

**IN THE SUPREME COURT OF**  
**THE REPUBLIC OF VANUATU**  
*(Civil Jurisdiction)*

Civil Case No. 157 of 2009

**BETWEEN:**            **JOHN WOOD TRADING AS**  
                                 **TRIWOOD INDUSTRIES LIMITED**  
                                 *Claimant*

**AND: LOUISE STEVENS**  
*Defendant*

**AND : KRAMER AUSENCO (VANUATU)**  
**LIMITED**  
*Third Party*

**Hearing:**            *27 – 30 March, 2012*

**Before:**            *Justice Robert Spear*

**Counsel:**            *Nigel Morrison for the Claimant*  
                                 *John Malcolm for the Defendant*  
                                 *Mark Hurley for the Third Party*

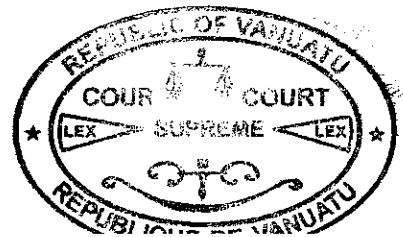
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**JUDGMENT OF THE COURT**

**Ex Tempore**

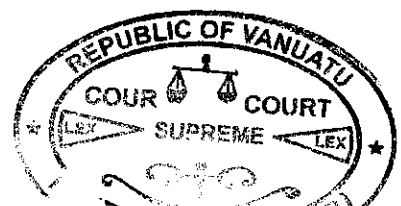
**(30 March 2012)**

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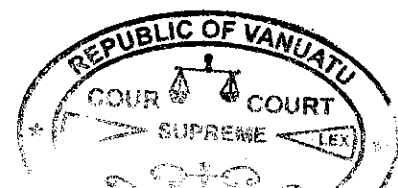
1. This is a building dispute primarily involved with a claim by the builder (John Wood) for amounts owing to him under the contract.
2. The contract was for the construction of a substantial residential dwelling on the Numbawan Lagoon. The claim is specified as being for payment required under the contract for the excavation of hard rock over and above the allowance in the contract and projected on 3 separate bases:-
  - a) *Schedule of rates claim or alternatively;*
  - b) *As a latent condition or alternatively;*
  - c) *As a variation*

*For the amount of 997.25 cubic meters.*
3. The claim is defended on the basis that nothing is owed to Mr Wood. There is indeed a counterclaim by the defendant (Louise Stevens) seeking an adjusted amount of Vt 3,914,401 under the final payment certificate issued by the Superintendent of Works; being the third party (Kramer Ausenco). There is also a third party claim by Mrs Stevens against Kramer Ausenco essentially on the basis that if Mrs Stevens is found liable to Mr Wood then that could only have come about as a result of her interests not being appropriately protected by Kramer Ausenco.
4. The claim against Mrs Stevens is for approximately Vt 25 million. There has been some movement in respect of that amount but that is generally what was initially outlined.
5. The claimant was originally presented by the claimant described as, *Triwood Industries Ltd.* However, right from the outset, Mr Wood acknowledged that, in fact there was no such incorporated company. He acknowledged that *Triwood Industries* was a registered business name with the proprietors of that business being himself and another person whom he said no longer has any involvement or connection with it. Counsel for the defendant and third party accepted that there was no need to join that other partner to the



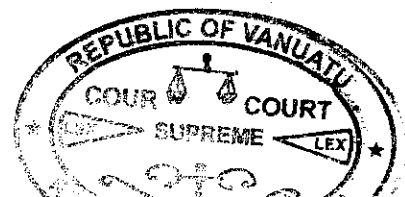
proceeding. By consent, the description of the claimant was amended accordingly to appear as now set out above.

6. Mrs Stevens owns a property on the waterfront of the Numbawan Lagoon in Port Vila. From her evidence, as appears that she has owned this property for quite some years; initially with her husband, since deceased, and subsequently by herself. There had been some reclamation of the lower section of the property, part of which occurred some years ago and another part more recently.
7. Mrs Stevens decided to build on this property and, to this end, she engaged a firm of Architects in Sydney (MacCormicks) to design the house. She also engaged Kramer Ausenco (the Vanuatu Branch of an international firm of civil engineers) as the project manager/Superintendent of Works.
8. Eventually, the architectural plans completed and the building works were put out for public tender by Kramer Ausenco. Mr Wood was successful with his tender. What then followed was a formal contract entered into by the parties on 5 April 2007. The contractual documentation was substantial and all as detailed on the first page of the contract. The level of detail in the contractual documentation was hardly surprising as it was for the construction of a substantial residential building. The contract price was eventually determined and specified in the contract as Vt 101,270,000.
9. Kramer Ausenco (the third party) had been engaged initially as the engineer in respect of the proposed contract works.. It was responsible for the preparation of the contract documentation. It was in due course engaged by Mrs Stevens as the project manager and became the appointed superintendent of works.
10. Mr Wood took possession of the site in April 2007 and then set about undertaking his site preparation for the actual building work to commence. In this respect, he was assisted by a local surveyor. It quickly became apparent that there was a problem with the site layout in relation to the



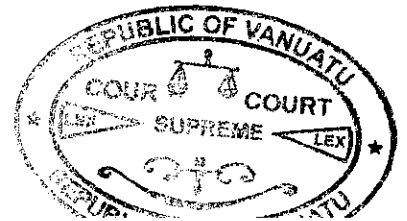
planned residence as two substantial trees on the property were not correctly located on the survey plan on which the architectural drawings have been prepared. Mr Wood brought this to the notice of the superintendent of works (Kramer Ausenco) once this difficulty became apparent to him. This is a matter of some importance. What then occurred was the redrawing of the architectural plans including the layout of the site works. The decision was made that the trees should be saved. This was achieved by resiting the house by moving approximately 2 meters West which was into the bank.

11. This site slopes up gradually from the water's edge of the First lagoon and that relatively flat area accommodates the vast majority of the building. There is then a steep bank leading up to the access road and it was into this bank that the building footprint was relocated.
12. I was invited by counsel to take a view of the building site before hearing any evidence and this indeed occurred. As will become apparent, the essential foundations and part of the lower structures of the building were already completed. The view was helpful to gain an impression of the general physical nature of the property but, of course this case is required to be determined on the basis of the evidence presented and not any particular impression that I have may have gained from such an inspection.
13. Mr Wood then commenced the building work which included the various site works and then eventually the laying of the foundations and the commencement of the general structure of the house. This was from a period of mid-2007 through to 2008 when difficulties arose.
14. During the course of the construction period from mid-2007 through to October 2008, a number of variations to the contract works were approved by the superintendent of works after conferring with Mrs Stevens. Additionally, a number of progress payments were made pursuant to the contract which would conventionally arise by Mr Wood submitting a claim for a progress payment which was then assessed by the superintendent of works, discussed with Mrs Stevens, and a payment certificate would then issue. No difficulties arose in these respects until the final payment certificate was issued at the



time the contract was cancelled in October 2008 and which required Mr Wood to reimburse Mr Stevens for an overpayment. All in all, some 18 progress payments were made pursuant to certificates issued by the superintendent of works.

15. In October 2008, Mr Wood indicated to the superintendent of works that he wished to have a meeting to ascertain his costs incidental to extra-excavation work required by the movement of the house 1.7 meters West into the bank. A meeting did take place on 20 October 2008 and it continued the following day when measurements were made of various features of the building site.
16. Mr Morris Fung, a local surveyor, gave evidence that he was present at that meeting at the request of Mr Wood. It was difficult on the evidence to understand exactly what role Mr Fung played. It appears probable that a number of measurements were made by Mr Wood, discussed with Mr Fung, and then noted on a piece of paper which has been the subject of some careful attention. Mr Fung said that he did not carry out any of the measurements himself, although there is some other evidence that he may have assisted in some respects.
17. Mr Wood acknowledges that the hand written notes of the measurements were made by him. He then had Mr Fung endorse the notes as acknowledging the accuracy of the measurements. I say now that Mr Fung's evidence was not particularly helpful either to the Court or to Mr Wood in this respect as it is clear that the measurements were not ones that he undertook himself but merely observed those being undertaken by Mr Wood. There is a real question as to exactly what he observed and how close a regard he was able to have to the measurements being undertaken by Mr Wood. A further difficulty is that he necessarily had to rely upon what Mr Wood was telling him at that time.
18. On 20 and 21 October 2008, virtually all excavation works had already been completed and at least the foundations were in place. Accordingly, this was not a case where a bank would be seen with the excavation showing or what the bank was like before it was excavated. I say this acknowledging that Mr

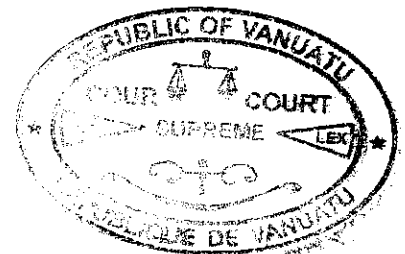


Fung was indeed involved with the property prior to any excavation works being undertaken. But the measurements were not Mr Fung's measurements but Mr Wood's.

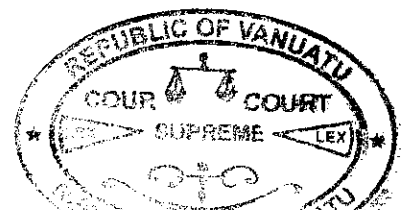
19. Mr Wood then submitted a claim to the superintendent by letter dated 21 October 2008 immediately after the second day of that meeting, in which it reference was made to the meeting that took place on 21 October 2008 on site purportedly for the purpose of measuring the quantity of hard coral rock excavated. Indeed the letter says:-

*"today 21 October 2008 on the job site meeting, verifications of measurements to extract hard coral rock with 20 tonne super breaker. All present witness the measurements and calculation, and the total amount of volume of extraction being 1130.24 cubic meters".*

20. This letter was followed up by a further letter by Mr Wood dated 27 October 2008 to Kramers with the reference *"additional variation claim extra rock excavation"* which endeavoured to increase the figure of 1130.24 cubic meters by 91.41 m<sup>3</sup> relating to extra-excavation alleged to have been undertaken under the garage and under the stairs. That increased the amount of material removed by extraction to 11221.65 m<sup>3</sup>. An additional amount of 75.6 m<sup>3</sup> was then included for an entry platform to the main house making a total of 1297.25 m<sup>3</sup>. An allowance of 300 cubic meters was then deducted pursuant *"under contract"* leaving an amount of 997.25 m<sup>3</sup>. The letter concludes *"our claim for 997.25 meter cubed of additional excavation at Vt 25,000 per cubic meter hard rock equals Vt 24,931,250.*
21. This claim was met by a letter dated 30 November 2008 from the superintendent of works (Kramer Ausenco) and signed by its Director, Danny Amanaki rejecting this extra claim. In particular, Mr Amanaki specified in the letter that there had been a failure on the part of Mr Wood to give the prescribed notice of the intended works to the superintendent within 28 days pursuant to clause 46.1 of the general conditions of contract.



22. Matters then quickly deteriorated to a state of significant impasse between the parties which eventually resulted in the mutual cancellation of the contract in November 2008. This proceeding was commenced in 2009.
23. I mentioned earlier that the claim was for an amount that Mr Wood sought to recover under the contract for the excavation of "*hard rock over and above the allowance in the contract*" and that three separate bases were presented as justifying the claim. At the commencement of this hearing, and indeed also at a pre-trial conference held on the previous day, Mr Morrison specifically abandoned the claim as being based on the extra excavation as arising either as a latent condition or a variation of contract works. This was indeed repeated on a number of occasions during the course of this hearing and, in particular, it was emphasised by Mr Wood to be so during the course of his evidence.
24. This claim is accordingly to be determined on the sole basis as to whether Mr Wood is entitled to payment for the excavation of hard rock over and above the allowance in the contract. The claim is not to be considered as being based on a *latent condition* and, indeed, Mr Wood was quick to acknowledge that no such latent condition arose. That indeed appears to be so and accordingly the concession is entirely appropriate. Additionally, Mr Wood specifically excluded any suggestion that there was anything owing to him by way of a variation to the contract works. This is of particular significance as both Mr Malcolm and Mr Hurley each argue that any claim for extra excavation work could only arise through a certified variation in these circumstances. The confinement of the claim has permitted me to give an oral decision as the outcome then became obvious.
25. It is also always important to remember that the onus is on the claimant to prove his case on the balance of probability. There is no onus on the defendants to prove anything at all in relation to the claim.
26. There is a counterclaim for some Vt 9 million which was pursuant to a final payment certificate issued by the Kramer Ausenco as the superintendent of

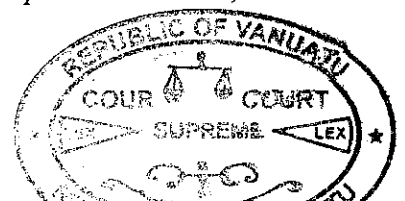


works. That final payment certificate effectively reflected the assessment by the superintendent, after the contract was mutually cancelled, as to exactly where the contract works had reached as against the progress payments made. Payment certificate number 19 dated 12 December 2008 claimed an amount for *retention monies* and the sum of Vt 3,914,401 as being the amount over paid to Mr Wood by Mrs Stevens.

27. There can be no answer to this counterclaim. There is a clear scheme provided by the contract by which any dispute taken in respect of a certificate issued by the superintendent of works can be reviewed. Mr Wood has not activated that dispute process in anyway. If he had, then the requirements of the contract would have ensured that the particular dispute would have resolved appropriately. Accordingly there can be no answer by Mr Wood to that counterclaim.
28. Returning however to the claim. Mr Wood presents his claim entirely on the basis that the excavation work he claims to have carried out on the site over and above what was initially envisaged by the original drawings is recoverable having regard to clause 28.3 of the general conditions of contract. It is clear that Mr discovered the mistake in relation to the trees and that he brought that to the notice of the superintendent of works without delay. The result was that the architect reviewed the drawings in order to retain the trees which resulted in a new set of plans with the building moved 1.7 meters West into the bank.
29. The argument for Mr Wood, and raised on a number of occasions by him during the course of his evidence, is that the operation of clause 28.3 permitted the contractor to proceed with the extra excavation work that came about as a result of the movement of the building 1.7 meters West into the bank.

28.3 *Errors in Setting Out*

*If the Contractor discovers an error in the position, level, dimensions or alignment of any work under the Contract, the Contractor shall immediately notify the Superintendent and,*

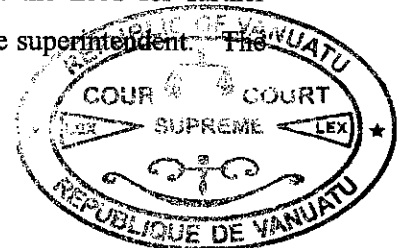




*unless the Superintendent otherwise directs, the Contractor shall rectify the error.*

*If the error has been caused by incorrect information, survey marks or data supplied by the Superintendent, the cost incurred by the Contractor in rectifying the error shall be valued under Clause 40.5*

30. In this respect, Mr Morrison argued that the first paragraph of clause 28.3 was such that, in the absence of a direction by the superintendent of works, Mr Wood was entitled, if not required, to correct the mistake that he had discovered. The second paragraph of clause 28.3 provides that any such further work required of the contractor as a result of “*incorrect information, survey marks or data supplied by the Superintendent*” that work will be valued under clause 40.5.
31. It is this reference to costing pursuant to clause 40.5 that Mr Wood contends permits him to charge for the extra excavation work pursuant to the rate s specified in the schedule to the contract.
32. There are fundamental difficulties with the claimant’s argument and his case in this respect. As I have mentioned, there is no doubt that Mr Wood discovered the error and that he brought it to the superintendent’s attention. However, I do not accept and specifically reject any suggestion that there was no direction from the superintendent as to how the mistake should be rectified. There was abundance of direction and, in particular, the plans were redrawn by the architect and then submitted to Mr Wood requiring the house to be moved at 1.7 meters West. The matter was not left for Mr Wood to rectify at his own initiative. Rectification occurred by the architect through the superintendent and there can be no doubt about that.
33. If Mr Wood’s view of how clause 28.3 was correct then it would have affectively given him carte blanche to carry out whatever work he thought should be undertaken to rectify the mistake without the need for further notification either to the principal (Mrs Stevens) or the superintendent. The



absurdity of such an approach can easily be seen by regard to Mr Wood's claim for some Vt 25 million for this extra excavation work he said was required because of the movement of the complex. That is an amount approximate to 25% of the total contract works. How could any provision in this contract be construed so to permit such a substantial increase in the contract price by the contractor without any further reference or consultation with the principal. In particular, if Mr Wood and Mr Morrison are correct in their construction of clause 28.3, it would mean that Mrs Stevens would have been effectively denied the opportunity to be involved, with her advisers, on possible ways in which the error could be rectified.

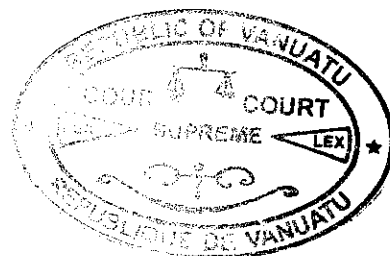
34. This was an error that was brought to the notice of the superintendent but what then followed was a clear direction as to how that would be rectified. The movement of the building was not Mr Wood's decision or even his idea. It was a direction that can appropriately be attributed to the superintendent..
35. It is trite law individual provisions of a contract are read in context and having regard to the entire contract. Individual clauses are not to be extracted and left to be considered in isolation to the rest of the contract unless the contract clearly identifies that this is the intention of the contracting parties. There is a specific provision found in addendum 2 to the contract documents which deals with extra-excavation. Item 2.5 of that addendum 2, a document prepared by the architects, deals specifically with excavation:

2.5 *Excavatioin*

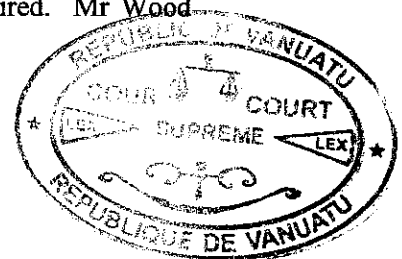
*The excavation has been estimated as follows:*

- *Other than rock 580 m3*
- *Rock (coral) 300 m3 (as defined in the S. Eng Specification)*

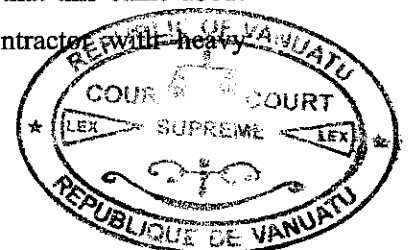
*Should the volume of material excavated from site vary, then the builder shall request that the superintendent inspect the area of additional excavation prior to excavating and once the the excavation is complete. Any variation for the excavation shall be calculated on an unexcavated m3 rate, the builder must be able to justify in some way this unexcavated volume. The builder shall provide rates for excavation in rock and other-then-rock as aprt of te rates schedule required for the tender.*



36. It is clear that what is meant by *"should the volume of material excavated from the site vary"* refers to the estimates appearing above being
- *"Other than rock 5.80 cubic meters"*
  - *"rock (coral) 300 cubic meters (as defined in the S. Eng Specification.)"*
37. Paragraph 2.5 of addendum 2 requires that, in the event that the volume of material required to be excavated vary from the specified estimates, Mr Wood was required to request the superintendent to inspect the area of additional excavation both prior to excavation and also once the excavation was complete. It provides further that, if further excavation is contemplated, Mr Wood must be able to justify in some way the unexcavated volume and provide, *"rates for excavation and rock and of other than rock as of part of the rates schedule required for tender"*.
38. As I have mentioned, no notice for such a variation in this respect was ever given pursuant by Mr Wood to the superintendent for extra excavation work incidental to the movement of the house other than what had already been addressed by earlier variations and progress payments. In particular, Mr Wood never requested that the superintendent inspect the bank or the area concerned before the extra excavation was undertaken although it can be argued that there was an inspection after that excavation was completed.
39. The rationale behind for paragraph 2.5 is obvious and probably multifaceted.. There would usually be a concern about excavation as to whether this might undermine the integrity of the site. That may not have been an issue here given the nature of the ground but it surely would be in some other cases. In a contract of this size, it would hardly be left to the builder to determine what area of a steep bank he could take out for the purposes of locating the building. Mr Wood was critical of the Geotech report obtained for Mrs Stevens but nothing really turns on that. What is clear is that there was a clearly defined process that was required by the contract to be followed by all concerned in the event that additional excavation was required. Mr Wood did not follow that procedure.

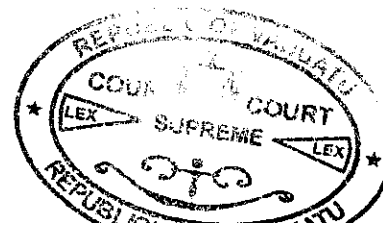


40. This failure on the part of Mr Wood to comply with clause 2.5 meant that he not only excluded the superintendent from a direct involvement in how the (so called) extra-excavation was undertaken, far more importantly and critically, it meant that Mrs Stevens was never given the opportunity decide whether she wanted or could afford to have the house being moved 1.7 meter Wwest. That is surely the reason behind paragraph 2.5 of addendum 2. It is to enable people to make informed decisions and not to be surprised, months later, with a claim amounting to an increase in the contract price by approximately 25% from that originally agreed.
41. There are also significant difficulties and indeed inadequacies with the evidence for and from Mr Wood in relation to whether all that excavation work was carried out in the first place and, if so, how that should be costed within the contract price.
42. Mr Wood did not follow the simple provisions of the contract and involve the superintendent right from when Mr Wood says that he appreciated that further or extra excavation work was required. Accordingly, no assessment was made that early time as to whether that decision should be maintained and the house moved 1.7 meters West, whether the trees should be cut down, or whether the building itself should be altered.. Mrs Stevens may have decided that it should be moved but she would have been able to do so with full knowledge of what it was going to cost her.
43. One of the other difficulties faced by Mr Wood relates to whether there was a need for such extensive jack hammering at the site. There was evidence that questioned Mr Wood's management of the building works. That is, if he had been more efficient with his building work's management, heavy machinery could have been used to carry out the extraction at a fraction of the price that Mr Wood now attempts to place on it. Mr Wood said that the engaged Perronet Enterprises to use its heavy machinery but it had leave after a short period because of other commitments. He was left having to use men with jack hammers. However the evidence suggested that this came about more because Mr Wood did not organise a sub-contractor with heavy



machinery as soon as he should have incidental to the site works and irrespective of the eventual decision to move the building. Accordingly, once the building work started, it was no longer possible to bring heavy machinery on to the site.

44. There is another concern in the evidence and that relates to the fact that neither Mrs Stevens, Mr MacCormick (the architect) and, in particularly, Mr Amanaki of Kramer Ausenco (who had effective oversight as the superintendent of works, knew anything about a claim for extra-excavation incidental to the movement of the house until the claim made on 21 October 2008. This was, indeed, after an amended variation number 1 of the contract occurred which approved a claim by Mr Wood and described by Mr Wood on his invoice for *"moving complex 1.7 meters west (Perronet's claim plus 10% supervision by Triwood Industries)."*
45. Mr Wood indeed initially presented his claim as if it was a variation. Mrs Stevens, Mr MacCormick (the architect), and Mr Amanaki all stated in evidence that the first reference they ever heard by or on behalf of Mr Wood to clause 28.3 was during Mr Wood's evidence. They did not know until then that this was what Mr Wood considered or asserted was the basis of his claim. The subtext of their evidence is that Mr Wood eventually came to realise that his claim based on a variation was doomed to failure and he then scoured the contract searching for another provision on which he could base his claim. His evidence was then tailored to suit. It is unnecessary that I attempt to resolve this allegation although I consider that there it most certainly cannot be lightly dismissed.
46. While Mr Malcolm and Mr Hurley took issue with the claimant's pleadings in this respect, they acknowledge no significant prejudice.
47. So, for these reasons, the claim by the claimant Mr Wood (trading as Triwood Industries) must fail. It fails because there is no proper contractual basis for it. It fails additionally because there is inadequate and unsatisfactory evidence that could support such a claim for all the reasons



that I have addressed. In particular, there is the challenge to Mr Wood's evidence that this work was carried out or at least to the extent he claimed. There is the challenge that the cost of what work was required should have been completed by heavy machinery at a fraction of the cost now claimed. All those challenges have substance and leave me concerned at Mr Wood's credibility.

48. It is unnecessary to go through all the other issues that have been raised by counsel. It is important that this long-standing claim is now brought to an end and it is unnecessary to give further explanation as to why the claim must fail.
49. Accordingly, I find against the claimant and this claim is dismissed.
50. I find for the defendant on the counterclaim and judgment is entered against Mr Wood in the sum of Vt 3,914,401.
51. In those circumstances, there is no decision required in respect of the third party action which is dismissed.
52. I will hear from counsel by way of memorandum as to a final interest calculation and also as to costs unless that can be agreed between the parties.
53. Any such memorandum as to interest and costs to be filed within 21 days.

BY THE COURT

