

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 22 of 2014

BETWEEN : **CHANDAR BHAN** and **FLORENCE ANITA PRASAD** both of Pacific Harbour, Navua in Fiji, Retired Businessman and Businesswoman respectively.

PLAINTIFF

AND: **PREM CHAND** of Lokia, Nausori in Fiji trading as **PREM BUILDERS**.

DEFENDANT

Counsel : **Plaintiff:** **Mr. V. Kapadia**

Defendant: **Mr. S. Chandra**

Date of Hearing : **14.11.2016**

Date of Judgment : **19.6.2020**

Catch words

Construction contract-Liquidated Damages-variations/additional work- clause for extension of time- estoppel-parties deviating form terms-general damages

Cases submitted by Plaintiff in written submissions

1. *Mahendra Motibhai Patel v. Fiji Independent Commission Against Corruption*, (FJCA Criminal Appeal No. AAU 0039 of 2011)
2. *Browne v. Dunn*, [1893] 6r 67 (Court of Appeal of England)
3. *Murugesan Pillai v. Gnana Sambanda Pandara Sannadhi*, (AIR 1971 PC6) (Privy Council Appeal No. 117 of 1915)
4. *L'Estrange v. F Graucob Ltd*, ([2005 Volume 17, Issued 2, Article 10] Bond Law Review)

5. NBF Asset Management Bank v. Chand Kuar Sharma and Ram Harak Sharma, (FJHC Civil Action No. HBC 0132 of 1999)
6. Rama v. Sher Ali & Sons Ltd, (FJHC Civil Appeal No. 491 of 2016)
7. Wadman v. Kamea (FJHC Civil Action No. 287 of 2001)
8. Nitya Rama v. Sher Ali & Sons Limited and Patel & Sharma Lawyers, (FJHC Civil Appeal No. 09 of 2014)
9. Damodar Narsey and others v. Mata Prasad and others, ([1973] FJCA 19 FLR 39)
10. Carlill v Carbollic Smoke Ball Co, (1892 WL 9612 (CA), [1893] 1 Q.B. 256)
11. Photo Production Limited v Securico Transport Limited, [1980] AC 827
12. Equuscorp Pty Ltd V Glengallan Investments Pty Ltd (Matter No. B93/2003) (High Court of Australia)
13. Martin Francis Byrnes v Clifford Frank Kendle, [2011] HCA 26 A23 of 2010
14. Pathak vs Sami[2009] FJHC 153

Cases Referred in the Judgment

15. Unaoil Ltd v Leighton Offshore Offshore Pte Ltd (Rev 1) [2014] EWHC 2965 (Comm) (12 September 2014)
16. Cleveland Bridge UK Ltd v Sarens (UK) Ltd [2018] EWHC 751 (TCC) (10 April 2018)
17. Dodd v Churton [1897] 1 QB 562
18. Liberty Mercian Ltd v Dean & Dyball Construction Ltd [2008] EWHC 2617 (TCC) (31 October 2008)
19. Air Studios (Lyndhurst) Ltd t/a Air Entertainment Group v Lombard North Central plc [2012] EWHC 3162
20. Arcadis Consulting (UK) Ltd v AMEC (BSC) Ltd [2016] EWHC 2509 (TCC)
21. Great North Eastern Railway Ltd v Avon Insurance Plc [2001] EWCA Civ 780
22. Stearns Bank plc v Forum Global Equity Ltd [2007] EWHC 1576 (Comm)
23. Crest Nicholson (Londinium) Ltd v Akaria Investments Ltd [2010] EWCA Civ 1331
24. Day Morris Associates v Voyce [2003] EWCA Civ 189
25. Spartafield Ltd v Penten Group Limited [2016] EWHC 2295 (TCC)
26. GNER v Avon Insurance Ltd [2001] EWCA Civ 780
27. Wood v Capita Insurance Services Ltd [2017] UKSC 24

28. Dunlop Pneumatic Tyre Company Ltd v New Garage and Motor Company Ltd [1915] AC 79
29. Tito v Waddell(No2) 1977 Ch 106

JUDGMENT

INTRODUCTION

1. The Plaintiffs issued a Writ of Summons and Statement of Claim against the Defendant. Plaintiffs entered in to a construction contract (the Contract) with Defendant to build a house. The contract price included labour and building material. This construction of house was to be according to the plan supplied by Plaintiff. The Contract stated that house for Plaintiffs needed to be in completed within eight months from 15.10.2012, and if not a Liquidated Damages (LD) would be charged at predetermined, \$ 1,000 a day. The Contract also state that Defendant needed to comply with the directions given by Plaintiffs and also any variations to the contract needed to be in writing before start of additional work or variation. There were admitted evidence that Plaintiff had sought some structural variations, but the cost and time for such variations were not agreed between the parties in terms of the Contract. Defendant did not complete the house within stipulated time and the Contract was terminated on 10.12.2013. Plaintiff was seeking LD for time period it had exceeded when notice of termination of the Contract was given. Defendant was counterclaiming for additional work he did. Defendant was also stating that the Contract was unreasonably terminated. Defendant could not have completed within stipulated time and additional time and material were also needed hence Plaintiffs could not seek LD (see Unaoil Ltd v Leighton Offshore Offshore Pte Ltd (Rev 1))¹. The Contract contained a clause that required Defendants to work continuously and if work was ceased for more than two days the right to termination and also seek damages. It was admitted fact that Defendant had stopped work for more than stipulated time, but Plaintiff failed to prove damages due to such stoppage. Plaintiff did not produce any payments to subsequent contractors and or assessed the work done by Defendant when contract was terminated. There was no evidence that house was completed by subsequent contractors after termination of the Contract, in accordance with plan relied on the Contract which was priced at \$285,000. Plaintiff's claim for LD and general damages fail. Defendant's counter claim was not proved as there was no proof of reconciliation of work completed before termination and payments made. In order to claim for additional work Defendant needed to prove reconciliation of work he did with payments received.

FACTS

¹ [2014] EWHC 2965 (Comm) (12 September 2014)

2. In the Statement of Claim the Plaintiff sought reliefs against the Defendant as following terms:
 - (i) The sum of \$178,000 as LD from 15.6. 2013 to 10.12. 2013 at the rate of \$1,000 per day for 178 days.
 - (ii) General damages for breach of Contract.
3. The Plaintiffs claim is for an order for the LD of \$1,000 per day for 178 days (from 15.6. 2013 to 10.12. 2013) as per Clause 2 of the Contract (Marked as P2 at trial).
4. The Defendant filed his statement of defence including a counter claim for additional works of \$32,820.
5. In the said statement of defence it was alleged inter alia:
 - a. Denied signing of the Contract dated 16.1.2013.
 - b. Work did not begin on 15.10.2012.
 - c. No agreement as to finish work within eight months.
 - d. Denied contents of pages 3 and 4 of the Contract of 16.1.2013.
 - e. Was not independently advised before signing of the Contract and opportunity to seek such advice was not given.
 - f. The terms relating to LD, which was penal not explained, and had no knowledge of that.
 - g. Defendant was shut out from the site of work by Plaintiffs.
 - h. Complied with plans provided by Plaintiffs.
 - i. Termination of contract was unjustified.
6. For the Plaintiffs first named Plaintiff gave evidence he stated that there were two agreements entered and initial agreement (P1) was entered to start work relating to construction of house and second contract was more detailed construction contract (P2). Both these contracts state the completion date as eight months from 15.10.2012.
7. The value of both P1 and P2 was same and it was \$285,000 and they both related to building of a house, according to plans and specifications supplied by the Plaintiffs. The Contract was to supply both labour and building material including plumbing and electrical works. It was admitted that Plaintiffs supplied doors and windows.
8. According to Plaintiff Defendant had complied with their requests of variations, without seeking additional time or money. Accordingly, Plaintiff had paid a sum of \$227,000 to the Defendant and had stopped payment as work had stopped for more than a month.

9. Defendant gave evidence and said that he had agreed and also complied with all the requests of Plaintiffs for variations from initial plan. According to him he had requested \$27,000 for such variations and from this a sum of 7,000 was paid by Plaintiff.
10. Defendant also called the foreman of the construction, and he said there were number of variations and they were all complied. He said such variations needed extra time, but did not specify a time period.
11. According to Defendant's evidence the delay in the construction was due to additional work and adverse weather and or Plaintiff's nonpayment.
12. Both parties filed written submissions with some case authorities.
13. According to a site inspection done by engineers (marked as P11)

"The site revealed that construction has yet to be completed as only the concrete shell has been erected up to the RC roof beam. As it is, there is currently no roof, doors, windows and plaster on walls."

ANALYSIS

14. Plaintiff's claim based on LD and General Damages for breach of the Contract. Plaintiff had given notice of termination to Defendant on 10.12.2013 on the basis that construction had not completed by stipulated eight month time period by 15.6.2013 and also for stoppage of work beyond time allowed under the Contract.
15. Defendant had pleaded that he did not sign the Contract dated 16.1.2013. (See paragraph 1(a) of statement of defence) This was the agreement that contained a clause for LD. So the first issue is whether he signed the Contract. He had also stated that there were no third and fourth pages in the Contract, which was contrary to his earlier position. He had also stated that he was not given opportunity to obtain independent legal advice.
16. Plaintiffs and Defendant had entered in to two contracts. The first contract was not a detailed one and it only stated the final price of the contract and nature of the contract and also time of completion. It can be considered as preliminary agreement of key issues to be followed with more detailed agreement. Plaintiff said that soon after entering in to first contract he had gone abroad and ground preparation had started with that initial contract and payment of money to the Defendant. This contract was marked P1 and date was 15.10.2012.
17. Plaintiff had returned from abroad, and was satisfied with Defendant's preliminary work on the site and more detailed contract was entered. Plaintiff explained the circumstances that resulted in these two contracts. First contract was entered without the assistance of

lawyers and the Contract dated 16.1.2013 was executed with involvement of solicitors, through whom money for part completion for construction was paid. Plaintiffs were residing overseas and payments were done locally and also in abroad when Defendant visited them twice for purchase of doors and windows for the house.

18. Defendant had pleaded that he was not explained as to the content of the Contract and more specifically LD clause which had predetermined damages for late completion at the rate of \$1,000 per day. Defendant stated that he was not given an opportunity to seek independent legal advice regarding terms of the contract and he was not explained as to the contents of clause relating to LD.
19. In a recent UK Technology and Construction Court (High Court) decision Cleveland Bridge UK Ltd v Sarens (UK) Ltd [2018] EWHC 751 (TCC) (10 April 2018) it was held ,
“The principles to be applied when identifying whether a term has been agreed by the parties and, if so, the proper interpretation of that term.

Before I turn to look in detail at the chronological run of documents passing between the parties, I should set out briefly the well-established and uncontroversial principles that I must (and do) have in mind in dealing with the issues raised in this case:

- (i) In determining whether a term forms part of a contract (or indeed whether the parties have reached agreement at all), it is necessary to look at the whole course of the parties' negotiations (see Chitty on Contracts 32nd Edition at 2-027 and Air Studios (Lyndhurst) Ltd t/a Air Entertainment Group v Lombard North Central plc [2012] EWHC 3162, per Males J at [5]-[12]);
- (ii) In looking at the chronological documents I am not concerned with the subjective state of mind of the parties, but with arriving at an objective conclusion as to whether the parties intended to create legal relations (see Arcadis Consulting (UK) Ltd v AMEC (BSC) Ltd [2016] EWHC 2509 (TCC) per Coulson J at [50]);
- (iii) In seeking to arrive at an objective conclusion, I am required to place myself into the same factual matrix as that occupied by the parties (Great North Eastern Railway Ltd v Avon Insurance Plc [2001] EWCA Civ 780, per Longmore LJ at 28). This will involve asking how a reasonable man, versed in the business, would have understood the exchanges between the parties (Bear Stearns Bank plc v Forum Global Equity Ltd [2007] EWHC 1576 (Comm) per Andrew Smith J at [171]);
- (iv) In examining the exchanges to see what, if anything, has been agreed, I should be looking for (i) a proposal (or offer) from one party (A) which is capable of being accepted by the other party (B) and (ii) acceptance by the party (B) to whom the proposal was made. In determining the first of these questions, the correct approach (consistent with the objective approach identified in the

preceding paragraph) is to ask whether the offeree (B) (having the knowledge of the relevant circumstances which the offeree had) acting reasonably, would have understood the offeror (A) to be making a proposal to which he intended to be bound in the event of an unequivocal acceptance (*Crest Nicholson (Londinium) Ltd v Akaria Investments Ltd* [2010] EWCA Civ 1331 per Sir John Chadwick at [25]);

- (v) A contractual acceptance has to be a final and unqualified expression of assent to the terms of the offer. Conduct may amount to an acceptance if it is clear that the offeree did the act in question with the intention of accepting the offer. This is however an objective test and the conduct must be clearly referable to the offer and, in the absence of knowledge of the offeree's reservations, not reasonably capable of being interpreted as anything other than acceptance (*Day Morris Associates v Voyce* [2003] EWCA Civ 189 per Black J at [35]). Silence or inactivity by a party in response to an offer will not generally amount to an acceptance (Keating on Construction Contracts 10th Edition at 2-048);
 - (vi) It is open to the court to decide that a contract was formed in a manner that is not contended for by either party (*Spartafield Ltd v Penten Group Limited* [2016] EWHC 2295 (TCC) per Mr Alexander Nissen QC at [92] and *Arcadis Consulting (UK) Ltd v AMEC (BSC) Ltd* [2016] EWHC 2509 (TCC) per Coulson J at [47]);
 - (vii) Events occurring after an agreement was made are admissible in the context of the objective exercise of determining whether a particular term was agreed, despite not being admissible for the different exercise of construing the terms of an acknowledged agreement (*GNER v Avon Insurance Ltd* [2001] EWCA Civ 780 per Longmore LJ at [29]);
 - (viii) As to the interpretation of a term, the law was recently restated by Lord Hodge in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 at [10]-[14]: "The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement". This is to be done against the relevant factual background known to the parties at or before the date of the contract but excluding evidence of prior negotiations."
20. In the analysis of evidence that it is proved on balance of probability that the Construct of 16.1.2013 was entered between the parties and there was no obstacle for Defendant to seek independent legal advice if he desired. Period of completion was discussed between the parties and had entered initial contract P1 which contained contract price and also time of completion. This contract was executed by solicitors and being an experienced contractor, Defendant knowledge about the Contract and the existence of clause for LD.
21. After considering required labour and material both parties had agreed to a price of \$285,000 and also time for conclusion was eight months from 15.10.2012. Document

marked P1 dated 15.10.2012 was the precursor to the formal Contract that entered with the assistance of solicitors which contained LD. Defendant's denial of that document was an afterthought.

22. Plaintiff had entered in to the Contract with Defendant and it contained a clause for LD. This was for assessment of damages in case of delay in completion, having considered various factors. So LD was agreed between the parties considering whole contract and circumstances.
23. It can be presumed that the value of the contract was agreed on a specified plan though that was not stated in any of the two agreements entered between parties. Without a specific plan it was not possible to estimate price of construction at \$285,000 which included labour as well as materials. Though neither party relied on said plan it was part and parcel of the Contract to give effect to the determination of price for labour and material needed for the construction.
24. Parties had agreed to facts at pre-trial conference:
 - a. *The Plaintiffs are and were at all material time the registered proprietor of all that piece and parcel of land comprised in Certificate of Title No. 39531 being all that land described as Lot 3 on DP 9650 and situate at Pacific Harbour, Navua (hereinafter referred to as the "said property").*
 - b. *The Plaintiffs entered into a building contract with the Defendant whereby the Defendant agreed to build a dwelling house for the Plaintiffs on the said land according to the building plans and specifications.*
25. Having agreed for those facts, Defendant is now attempting to dispute the ownership of land which was transferred which was irrelevant to claims before me.
26. Defendant in his evidence denied seeking the lawyer who gave evidence as the person who executed the Contract on 16.1.2013. On the analysis of evidence Defendant was not consistent and had taken contradictory positions regarding the Contract dated 16.1.2013. In my judgment Defendant was not truthful about the execution of the Contract. He had signed it with full knowledge of the LD. He was an experienced contractor who had engaged with much larger projects on his own evidence. So he cannot be naïve about LD in construction contracts.
27. Having decided that Plaintiffs and Defendant had entered in to the Contract, the Law relating LD and General Damages needs to discuss. The emphasis on evidence was not for claim on general damages but for LD, as only the Plaintiff gave evidence. There was no proof of evidence to calculate compensatory damages for delay and this will be discussed later.

28. The Defendant had not pleaded that LD clause was not enforceable as it was penal. Courts are reluctant to invalidate LD clause when they are of equal status, when they enter in to a contract. Plaintiffs were residing overseas and Defendant was a contractor who was engaged in several building projects. So neither party had any undue bargaining power and agreement was entered at arm's length.

Liquidated Damages (LD)

29. In UK High Court (Technology and Construction) *Liberty Mercian Ltd v Dean & Dyball Construction Ltd* [2008] EWHC 2617 (TCC) (31 October 2008) it was discussed law applicable to LD as follow;

“The courts have always been wary of allowing one party to a contract to avoid the consequences of a liquidated damages provision freely entered into. In *Dunlop Pneumatic Tyre Company Ltd v New Garage and Motor Company Ltd* [1915] AC 79, the House of Lords held that where a single sum was agreed to be paid by way of liquidated damages on the breach of a number of stipulations of varying importance, and the damage was the same in kind for every possible breach, and was incapable of being precisely ascertained, the stipulated sum, provided it was a fair pre-estimate of the damage and not unconscionable, would be regarded as liquidated damages and not as a penalty.

In more recent years, arguments as to whether or not the sum in question was or might be a penalty have often turned on the clumsy drafting of the contract in question which, so it was argued, could give rise to sums that would not be a genuine pre-estimate of loss. An example of this 'mathematical' approach in a building case, where the court declined to construe the provisions as a penalty, was *Philips Hong Kong v The A-G of Hong Kong* (1993) 61 BLR 49.

However, there are buildings cases in which that contention has been successful. In *Bramall and Ogden Limited v Sheffield City Council* (1983) 29 BLR 73, His Honour Judge Hawser QC held that the contractual arrangement was a penalty because the sums payable by way of liquidated damages could substantially exceed the actual loss suffered. The difficulty in *Bramall and Ogden* was that the contract did not provide for sectional completion, although that was what was happening on the ground. As a result, because the contract simply provided that damages might be recoverable at the rate of £20 per week for each dwelling, there was a risk that liquidated damages could be levied in relation to properties that had already been completed and handed over. The learned editors of the BLR comment that this was a rather strict construction of the contract provisions. It led directly to the amendments to the JCT forms which expressly allowed for sectional completion.

An argument that a liquidated damages provision was, in reality, a penalty arose very recently in the TCC. In *Braes of Doune Windfarm (Scotland) Ltd v Alfred McAlpine Business Services Ltd* [2008] EWHC 426 (TCC) Akenhead J was dealing with an appeal from an arbitrator who had found that the provisions of the contract were not capable of generating with certainty liquidated damages flowing from an identified breach by the contractor, and that therefore the relevant clause should not be enforced. *Akenhead J* initially thought that it was at least arguable that the arbitrator was obviously wrong because, as he observed, it was unusual for liquidated damages clauses freely agreed by the parties to be regarded as unenforceable. However, having worked his way through the contractual provisions, the learned judge concluded that not only was the arbitrator not obviously wrong but that his decision was ultimately right. The problem in that case was that, because of how it was drafted, the liquidated damages clause could well impose a liquidated damages liability on the contractor in respect of delays to individual wind turbines which were caused by another contractor altogether.

Of course, another way in which it can sometimes be argued that the **liquidated damages provisions constitute a penalty is the situation where the employer has prevented completion and could be said to be seeking to take advantage of that wrong by levying liquidated damages in respect of the delay.** It was the proliferation of such arguments which gave rise to extension of time provisions in the first place, in order to ensure that the contractor was not penalized for delays which were not his responsibility, but that an employer could be compensated by way of liquidated damages for those delays for which the contractor did bear the risk under the contract. The decision of the *Court of Appeal in Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* [1970] 1 BLR 111 is an example of a case in which the liquidated damages provision was not found to be operable because the particular extension of time mechanism under consideration there did not allow a **proper extension of time to be granted in relation to delays for which the employer was to blame.**

With those principles in mind, I turn to address the particular issues that arise in the present case.”(Emphasis added).

30. If employer (i.e. Plaintiffs) had requested additional work or structural variations to the construction contract that would have affected the completion time. So it was nothing but prudent to restate new position and agree to renewed position with LD. When an initial project was varied LD needs to be adjusted or at least restated so the parties were clear about completion date, cost and method of payment for additional work and time for completion of the additional work and also be aware of renewed completion date with renewed LD.

31. The owner cannot request a contractor for variations and or additional work in terms of the construction contract, or otherwise, and at the same time rely on LD in terms of the contract when there was a delay. It would be most unreasonable to do so.
32. In this case Plaintiffs had not even agreed as to the cost of the additional work in writing, while the costs of construction materials and work to be done, were factored in to the Contract price, completion time and also LD.
33. Contractor is not bound by completion date when the employer had requested additional work that require additional time and also additional material, and LD cannot be claimed by Plaintiffs.(see Dodd v Churton [1897] 1 QB 562).
34. Lord Denning in Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board in Court of Appeal held,

*“It is well settled that in building contracts –and in other contractor- when there is a stipulation for work to be done in a limited time, if one party by his conduct- and may be quite legitimate conduct, such as ordering extra work-renders it impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon strict adherence to the time stated. He cannot claim any penalties or liquidated damages for non-completion in that time.”*²
35. Lord Denning had derived said principle from Dodd v Churton [1897] 1 QB 562³ and House of Lords in Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board , approved said position.⁴
36. If the employer decided not to request additional work in writing in terms of the construction contract, he cannot take advantage of that to state such additional work was not done in terms of the agreement, when evidence indicated to the contrary.
37. Plaintiff was estopped from denying additional work, irrespective of such work was not carried out in terms of the Contract. Plaintiffs cannot rely on LD, as they had requested for additional work and had not adhered to terms of the Contract and encouraged the Defendant or allowed the Defendant to act outside the terms of the Contract.

² Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board [1973] 2 All ER 266 (HL) Per Lord Pearson

³ The Court of Appeal held that building owner may compel the contractor to carry out extra works pursuant to a variations clause. The contractor could not be held liable for default when he had been prevented from performing his obligations by the acts of the building owner. Lord Esher MR stated 'the reason for that rule is that otherwise a most unreasonable burden would be imposed upon the Contractor'.

⁴ Ibid p 266 paragraph g

38. Plaintiffs cannot rely on novation to impose LD on Defendant.
39. Parties who had voluntarily acted outside of contract cannot pick and choose only LD and insist on that to other party, this is not only unreasonable but also not proper interpretation of the construction contract that they entered. (See *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* 1973(2) All ER 260 (HL).
40. In the analysis of decisions of UK court, and applicability of LD, text **Hudson’s Building and Engineering Contracts** (10th Edi) at p 631-632 stated. “It is suggested that the effect of the preceding cases is as follows:
- (a) That acts of prevention by the employer, whether authorized by or breaches of the contract, will kind general set time at large and invalidate any liquidated damages clause, **in the absence of an applicable extension of time clauses.**⁵⁹
 - (b) That **where the act of prevention is a cause of part of the delay but not the whole, the liquidated damages clause will still be invalidated,** ⁶⁰ unless an applicable extension of time clause exists.⁶¹
 - (c) That where there is an extension of time clause, this is regarded as being inserted for the benefit of the employer, since it operates to keep alive the liquidated damages clause in the event of delay being due to an act of the employer or his agents.⁶² Where it does not cover the acts of prevention which have in fact occurred, no decision under the clause can bind the builder, or preserve the liquidated damages clause.⁶³
 - (d) That general or ambiguous words in an extension of time clause, such as “any matters beyond the control of the builder” will, for this reason, not be construed to include acts of prevention or breaches of contract by the employer or his architect.⁶⁴
 - (e) But that where an extension of time clause does clearly cover the delay in question, even if it involves prevention or breach of contract by the employer, the normal sense of the contract, and the law relating to the approval and

⁵⁹ *Holme v. Guppy; Thornhill v. Neats; Dodd v. Churton; Wells v. Army and Navy Co-op. Society, supra.*

⁶⁰ *Holme v. Guppy; Russell v. Sa Da Bandeira; Dodd v. Churton and Wells v. Army and Navy, etc.; Peak Construction Ltd. v. McKinney Foundation Ltd.*

⁶¹ *Legge v. Harlock* (1848) 12 Q.B. 1015.

⁶² See *post*, Section 3.

⁶³ *Murdoch v. Luckie; Meyer v. Gilmer; Wells v. Army and navy Co-op. Society; Peak v. McKinney, supra.* See also *Gallivan v. Killarney U.D.C.* [1912] 2 I.R. 356, *infra*, Section 3 (3), p. 643. The clause will be equally inoperable in the hands of an arbitrator, it is submitted.

⁶⁴ *Wells v. Army and Navy Co-op. Society* (1902) Hudson’s B.C., 4th ed., Vol. 2, p. 436; *Perini Pacific Ltd. v. Greater Vancouver Sewerage* (1966) 57 D.L.R. (2d) 307 (Canada); *Peak v. McKinney*; and see *Russell v. Sa Da Bandeira* (1862) 13 C.B.(N.S.) 149. This principle does not seem to apply, however, in the somewhat analogous case of forfeiture clauses—see *wadey’s case*, illustrated *post*, Chap. 13, p. 693.

certificates of quasi-arbitrators⁶⁵ will require that, if an extension of time is refused, this will bind the builder,⁶⁶ a *fortiori* if some extension has been given, subject to any overriding arbitration clause.⁶⁷

- (f) An extension of time clause may, however, fail, and with it the whole of the liquidated damages clause, if it is not exercised within any time permitted by the contract, in certain rare cases where the contract may restrict the time for its exercise.⁶⁸ (emphasis is mine)
41. In the Contract there was LD clause and also provision to extend the time of the contract for specified reasons stated in clause 6. Once such reason was ‘extras or variations requested by the owner’. There were evidence to the effect that Plaintiffs had requested variations from initial plans and reason for that were that some of the rooms were smaller than expectation of Plaintiffs, which cannot be attributed as a defect of Defendant.
42. Plaintiff had requested to demolish certain construction of walls and had requested making bed rooms bigger. He had also requested to demolish another wall which he considered needed some iron rods. There were no allegation of Defendant either using substandard material or poor workmanship. Defendant was obliged to follow the instructions of Plaintiffs and also engineers. There was a provision for Plaintiff to appoint a person to inspect the progress or the work. There was no person appointed. There was no complain about poor workmanship and or not complying with plans and or directions given, including Plaintiffs.
43. Plaintiff had admitted in evidence some structural changes to the plan including raising of the foundation, verandah around the house, removal of attach bathrooms after constructions etc. Any one or all of the said requests required time and also material and additional labour.
44. The foreman of the construction of Plaintiffs’ house corroborated that there were number of variations upon request of Plaintiffs and he had complied with all of them. He confirmed that such variation needed additional labour and material and required some time.
45. Clause 12 of the Contract required any variations to be in writing, before commencement of such additional work. Plaintiffs did not request the variations of the contract in writing but the Defendant had complied. Plaintiffs at no time made any request or complain that

⁶⁵ See *ante* Chap. 7, Approval and Certificates.

⁶⁶ *Jones v. St. John’s College* (1870) L.R. 6 Q.B. 115; *Tew v. Newbold-on-Avon School Board* (1884) 1 C. & E. 260; *Sattin v. Poole* (1901) Hudson’s B.C., 4th ed., Vol. 2, p. 306.

⁶⁷ As to which see Chap. 7, Section 4, *ante*, pp. 435 *et seq.*, and *infra*, Section 3 (2). The foregoing paragraphs (a) to € (in the Eighty Edition) appear to have been approved by the Supreme Court of Canada in the *Perini Pacific* case, and in the Ninth Edition by the English C.A in the *Peak* case.

⁶⁸ See *infra*, Section 3, p. 643.

all or any of the variations were not complied by Defendant. So, both parties had voluntarily deviated from the conditions of the Contract. Once both parties had done so Plaintiff cannot insist on LD agreed prior to variation (See Unaoil Ltd v Leighton Offshore Offshore Pte Ltd (Rev 1))⁵.

46. Plaintiff had voluntarily varied the plan on which parties had contracted in 2012 which was formalized with the Contract signed on 16.1.2013. Since the Contract was varied with additional work and the variation required additional time and money Plaintiff cannot claim LD as it was agreed as per earlier conditions taking consideration all the circumstances.
47. In Unaoil Ltd v Leighton Offshore Offshore Pte Ltd (Rev 1))⁶ UK High Court decision held that LD clause was inapplicable. In that case claimant had a contract that contained LD clause. Claimant had an agreement with another party that it would be selected as sub-contractor if main contract was awarded to said party. Claimant's sub contract had a value and it had LD if other party failed to award sub contract to them. Subsequently claimant reduced the value his sub contract but did not alter LD clause. The main contract was awarded to the other party, but claimant was not granted subcontract and for that said action was filed to claim LD for failure to award sub contract to claimant. Court held that initial LD cannot be claimed as the price of subcontract had been reduced. This indicates the reluctance of court to apply LD when there are variations from initial position.
48. So, in my judgment on the balance of probability there is proof that Plaintiff had varied the Contract hence he is estopped from relying on the previous date of completion of construction and to claim LD from that date at previous predetermined rate. Plaintiffs had also not complied with the contract by requesting additional work in writing and agreeing on the terms of the additional work before commencement of such additions or variations. Plaintiffs cannot work outside the agreed terms and conditions when it suits them and also seek assistance of LD when they had contributed to delay.

General Damages

49. Breach of contract is a civil wrong and actionable for damages. Such damages are assessed for the loss to the claimant from breach of contract. (see Tito v Waddell(No2) 1977 Ch 106) It is compensatory. Plaintiff is seeking general damages in the statement of claim, but did not lead evidence to calculate the loss due to alleged breach of contract by Defendant.

⁵ [2014] EWHC 2965 (Comm) (12 September 2014)

⁶ [2014] EWHC 2965 (Comm) (12 September 2014)

50. There is admitted evidence that construction of the house was ceased for more than time period specified in clause thirteen of the Contract. Foreman of the construction said he sopped work on the instructions of Defendant. This gives a right to the Plaintiffs to terminate the contract, without prejudiced to their right to claim damages for breach.
51. Plaintiff stated that completion of the construction cost approximately \$400,000. This value was not substantiated by any evidence of such payment other than admitted payments to Defendant. He said that after Defendant was terminated, another contractor was engaged and that person was also terminated and a final contractor completed the house. He also said that expenditure on the construction was increased due to poor workmanship of second contractor. He said that second contractor's work needed to be rectified by final contractor as they were defective.
52. There were no allegations as to the quality of the Defendant's work and any remedial work needed, regarding work he had completed before termination of the Contract. So the cost of \$400,000 included all expenditure, including the remedial work due to poor workmanship of a contractor who was engaged after termination of the Contract on 10.1.2014.
53. Defendant cannot be liable for any poor workmanship of third party who was engaged after the construction contract was terminated on 10.1.2014. Damages needs to be compensatory and needed assessment of incomplete work left at the time of termination.
54. There was no allegation that Defendant had not done sufficient work for the payments made to him at the time of termination of the Contract. There was no evidence to reconcile work Defendant did and what remained to be done and what was the loss to Plaintiffs from the delay and or non-completion of the Contract.
55. Defendant was counterclaiming for additional work, which were done on the request of Plaintiffs. Defendant had specifically pleaded for each additional work but again had not supplied details of work done when contract was terminated. Without that it was not possible to estimate any amount due to the Defendant from Plaintiff.
56. According to Defendant's evidence additional work cost him \$27,000 and from that Plaintiff had paid \$7,000. He had given different amounts in his statement of defence and also in an affidavit filed in this action for pervious application. This show that without a proper estimate even Defendant could not state the value of extra work. In order to prove a counter claim proof of additional work was not sufficient. Defendant was required to reconcile all the work he did with the payments and any shortfall can be part of counterclaim.
57. Plaintiff had terminated the Contract on 10.1.2014 but by that time how much work was completed was not proved in order to estimate any shortfall in payment. As the Plaintiffs

had admittedly paid to Defendants more than \$220,000 it was needed to consider whether Defendant had done work in terms of the schedule given in the Contract in order to ascertain if any additional payment was due to the Defendant.

58. There was no evidence of estimate of work done by Defendant reconciling with the payment he received till 10.1.2014.
59. Plaintiff had failed to prove general damages as there was no evidence of payments to third parties after termination of the Contract. There was no detailed report as to the work completed by Defendant other than an inspection of engineers marked P4 which had not estimated any work done and or work remained to be performed in terms of the plan agreed between Plaintiffs and Defendant.
60. Plaintiff said that construction of house was completed with engagement of two other contractors. There was no evidence whether they completed in terms of initial plan referred to in the Contract. It was not certain some further variations were done and there was no evidence to ascertain loss due to breach of contract by Defendant.

CONCLUSION


61. Plaintiff in the statement of claim sought LD and general damages. Defendant in the counter claim was seeking claim for additional work. Defendant had taken contradicting positions in the statement of defence regarding the Contract dated 16.1.2013. On the balance of probability it was proved that parties to this action had signed the Contract and it contained a clause for LD and also completion date of construction was 15.6.2013. The contract price was \$285,000 and it included material cost. Variations of the plan on which parties had calculated cost and completion time as well as LD, requested and also complied by Defendant. Parties had acted outside the Contract for such approval of variations and related issues. Hence Plaintiffs cannot seek LD. Though Plaintiffs sought general damage, which is compensatory, no evidence was produced to assess them. There was no evidence of work completed with assessment of cost of that and what subsequent contractors did. There was no evidence whether they even followed the same plan upon which price \$285,000 was agreed. Defendant's counterclaim for payment to additional work also fails as there was no assessment of work done with the payment received from Plaintiffs. Considering circumstances of the case no cost awarded. The delay is regretted.

FINAL ORDERS

- a. Plaintiff's action is dismissed.
- b. Defendant's counter claim struck off.
- c. No costs awarded.

Dated at Suva this 19th day of June, 2020.




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Justice Deepthi Amaratunga
High Court, Suva