In the High Court of Fiji at Suva
Civil Jurisdiction
HBC 341 of 2011
Alspec Holdings Limited
Plaintiff
vs
Ministry of Works, Transport and Public Utilities
First defendant
And
The Attorney General of Fiji
Second defendant

COUNSEL : Mr G. O'Driscoll for the plaintiff
Ms O.Solimailagi with Ms M. Ali for the defendants
Date of hearing: 12th, 13th, 14th(morn), 17th, 18th, 24th, 25th, 26th and 27th July, 2017
Date of Judgment: 8th June, 2018

JUDGMENT

1. The plaintiff and the first defendant entered into a "*Contract Agreement*",(Contract) in terms of which the plaintiff agreed to construct the Natadola Reservoir, Voua Pump Station and Voua to Natadola pipeline for a sum of $8,181,605.25VIP. The plaintiff, in its amended statement of claim alleges that Erasito Beca Consultants and Beca International Ltd,the first defendant's Project Engineers and Consultants "*manufactured*" grievances and defects on its works. It is also alleged that the Consultants "*maliciously*" withheld progress payments and failed to certify progress payment claims of works done, with intent that the plaintiff could not complete the works. As a result, it was forced to renege under the Contract. The defendants unlawfully terminated the Contract. The plaintiff claims general damages for breach of contract and special damages, in a sum of $1,924,469.78, as the value of works done less $642,667.99(VIP) received from the defendants. Alternatively, for works done on a "*quantum meruit*" basis.

2. The defendants, in their amended statement of defence deny the allegations and state that progress payments were determined from instructions and appropriate progress reports provided by the Consultants. The first defendant issued a Notice of Default to the plaintiff, as the plaintiff did not carry out its work and obligations under the Contract. The plaintiff was given 10 working days to complete or remedy the breaches, prior to termination of the Contract. The defendants assessed and paid the plaintiff only for works completed in accordance with specifications and standards set out in the Contract.

The determination

3. The parties entered into the Contract on 21st November,2005. The Contract was in writing and also contained in various documents, including the "*NZS 3910:2003 Conditions of Contract*",(NZS Conditions). The Schedule of Prices details the Summary of Prices and the works to be carried out. The works was to be completed in 56 weeks.

4. The statement of claim contends that the plaintiff was forced to renege on the Contract, as the Project Engineer:(i) manufactured grievances and defects on its works, and (ii) maliciously withheld progress payment claims. I will deal with the first allegation later in my judgment.

5. *The allegation against the Project Engineer*

PW3,(*Mr Anul Narayan, Managing Director of the plaintiff company*) in evidence in chief stated that DW2,(*Mr Erasito, the Project Engineer*) was against him, as he declined to give him the sum of $500,000.00 he requested. before the Contract was entered into. DW2 denied the allegation. PW3 said that PW2,(*Vishant Narayan, Investment Manager in Sydney*) informed the first defendant in writing that DW2 made this request. A copy of the communication was not produced. I hold that the allegation has not been established to the satisfaction of the Court.

Progress payment claims

6. Clause 12.1.1 of the NZS Conditions provides that the "*Contractor may submit to the Engineer payment claims under the contract*".

7. Clause 12.1.4 provides that the "*Engineer shall assess each of the Contractor's payment claims and may amend them as necessary to comply with the terms of the contract and his or her valuation of the work carried out*".

8. Progress payment claims were made by the plaintiff and certified by DW2, as follows:

(i)	Claim 1 of $ 200,000.00 made on 9 December, 2005	: $142,762.50
(ii)	Claim 2 of $ 436,595.06 made on 18 January 2006	: $ 90,279.51
(iii)	Claim 3 of $ 278,314.02 made on 13 February 2006	: $ 17,082.85
(iv)	Claim 4 of $ 370,679.34 made on 3 March 2006	: $ 38,675.06
(v)	Claim 5 of $ 532,764.00 made on 13 June 2006	: $ 83,349.00
(vi)	Claim 6 of $ 40,253.80 made on 22 June 2006	: This was not certified.

9. The plaintiff complained to the first defendant on the low certification of $90,279.51 for Claim 2. PW2 said that this resulted in the first defendant issuing an interim payment certificate on 1st February,2006, certifying $148,935.66. The plaintiff also objected to DW2's certification of $17,082.85 for Claim 3. The first defendant issued an interim payment certificate certifying $ 100,757.70.

10. The plaintiff primarily relies on these certifications to support its contention that the Progress Certificates issued by DW2 were erroneous and unfair.

11. The reasons for the increased payments are contained in the first defendant's letter of 12 May,2006, to DW2, as referred to by Mr O'Driscoll, counsel for the plaintiff in the cross-examination of DW2, viz, at that time, the Clerk of Works was not on site and the first defendant was unaware of the change in DW2's supervision personnel nor the construction anomalies. The letter reads:

> *,,,Please note that only two (Payments 1 & 2) progress payments had been processed and paid out by MoWE to the contractor. Details of payments are as follows:-*
>
> - *The first payment of $142,762.50 (VIP) was paid in accordance to your Progress Certificate No. 1.*
> - *For the payment number 2, we had change the payment under item 2.01 from your value of $59,868 to our certified value of $117,800. The P & G item you had certified was not changed. Therefore our Interim Payment Certificate (IPC) No. 2 certified a total of $148,935.66(VIP) and was paid to the contractor accordingly. .. we wrote to you on 20/2/06 to inform of the changes made and request that you adjust your payment certificate ..*
>
> *It must also be noted that this was the time when the clerk of works was not available on site nor was MoWE made aware of the change in ECL supervision personnel. Therefore after Alspec Holdings Ltd wrote to us refuting ECL's Certificate No. 2, we (MoWE) felt obliged to certify things ourselves since we were not fully convinced on ECL's certificate for reasons stated above. Thus a site visit was made by MoWE on 06/02/06 to ascertain AHL claim and subsequently the changes were made to Payment No. 2. It must also be stressed here that this payment was made before the construction anomalies was raised by ECL and therefore our certification was based on the 80% entitlement for the 1.2km pipeline completed. Moreover it was our (MoWE) understanding that you (ECL) had reconciled your certificates after notifying you on 20/02/06...*
>
> *Mr S. Yanuyanurua,*
> *Senior Engineer,(Water)*
> *For: Chief Executive Officer, Ministry of Works and Energy*

12. DW2 said that he reduced the value of the payments, as the plaintiff had not adhered to the specifications and drawings of the Contract nor remedied the construction anomalies, (as I have found in the final part of my judgment) and made unsupportable claims as follows.

13. In Claim 1, the plaintiff, claimed a sum of $10,000 for "*Fuel and operating costs*". PW3 admitted in cross-examination that there was no vehicle made available for the Engineer, at the time this claim was made. The Contract stipulated that a vehicle was to be provided to the Engineer.

14. Claims 5 and 6 contained six "*Variations*" of the Contract. PW3 said that his Engineer made requests for variations in writing, but DW2 did not reply. The requests were not produced. DW2 confirmed that any variation to the Contract has to be identified and negotiated, in terms of clause 9 of the NZS Conditions.It also transpired that the plaintiff had made Claims 5 and 6 in June,2006, 8 days apart from each other, contrary to clause 12.1 of the NZS Conditions. Clause 12.1.1 provides that no payment shall be submitted in respect of work carried out during period of not less than 1 month.

15. Moreover, there was no Performance Bond,(PB) in place when Claims 4,5 and 6 were made on 3rd March,2006, et seq. Clause 3.1.3 of the NZS Conditions stipulates that a claim shall not "*become payable until the Contractor*(has)..*executed and delivered the bond..*".The PB provided by the plaintiff was withdrawn by Dominion Finance Co Ltd,(DFCL) on 24 February, 2006.

16. PW2 said that the plaintiff was cash strangled, as payments were maliciously withheld. The material fact is that it did not have the financial resources to carry out the works. The plaintiff had purchased plant and equipment on loan, which were repossessed by its financiers.

17. In my judgment, the plaintiff has failed to establish that progress payment claims were maliciously withheld by DW2.

Termination of the Contract

18. The plaintiff contends that the defendants unlawfully terminated the Contract.

19. The first defendant gave notice of default to the plaintiff on 30th May,2006, giving 10 working days to complete or put in irrevocable measures to carry out the obligations under the Contract, which included providing a PB, demonstrating its finances and cash flow for the project, the services of a qualified "*Contractor's representative*", evidence of purchase of major materials, Sub Contractors, reports and records of work undertaken and the Engineer's vehicle.

20. The first defendant terminated the Contract by letter of 8th August,2006, which reads:

> *The Ministry of Public Utilities and Infrastructure Development (the Principal) refers to its "Notice of Default by the Contractor" dated 30th May 2006 wherein the* ***Principal requested that Alspec Holdings Ltd (the Contractor) fulfils its obligations under the Contract, including (but not limited to) provision of:***
>
> ***A Contractor's Performance Bond in accordance with .. Clause 3.1,***
>
> - ***Supply of Materials***
> - ***Repair of Defects,***
> - ***Project management, Quality Management, Plant, Labour and Supervision in order to advance and complete the Contract Works.***
>
> *The "Notice of Default by the Contractor" was received by Alspec Holdings Ltd on Thursday, 8th June 2000.*
>
> *Further, another meeting was convened on the 20th July 2006 at the Ministry's Head office following the contractor's request dated 22nd June, 2006 followed by another letter on 6th July 2006.* ***It was then decided in that meeting that the contractor be given another ten (10) working days to specifically provide:***
>
> *i)* ***A contractors Performance Bond in accordance with NZ:3910 2003 Clause 3.1***
>
> *ii)* ***A proof of financial capability and strong cash flow to sustain the duration of the project***
>
> ***The Principal has no received within the extended ten working days period that expired on Friday 4th August, 2006, any response from the Contractor in regard to the Notice of Default and also to the outcome of the meeting held on 20th July 2006.***
>
> ***Accordingly, the Principal hereby gives notice that under NZ 3910:2003 Clause 14.2.1 it has elected to terminate the contract.***(emphasis added)

21. Clause 14.2.1 of the NZS Conditions provides that:

> *The Principal may at its option after giving notice to the Contractor either terminate the contact or resume possession of the site in the event of:*
> *(a)* ***The Contractor failing to execute the*** *Contract Agreement under 2.7 or* ***the Contactor's bond*** *under 3.1 where required by the Contract Documents; or*
> *(b) The Contractor subletting the whole or substantially the whole of the Contract Works without the consent in writing of the Principal; or*
> *(c)* ***The Engineer certifying in writing to the Principal that in his or her opinion the Contractor has abandoned the contact or is persistently, flagrantly or wilfully neglecting to carry out its obligations under the contract;***
> *and the Contractor's default has not been remedied within 10 Working Days of receiving the notice.*(emphasis added)

22. The plaintiff had initially provided a PB dated 1st December,2005, from DFCL. PW2 alleged that the PB was withdrawn by DFCL, as the first defendant had breached the PB by making payments directly to the plaintiff contrary to its undertaking to make all payments to DFCL.

23. The parties and DFCL had entered into an agreement termed a "*Deed of Assignment*", in terms of which the plaintiff authorized the first defendant to release all monies payable to the plaintiff to DFCL and the first defendant undertook to do so.

24. I have examined the terms of the PB. In my view, the PB was clearly independent of the tripartite agreement. In cross-examination, PW2 could not point out to any provision of the PB, which provided it was conditional on the Deed, as contended.

25. It transpired in the cross examination of PW3 by Ms Solimailagi,counsel for the defendants that although the Deed was dated 1st December,2005, it was signed on 11th January,2006, and the first payment of $142,762.50 was made on 20 December,2005. It also emerged that the plaintiff's clerk had asked a staff member of DFCL, to accompany him to the PWD office, to collect the cheque in payment of the second progress claim, but DFCL declined to do so and chose to waive its rights.

26. In my judgment, the failure of the plaintiff to provide another PB was a valid ground for termination of the Contract, in terms of clause 14.2.1 of the NZS Conditions.

27. PW3, in cross examination accepted that DW2, as Project Engineer, as expert adviser was required to supervise the work, but denied that the works was not carried out according to the specifications and drawings. He said that DW2 wrote many letters containing instructions, but he did not supervise the project. He never visited the site nor measured the work done. He did not have experience in laying pipes and "*back filling*", that is to cover the pipelines.

28. Ms Solimailagi put it to PW3 that he did not comply with the instructions of DW2, in particular, to bring a type of sand stipulated in the specifications for the "*back filling.* His response was that DW2 did not understand there was no need to bring sand from elsewhere ,as there was sea sand in the vicinity.

29. Clause 6.2.1 of the NZS Conditions provides that the role of the Engineer is to give directions to the Contractor.

30. C0202B.13 of the Specifications and Drawings titled "*TRENCH EXCAVATION, BEDDING, BACKFILL AND REINSTATEMENT* "provides that

> *After the excavation has been completed and approved by the Engineer a layer of approved bedding material consisting of sand shall be placed on the subgrade and compacted to the grade of the pipe...*
> *No pipe shall be laid until the Engineer has approved the bedding*
> *The sand used for bedding and backfill to the pipe shall have a particle size not larger than 5-7 mm and shall be free from organic matter.*

31. DW2, in evidence in chief said that the plaintiff did not have the capacity,expertise, experience nor the appropriate machinery to conduct the works, as he observed when he visited the plaintiff's site office before the contract was awarded. He saw anomalies in the laying of the pipe. Site instructions were issued to the plaintiff from "*day 1*", as their verbal advice was not being followed. One hundred and six site instructions were issued instructing the plaintiff to have the construction anomalies rectified. The majority were not adhered to by the plaintiff. It continued to lay pipes in an incorrect manner.

32. DW2 produced his Project Report, which outlines "*the* (following) *major issues associated with the plaintiff's performance and other factors contributing to a significant delay in the works*,namely,(a)The PB was withdrawn by DFCL,(b)Major plants, equipment and belonging to the plaintiff were impounded by its financier in February,2006.The plant available was inadequate and broken,(c)Unsuitable management and supervision staff,(d)Abandonment of the Voua Pump Station and failure to remove the defective foundation, (e)Abandonment of the Natadola Reservoir. The plaintiff has been unable to secure a concrete mix design and supply precast unit fabrication and installation,(f)Abandonment of PVC pipe works,(g)Subcontracting of PE pipework to BW Holdings Ltd, which was not approved, and (h)Pipes leftover on site. A balance of 486 lengths of pipes were lying exposed in or around the FSC tramline and other areas along the pipeline route.

33. The witness stated further that the plaintiff was required to specifically focus on areas close to the tramline before the Fiji Sugar Corporation,(FSC) crushing season commenced in June ,but this was not done.

34. DW2 said that the plaintiff laid the pipeline incorrectly. It was not protected from rock and incorrect bedding material was used. The pipeline was laid sporadically over 16 kilometers only in areas that were easy to access. The pockets of pipe laid were not sufficiently long enough to conduct a pressure test.The final act of assessing a completed pipeline was to pressure test the pipes, as confirmed by PW1,[*Andrew Singh, Director, Weseng Consulting Ltd, formerly of Erasito Consultants Ltd and SKM*].

35. Next, he testified on the other two components of the project: the Natadola reservoir and Voua Pump Station. The plaintiff had only created a building platform for the reservoir and commenced with the preparation of the foundation for the pump station with reinforced concrete slab. DW2 said that he gave a zero valuation for Voua Pump Station.

36. DW2 continued to state that by letter of 25th May 2006, he informed the Director of the PWD he has suspended all pipe work due to the plaintiff's *"lack of resources,planning and management throughout the Contract Works to date.recent activities on Site have not been in accordance with the Engineer's Instructions and as a result there appears to be a significant escalation of these risks.*

In particular, the Contractor has continued to butt-weld PE pipe, even though:

- *The PE pipe welding sub-contractor has not been approved by the Engineer.*
- *The Contractor is unable to install PE pipe*

Consequently, extensive sectors of joined PE pipe are lying both inside and outside the FSC tramline reserve.. exposed and unprotected..

It is further highlighted that now the Contractor's only other activities are limited to:

- *Backfilling open trench in advance of closure of the tramline reserve.*
- *Minor benching earthworks at the reservoir.*

All other parts of the Contract Works appear to have been abandoned and the Contractor has no management on the Site..."

Finally, the letter expresses concern that the PB could not be enforced.

37. The Project Report contains the site instructions issued by Mr R. Imrie,(the Engineer's Representative),36 photographs depicting the plaintiff's delay of works, works not performed according to the work programme, orders made by the Engineers, correspondence and the Summary of Pipe works.

38. The first and second photographs depict the pipe placed on coral/silt subgrade without sand protection. The third contains sand that does not satisfy the specification. The fourth photograph shows that the pipeline is not supported by the bottom bedding. The others show presence of rock and stones in the backfill, damage to tramline etc.

39. In cross examination, DW2 reiterated that the first and second photographs depict that the pipe was place on coral, not sand. It was not a sandy area. Mr O'Driscoll asked DW2 whether the pipeline laid by the plaintiff largely remained. He said that the pipelines which were not in accordance with the specifications were extracted. He referred to his "*SUMMARY OF PIPEWORKS STATUS*" contained in his Project report, which depicted the status of the pipelines laid by the plaintiff.

40. The plaintiff's position is that it carried out the works according to the specifications and drawings. In answer to Ms Solimailagi as to whether the defects raised in the Notice of Default were rectified, PW3 said that there was no default on the part of the plaintiff. In support, the plaintiff produced a report of 17th October,2006, prepared by Chris Pulbrook of Sinclair Knight Merz,(SKM) which was given to the first defendant. This report states that the "***final valuation of works under the contract for items able to be verified from physical evidence on site is accordingly $1,418,145(VEP)***".(emphasis added)

41. DW2 refuted all the statements in the SKM report, with reference to contemporaneous records kept by him on a daily basis, recordings of formal meetings, photographs, survey records videos, photographs and physical samples jointly taken by the plaintiff, the first defendant and himself. SKM was not aware of the construction work on a daily basis, as it came into the project at a late stage, after the Contract was terminated on 8th August,2006. DW2 concluded that the report was speculative and did not have any merit whatsoever.

42. DW2 produced his comprehensive response of 11th April,2007,on the SKM report to the first defendant. I reproduce extracts from his response.

> ***The list of observations given by SKM are of unknown origin as, prior to termination of the contract, AHL/SKM advised that they had no record of any pipework that it had carried out. It appears that a partial walkthrough of the Site has been undertaken after the termination.***
>
> ***The pipework that is to be removed has been installed in various unsatisfactory conditions, including (but not limited to) combinations of:***
> - ***Silt/coral/rock subgrade without any bedding.***
> - ***No side support bedding.***
> - ***No top over bedding.***
> - ***End support bedding only.***
> - ***Uncompacted bedding.***
> - ***Uncompacted backfill.***
> - ***Backfill containing large rocks.***
> - ***Rock backfill that has been pushed on to the pipe.***

> ***It should be noted that inspection holes were only one mode of determining the level of the Contractor's workmanship by the Engineer.*** *AHL's own staff advised that they had installed pipework without bedding, and significant parts of the work were left open in which pipework could be seen without bedding, and with unsatisfactory support to the pipe.*

On the other hand, SKM acknowledges that pipework installed by AHL was not in accordance with the contract, but in SKM's opinion, such pipework is still of value to MPUID. *The main point in this argument is that SKM appears to claim that other similar pipes are laid in similar conditions (presumably this is deemed to mean without screened sand embedment). ECL is not aware of any such work through its own consultancy practice where it has specified pipework without screened embedment, or indeed any other part of the pipework that is specified to a lesser than that used in this contract.*

The contract provides a 20% reduction in the value of pipework until the satisfactory completion of testing and sterilization. AHL carried out no testing, despite recommendation by the Engineer to carry out testing as early as possible to verify that its construction methods were producing satisfactory pipework. AHL was dismissive of such recommendations, and it is still unknown whether any pipework installed by AHL will perform satisfactorily.

Throughout AHL's pipework activities, it continuously attempted to install pipes that were only laid supported on one or two locations per length. The Specification requires full support on compacted bedding for the full length of the pipe. *This is to provide adequate load distribution and to minimize the possibility of join rotation. This is industry standard practice, which should be known to AHL/SKM, but it is not referred to in the SKM document.*

Joining of PE pipework was done by an unapproved subcontractor using an unapproved method. It has resulted in large lengths of pipework in positions distant from its intended location, from where it will now be difficult and costly to relocate. It will need to be tested prior to handover, cut up and re-handled. AHL continued to construct pipework in this manner despite repeated instructions from the Engineer.

When it became clear that AHL were unable to complete pipework, the Engineer gave instruction for AHL to remove pipes from the Site and transport them to a secure location. AHL did not do this and abandoned the pipes. It is likely that the pipes have been damaged and will now have to be recollected, retested and accepted by a new contractor.

It is clear that AHL has attempted pipework only in soft ground using free issue pipes and fittings provided by MPUID. At the start of the contract it did this with large, new excavators, which were later impounded by a finance company in February, 2006.

AHL then carried on working through any remaining soft ground with its own remaining dilapidated plant. One or two locations in about 6km of intermittent trenching that AHL undertook in such circumstances. Specification Clause CO202A.8 provides the method for determination of whether material will be paid under the contract rock rates.

The Engineer did not authorize, or observe, any fences that had to be removed in order to install pipework. It is likely that claims by AHL/SKm are overstated and/or involve fences that it removed as a result of unnecessary work that it did outside the Site, and hence caused damage to the property of others.

The damp proof membrane is part of the grossly defective work that AHL undertook in its construction of the reinforced concrete foundation. (emphasis added)

43. I do not accept the SKM report for the reasons given by DW2 and as Chris Pulbrook, its maker was not available to testify to its contents. He was deceased. PW1 was called to testify on the contents of the report, on the basis that he was involved with SKM at the time the report was prepared. It transpired in cross-examination, that this witness was not involved in the evaluation process undertaken by SKM. He was unaware as to whether the evaluation was carried out according to the specifications. He had not seen the specifications and drawings nor the Contract. He said that he was asked to give evidence generally.

44. On a review of the evidence of DW2, supported as it is by site instructions, instruction orders, photographs together with the contemporaneous correspondence between DW2 and the plaintiff and DW2 and the first defendant on the continuing defaults of the plaintiff, I am satisfied that the plaintiff had not laid the pipes in accordance with the specifications and drawings.

45. The plaintiff did not provide any satisfactory evidence to controvert the cogent evidence produced by the defence. PW3 and his son, PW2 gave unconvincing and untruthful testimony. PW2 admitted that he was not qualified to assess the work nor speak on the technical specifications. He said that he had field experience and was involved with the plaintiff in the pre tender stage of the Contract. I have found that PW3 disregarded the specifications and made unfounded allegations against DW2 .

46. The plaintiff was given an opportunity to rectify the defects after the issue of the Notice to Default and a further ten days. PW3 maintained that there was no default, as I have already noted. Ms Solimailagi pointed out in the cross-examination of DW2 that the plaintiff had not invoked the dispute mechanism provided under the Contract, to raise the concerns it had regarding the Notice of Default, DW2 or the Clerk of Works.

47. In my judgment, the termination of the Contract was justified.

48. The next issue for determination is whether the plaintiff had been paid for the works correctly done.

49. Mr O'Driscoll produced the "*REPORT ON THE CONSTRUCTION OF THE NATADOLA RESERVOIR,THE VOUA PUMP STATION AND THE VOUA TO NATADOLA PIPELINE*", through DW1,(*Susana Pulini, Director, Dept of Water and Sewerage*). The Report contains the internal assessment of the works signed by seven members of the Panel of Engineers of the first defendant on 24th March,2009. This Report states that the total pipes laid successfully was 4289m, for which the total cost of laying is $514,680 VEP. The Report concludes that $462,238.12 remains outstanding following the termination of the Contract and 10% be retained to give a total retention value of $ 78,534.74 VIP.

50. DW1 said that that fifty per cent of the total retention was released to the plaintiff by a payment voucher of 25th September, 2009, in a sum of $32,057.95.

51. It transpired that the plaintiff had damaged the tramlines. There was an agreement between the FSC and the plaintiff, for the plaintiff to pay any damages caused to the tramline. The pipelines were constructed along he boundary of the tramlines and were damaged, as depicted in the photographs contained in DW2's Project Report. The increased bond of $ 24,000 given by the plaintiff was inadequate, to cover the FSC claim of $80,968 paid by the Water Authority of Fiji, as stated by DW3,(*Nemani Waqanivalu, General Manager, Planning, Design and Construction, Water Authority of Fiji*).

52. The question as to whether the sum of $357475.23 was paid as a final payment or in respect of Claim 3 was a matter in dispute. The controversy stems from the payment voucher of 2nd September, 2009, which states the sum of $357475.23 is "*Being payment of claim #3*".

53. PW2 and PW3 contended that this sum was in payment of Claim 3, as stated in the payment voucher. When Mr O'Driscoll quite correctly asked PW3, why the payment exceeded the claim, he gave an unrelated answer, viz, that the financier had "*stopped the Performance Bond*". PW2, in cross-examination said that the first defendant wanted to pay an amount higher than the claim because of the low certification by the Engineer. I do not find it necessary to deal with this contention.

54. The defendants argue that this sum was made in payment for Claims 4,5, and 6, as testified by DW1. She said that no payments were made to the plaintiff thereafter.

55. DW4,(*Manasa Lesuma, Deputy Secretary, Operations, Ministry of Infrastructure and Transport*) said that the sum of $357475.23 was paid after verification. It was referred to as claim 3 in the payment voucher, as two payments were previously made. This was the third.

56. In my view, it stands to common sense and reasoning that the sum of $357475.23 was paid as a final assessment and not in respect of Claim 3 for the following reasons. Firstly, this sum exceeds the sum of $278,314.02 claimed by the plaintiff in Claim 3. Secondly, the first defendant had already issued an interim payment certificate for Claim 3, which was processed on 9th March,2006. Finally, no payments were made to the plaintiff after the contract was terminated in August,2006.

57. The alternative claim for works done on a "*quantum meruit*" does not arise, as the plaintiff has been paid the value of the works correctly done.

58. In my judgment, the plaintiff's case fails.

59. ***Orders***

(a) The plaintiff's claim is declined.

(b) The plaintiff shall pay the defendants costs summarily assessed in a sum of $ 10,000.

A.L.B.Brito-Mutunayagam

Judge

A.L.B.Brito-Mutunayagam
Judge
8th June,2018