not 10%, in view of the provisions of s.17 of the Judgments Act 1838 (England). He gave notice that he would be seeking variation of the award to that extent. If the matter is governed by the English Act, the learned trial judge had no power to set a rate higher than 4%. In that event the respondent does not require leave to raise the matter.

Section 22(1) of the High Court Act (Cap.13) provides for the statutes of general application which were in force in England on 2 January 1875 to be in force in Fiji. The Judgments Act 1838 was such an Act. Its application to Fiji has not been repealed or varied by legislation. Section 3 of the Law Reform (Miscellaneous Provisions)(Death and Interest) Act (Cap.27) gives the Courts a discretion as to the rate of interest to be awarded in respect of the period between when the cause of action arose and the date of judgment; but it contains no provision in respect of interest after judgment. Section 17 of the English Act is still the only one that does so. Its provisions are mandatory: interest is payable at the rate of 4%. That is unrealistic in the current economic

situation would be desirable. However, unless and until there is such legislation, the Courts have no power to award interest after judgment at any rate other than 4%. Accordingly, on this point the respondent succeeds.

Conclusion

For the reasons stated above, we allow the appeal in part, that is to say in respect of grounds 5, 10 and 12(iii), (iv) and (vi). We increase the amount of the damages awarded by $3,383, so that the total amount awarded becomes $55,879. When the amount awarded on the counter-claim is off-set against that amount, the amount for which there is judgment for the appellants is increased to a total of $45,851.75. We also vary the rate of interest payable from the date of judgment to final settlement from 10% to 4%.

Each party has succeeded in part. We order, therefore, that each is to bear its own costs of the appeal. We affirm the learned trial judge's order that the respondent is to pay the appellants' costs in the High Court.

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Sir Peter Quilliam
Judge of Appeal

I. R. Thompson
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Mr. Justice Ian R. Thompson
Judge of Appeal

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Mr. Justice Peter Hillyer
Judge of Appeal