IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2004/HCV00380

BETWEEN ALVAL LIMITED CLAIMANT

AND THE ATTORNEY GENERAL OF JAMAICA DEFENDANT

Mr. Debayo Adedepi for the Claimant.

Mr. Curtis Cochrane Instructed by the Director of State Proceedings for the Defendant.

HEARD: June 8, 9, 10, 24 & 25, July 9, 2010 and October 28, 2011

Contract- construction contract- time fixed for completion- delay- whether breach of contract- operation of extension of time clause- termination of contract under forfeiture clause- validity of forfeiture clause- acts of prevention- equitable estoppel- waiver of right to forfeit- seizure of equipment- claim for loss of use- measure of damages.

Edwards, J.

BACKGROUND

[1] The claimant, Alval Limited, was a construction company and Mr. Alvin Dixon its Managing Director. Mr. Dixon had been a building contractor for 36 years. In April 1997, Alval Limited (the contractor) secured a building contract from the Government of Jamaica (the employer), through its authorized agents, the then Ministry of Local Government (Works), Public Works Department, to construct a modern Revenue Centre in May Pen, Clarendon, Jamaica. At the time of signing, the company had been in business for twenty three years.

[2] The duration of the contract was 18 months and was to commence 19th May 1997. The date fixed for completion was October 15th, 1998. The Works was to be executed in accordance with the General Conditions of Government Contracts for Building and Civil Engineering Works, (1956 edition). This was incorporated into the agreement. By condition 23, time was stated to be of essence of the contract and there was provision for the contractor to pay liquidated damages for failure to complete on time. However, there was a delay in completion and the contract was eventually terminated by the employer.

[3] This claim and counter claim are as a result of the termination of the contract. It was terminated under a forfeiture clause contained in the agreement. The claim alleges that the termination was wrongful. It, therefore, begs the question whether the employer is liable to pay damages for wrongful termination. The employer's counter claim raises a separate issue of whether the contractor is liable to make good, the costs of completing the Works, after the termination.

[4] The material facts in this case are not in dispute. The contract was for 18 months and the contractor was to be paid $73,495,000.00. However, after 44 months and millions of dollars in costs over runs, the project remained incomplete. It was terminated on January 25, 2001.

[5] On the facts, there appeared to be several reasons for the contractor's failure to complete on time. Firstly, the site for the construction was occupied by squatters. It was the duty of the employer to have the site vacated and to give possession to the contractor to begin building works. Five months after the signing, the contractor obtained only partial delivery of the site. The contract was signed in April; there was only partial delivery until November 1997.

[6] The second reason appeared to be that, at the time of the contract, the general area was plagued with criminality and personnel on the site was subjected to a racket perpetrated by extortionists. In recognition of this, and by agreement

between the parties, the employer made substantial payments to the contractor, for additional security. The contractor also developed cash flow problems as a result of which the employer also agreed to make advance payments for worker's wages.

[7] The contract continued to run and the contractor was given an extension of time to complete as a result of the delay caused by the presence of squatters on the site. It was never disclosed in the evidence exactly how much of an extension was granted for this purpose. There was some indication in correspondence from the employer to the contractor that based on the extension of time given; the Works should have been completed in January 1999.

[8] Forty-four months into the contract and at a time when 85% of the work had been completed, the contract was terminated. This came about because in November 2000, the employer refused to continue to pay additional security as previously agreed. There was also a delay in the payment of the salary advances, which resulted in the site being closed down by the so called "security operatives".

[9] In December 2000, whilst the site was still closed down, the employer gave written notice to the contractor ordering him to proceed efficiently with the works, invoking condition 37 of the contract which was the forfeiture clause. This notice was given 12 days before Christmas and required the site to be remobilized within 7 days of the notice. The contractor indicated to the employer that the site could not reasonably be mobilized within that time. The site was remobilized in January 2001. However, despite this, a determination notice was served on the contractor and thereby the contract was terminated on January 25, 2001.

[10] The contractor's equipment remained on site after termination and was never collected by him or delivered to him until October 2002. Condition 38 of the contract warranted the seizure of equipment, plant and machinery, if the contract

was terminated by default of the contractor. Thus, there is also a claim by the contractor for loss of use of certain equipment which was left on site.

[11] After the contract was terminated, the employer drew down on the performance and mobilization bonds which the contractor had entered into with Workers Bank/Union Bank & RBTT Bank. The contractor also averred that following the termination, he made claims for work done for a certificate 51 dated February 16, 2001, which was not honoured. The employer denied that there was any such certificate.

[12] A new contractor was engaged to complete the Works and took nine months to complete. Ironically, it too failed to complete on time and was given an extension of time to complete. The employer has counter-claimed a net amount of four million, six hundred and seven thousand, four hundred and fifty-five dollars and ninety four cents ($4,607,455.94) as a balance due and owing from the contractor, for the cost to complete.

THE ISSUES

[13] There are five substantive issues to be conclusively determined in this case. These are:

1. Whether the contract was wrongfully terminated.
2. Whether, as a consequence, the employer wrongfully drew down on the performance bonds and the mobilization funds.
3. Whether the contractor is entitled to damages for wrongful seizure of equipment under the forfeiture clause.
4. Whether the contractor is entitled to payments on a certificate dated February 16, 2001?
5. The question of damages if any, and whether the employer is entitled to the sums claimed in the counter-claim or any sums at all.

THE APPLICABLE LEGAL PRINCIPLES

[14] This is a case where the law involving time, delay and notice with regard to contracts in general and construction contracts in particular, will be of general importance. Therefore, before making specific reference to the case at hand, I think it may be necessary to expound somewhat on aspects of the relevant law which I found to be applicable to the issues to be determined in this case.

[15] Halsbury's Laws of England, 4th ed. Vol. 9 (1974), para. 481 reads:

> ***"The modern law, in the case of contracts of all types, may be summarized as follows. Time will not be considered to be of the essence unless: (1) the parties expressly stipulate that conditions as to time must be strictly complied with; or (2) a party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence.***

[16] In contracts generally, time will be of the essence if the contract so states or if after a delay the other party serves notice making time of the essence. The courts will require strict compliance with stipulations as to time where it is the intention of the parties for time to be of the essence. However, time is not usually of the essence in construction contracts which are subject to notorious delays, without express words making it so. See for example the case of **Charles Rickards Ltd v Oppenheim** (1950) 1 KB 616.

[17] Usually in construction contracts finishing late does not entitle the employer to dismiss but is a breach of warranty entitling him to damages. An exhaustive review of the authorities reveals that construction contracts are rarely determined for lateness. Damages are usually provided for in the contract calculated as a fixed sum for delay for each day, week or month. This is referred to as liquidated damages. For liquidated damages to be payable there must be a fixed date for completion, that is, a definite date from which to act as a starting point in calculating the damages due.

[18] In cases where time has not been made of the essence of the contract, or where although time was originally of the essence of the contract, the time for completion has ceased to be applicable by reason of waiver or otherwise, the employer still has a right, by notice, to fix a reasonable date within which to require completion of the work and in such a case, if the contractor does not complete by that date, the employer may dismiss him. See ***Taylor v Brown*** (*1839) 9 LJ CH 14; 2 Beav. 180; 48 E.R. 1149.*

[19] A fixed completion date does not necessarily make time of the essence unless the contract so states. The nature of the property and the surrounding circumstances would have to be considered. Time only becomes of the essence if express to be so, is made so by notice or where the nature of the contract or its subject matter implies that it is so.

[20] If the completion date passes due to the act or default of the employer and no extension is given, the employer has no right to claim liquidated damages,
as there would now be no new completion date. Time then becomes at large. This means that the time for completion must now be within a reasonable time or if notice is given; it must be completed within the time given in the notice.

[21] In a contract in which time is of the essence and a party fails to perform it by the stipulated time, the innocent party has the right either to rescind the contract, or treat it as subsisting. If the innocent party expressly or by conduct affirms the contract, it will continue but time will cease to be of the essence and will become at large. If the innocent party is the employer, the consequence of this is that it cannot claim liquidated damages under the contract unless there is an extension of time clause. If there is an extension clause, liquidated damages can be claimed from the new completion date after the extension is granted.

[22] If no extension of time is granted the contractor is bound to complete by the completion date. If the date is passed and the employer fails to exercise the right to determine, then time is at large and the contractor is bound to complete within a reasonable time. Where time has ceased to be of the essence it can be restored by notice giving a new date for completion. Where time remains at large the contractor must complete within a reasonable time, otherwise the employer can sue for general damages for any loss sustained as a result of the delay but is not entitled to liquidated damages.

[23] Where a reasonable time for completion becomes substituted for a time specified in the contract, in consequences of the specified time being no longer applicable, then in order to ascertain what is a reasonable time, the entire circumstances must be taken into consideration and not merely those existing at the time of the making of the contract. The question as to what is a reasonable time is one of fact. All the circumstances of the case should be taken into consideration, such as the nature of the works to perform, the proper use of customary appliances, and the time which a reasonable diligent contractor of the same class would take.

[24] The case of ***Ford v Cotesworth*** *(1870) L.R.5 QB 544* provides a good illustration of this. In that case there was a delay in construction and delivery of a motor car and it was held that completion by the original date having been waived, an obligation to complete within a reasonable time had been substituted for it. Nevertheless, notice having been given for time to complete, the date stipulated in the notice was reasonable and the buyer was entitled to reject the motor car.

[25] If a builder or contractor is unduly delaying the work and the contract time has ceased to be binding, the employer may give him notice to complete within a fixed reasonable time, and upon default therein by the contractor, the employer would be justified in refusing to allow him to proceed further. So by serving a notice giving a new date of completion, time being of the essence can be restored.

Liquidated damages can be computed from that date, if the contractor fails to complete on time. Factors which the court will give due regard in assessing the reasonableness of the period in the notice includes; (a) what remains to be done; (b) the fact that the party giving the notice has continually pressed for completion or has given similar notices before which he waived; (c) it was especially important to obtain early completion.

[26] Where time is of the essence or made of the essence by notice and the contractor fails to complete within that time, the employer is entitled to treat the contract as at an end and dismiss the contractor from the site. In ***Felton v Wharrie*** *(1906*) cited in Hudson's Building and Engineering Contracts 4th ed. 398, the contractor had not finished the Works by the completion date and when asked when he would likely be finished he said he did not know. Two weeks later he was ejected from the site. It was held that the employer could not determine the contract without giving reasonable notice to complete or unless the contractor had clearly stated his intention to repudiate the contract. It was decided that if the employer intended to use the contractor's conduct as evidence of repudiation, he should have so informed him. See also ***Sutcliffe v Chippendale and Edmonson*** *(1971)18 BLR 157 at p.161.*

[27] Where the contract is to be performed within a time which is undefined and there are unnecessary delays by one party the other has a right to limit the time and upon default to abandon the contract. Where time is not of the essence, delay on the part of the contractor does not amount to repudiation unless it is shown that he cannot complete the contract within a reasonable time or that the delay is such as would deprive the employer of substantially the whole benefit of the contract. An example of such a situation would be the failure to complete building a stadium in time for the Olympic Games.

[28] If a particular time for completion is specified in the contract, the mere fact of non-completion within that time will not, in ordinary circumstances, be such a

breach as to release the employer from his obligations, but it may entitle him to damages. There is some authority for the view that time cannot be of the essence of the contract where there is a provision for the payment of a penalty or liquidated damages for delay or generally where the parties contemplate a possible postponement of completion. See Emden and Gills Building Contracts and Practice seventh edition p. 155. So that the mere insertion of words indicating that time is of the essence of the contract will not be effective, if those words are inconsistent with other clauses in the contract which provide for delays.

[29] Mere negligent omission or bad workmanship where the Works are substantially complete does not go to the root of the contract and cannot result in repudiation: ***Hoenig v Issacs*** (1952) 2 All ER 176. However, an accumulation of breaches may indicate inability to carry out the contract to a reasonable standard. See ***Sutcliffe v Chippendale and Edmonson***.

[30] The date of completion is usually calculated from the date of commencement. Problems can arise in fixing a date for completion when extension of time is granted. Sometimes extension provisions are not properly administered or are waived. Where the employer waives obligations to complete within a specified time when faced with a breach by the contractor and elects to continue with the contract, time becomes at large until reasonable notice to complete is given

[31] Times and dates may cease to operate by acts of prevention. It is a general principle of law that a party cannot benefit from his own wrong. A party cannot insist on a condition when it is its fault that it has not been fulfilled. It cannot impose a contractual obligation on another party when he has impeded the performance of it: Per Lord Denning in ***Amalgamated Building Construction Ltd***. ***v Waltham Holy Cross Urban District Council*** *(1952) 2 All ER 452,* in which he cited ***Roberts v Bury Commissioners*** *34 J.P. 821,* as an authority for this proposition.

[32] The principle, as stated by Blackburn and Mellor JJ in ***Roberts's v Bury Commissioners***, is that the law will not allow persons to take advantage of the non-fulfillment of a condition which they themselves have hindered. Kelly CB stated it as a rule of law which would exonerate one party to the contract from the performance of it, when such performance was rendered impossible or was prevented, by the wrongful act of another party to the contract.

[33] There is an implied term in a contract by each party that neither will do anything to prevent the other from performing the contract or delaying him in the performance of it. This includes even legitimate conduct such as ordering extra work (Lord Denning's view). The court will also imply a duty to do whatever is necessary in order to enable a contract to be carried out.

[34] An act of prevention means any event not expressly contemplated by the contract and not within the contractor's sphere of responsibility. It could take the form of a breach of contract by the employer or any positive act or omission which prevents the contractor from completing the Works by the due date and where the contract did not expressly make provision for extension of time in such circumstances.

[35] The result is that the employer would no longer be entitled to demand completion by the contractual date; time would be at large and the employer can only claim damages for late completion. So in the case of ***Rapid Building Group v Ealing Family Housing 29 BLR 5,*** there had been a delay in giving the contractor possession of the site. This was a breach for which that particular extension of time clause did not cover. The employer being in breach could not insist on completion on the due date and there being no new completion date, time became at large by virtue of the prevention principle. The contractor's obligation therefore moved from one of completion on the contract date to completion within a reasonable time.

[36] The law in summary therefore, is that;

1. As a general rule, the main contractor is bound to complete the Works by the completion date stated in the contract. If he fails to do so, he will be liable to liquidated damages. This is subject to the exception that the employer is not entitled to liquidated damages if by his act or omission he has prevented the main contractor from completing his work on the completion date. There may be an exception to the general rule by express terms in the contract such as extension of time clauses. If negotiations continue between the parties for completion, time is extended by conduct. Continuing negotiations after the day fixed for completion of the contract as passed amounts to a waiver of any stipulation as to time and time becomes at large.

2. Where there is an act of prevention or breach causing a delay and the extension of time provision does not cover it, time becomes at large and completion is within a reasonable time. ***CCECC (HK) Ltd. v Might Foundate Development Ltd. and Ors***. (2001) HKCU 916. Here there was a delay in payment of interim certificates 12-17 which was not covered by clause 23; this carried the extension of time provisions. The claimant depended heavily on these payments and the work was delayed as a result. It was held that this was an act of prevention. This put time at large. It was held that the claimant should have had a reasonable time to complete, relying on the delay caused by the late payment or non-payment.

3. Also see ***Shawton Engineering Ltd***. **v** ***DGP Information Ltd***. *(2005) EWCA civ 1359,* where variations in the works which caused delays was not covered by the extension of time provisions. On November 7, 2000 the employer requested in

writing an acceptable time frame for completion to be given within seven days. Two weeks later the contract was terminated by the employer. At trial both sides accepted that the effect of the variation not being covered by the extension provisions was that time became at large and the contractor was obligated to complete within a reasonable time. The variations were substantial and the original completion date had ceased to be relevant. The court found that the employer had not established what a reasonable time was and on November 7, 2000, when the notice for a time frame was given, a reasonable time for completion was to be assessed anew with reference to outstanding work content and the variations. The contractor was found not to be in breach on November 7.

4. If the contractual machinery breaks down then time becomes at large. Where time is at large the contractor must complete within a reasonable time. In calculating a reasonable time must take into account all the circumstances of the case. This includes the nature of the work done, the time necessary to do it, the ability of the contractor to perform and the time which a reasonable diligent contractor of the same class as the contractor would take. See ***Lyle Shipping Co. v Cardiff Corp*** *(1900) 2 QB 638*.

ISSUE 1- WAS THE TERMINATION WRONGFUL

[37] As a matter of evidence and based on the pleadings there are four sub-issues that need to be resolved before the question in issue 1 can be conclusively determined. These sub- issues are:

1. Delay in Handing Over the Site

[38] It is not disputed that initially the site for construction of the revenue centre was occupied by squatters. Neither is it in dispute that the contractor was not

given vacant possession, which resulted in a delayed start to the project. After signing the contract the contractor was unable to acquire the site due to its occupation by squatters. At the commencement of the project only a part of the site was delivered and squatters remained throughout the preliminary works. The employer was aware of the problem as it was discussed at site meetings where all parties to the contract were present.

[39] Mrs. Patience Son Rom who was the architect on the project gave evidence and agreed that in 1997 squatters occupied the site. She said some were removed, to allow the contractor to take over the site to begin work. She agreed that it was the duty of the employer to remove the squatters from the site and that they had a continuing obligation to hand over the rest of the site free of squatters.

[40] The Quantity Surveyor also gave evidence. He agreed that the employer could not hand over the entire site to the contractor for months after the contract commenced. He noted that the area designated for the car park was still occupied by squatters at the time of hand over. He agreed that only the area of land on which the actual building would be constructed was unoccupied by squatters at handing over; the actual building site was not secured from squatters. The evidence of the Quantity Surveyor was that he visited the site at least twice per month. He said the presence of the squatters did in fact impede the progress of the works. He agreed that their presence would have been a significant impediment.

[41] All squatters were removed by November 1997. It is not disputed that the problem with the squatters resulted in an extension of the completion date. The contractor avers however, that this failure to deliver vacant possession on time was a breach of contract which caused disruption to the planned works and additional expense. It was alleged that the failure to deliver the site on time resulted in its inability to proceed in a cost effective manner as it created serious cash flow problems.

[42] When contractual obligations are to be performed concurrently by the parties neither can recover unless he shows that he himself was not in breach. Where one party repudiates his responsibilities this may constitute a material breach which would justify the others refusal to perform.

[43] In building contracts involving a new project the main contractor will normally be entitled to exclusive possession of the entire site in the absence of an express stipulation to the contrary. So in ***Freeman v Hensler*** (*1900) 64 J.P. 260* C.A., possession of the site was given to the contractor after the date agreed and then only in a piecemeal fashion. The last portion of the site was handed over five months after the agreed date. The contractor sued for damages for breach of contract on the basis of loss sustained during the period of delay. It was held that he was entitled to recover.

[44] Since a sufficient degree of possession of the site is clearly a necessary pre-condition of the contractor's performance of his obligations, there is an implied term that the site will be handed over to the contractor within a reasonable time of signing the contract. It is also implied that there will be a sufficient degree of uninterrupted and exclusive possession to permit the contractor to carry out his work unimpeded and in the manner of his choice. For an illustration of this see the case of ***Arterial Drainage Co. v Rathangan Drainage Board*** *(1880) 6 L.R. Ir 764***.** This is so especially when a date of completion is specified in the contract documents.

[45] In the case of ***Wells v Army and Navy Co-operative Society*** *(1902) 86 L.T. 64,* Vaughn Williams L.J. opined that where the contract limits the time within which the contractor is to complete the work, it not only meant that he was to do it in that stipulated time but he was also to have the time within which to do it. Failure to deliver the site could cause the contractor to repudiate. See also the Australian case of ***Carr v JA Berriman Pty Ltd*** *(1953) 27 A.L.J. 273.* I

acknowledge with gratitude the assistance given by the learned editors of Hudson's Building & Engineering Contracts 9th ed. pp. 228-229 (10th ed. pp. 318-319); the source of much discussion on the point.

[46] In this case the contract was originally for 18 months. The employer was obligated to provide the site to the contractor at the time fixed by the contract or immediately, if no time was fixed. Where the delay in handing over the site is caused by third parties, as in this case, the implied duty will depend on the degree of control the employer has over the third party. So as in ***Rapid Building Group Ltd***. ***v Ealing Family Housing***, the court held that the employer had control over third parties via eviction notices.

[47] The employer took over 6 months to completely hand over the site due to the presence of squatters, over which it had control via eviction orders. This was a breach of contract. Faced with this breach, the contractor had two choices; on the assumption that this was a breach of a fundamental term of the contract, it could elect to treat it as discharged and sue for damages; on the other hand, it could ignore the breach and elect to keep the contract alive. If the right to rescind is not exercised it is waived but the right to damages is still available; ***Bentsen v Taylor & Sons*** *(1893) 2 QB 274***.** See also ***Roberts v Bury Commissioners*** *(1870) L.R. 5 C.P. 310 at p 320 and 325-326*.

[48] In this case the contractor chose not to rescind the contract and sue for any damages which might have occurred; instead it chose to continue and waived the right to rescind. The contract was thereby affirmed. The contractor was however, entitled to an extension of time and relief from liquidated damages under the terms of the contract but it would still have an action for any provable loss consequent upon the employer's breach. Having affirmed the contract and accepted the extension of time to complete, which the employer was obligated to give for its delay under the provisions of condition 22, the consequential losses must now be proven.

[49] The contractor must produce evidence in court of the loss suffered as a result of the breach. Damages for this type of breach is usually in the form of reduced profits from the Works or increased costs of the work done by the contractor as a result of the delay. In the absence of documentary proof a court may nevertheless make a reasonable evaluation of the claimant's loss. It behooves the claimant however, to lead evidence which would enable this court to make a fair and reasonable assumption of the loss it claimed to have suffered.

[50] I find that the claimant contractor has failed to provide proof of any financial loss sustained as a result of the failure of the employer to hand over the site on a timely basis nor as it provided any evidence to form the basis of an assumption of increased costs consequent on the delay. It is always open to the court to grant nominal damages to the claimant; however, since an extension of time was given for the contract to be completed as a result of the employers delay and substantial payments were made for costs over runs, I see no basis for doing so. The Contractor has also failed to show any connection between the delay in handing over the site and the termination of the contract (wrongfully or otherwise) 44 months later.

2. Delay caused by Violence, Intimidation, Threats, Sabotage and Extortion

[51] The contractor also averred that progress on the work site was hampered by violence, threats, intimidation and extortion. It alleged that it was an implied term of the contract that the contracting authority and owner of the site (which happened to be the Government of Jamaica, the employer) would ensure the maintenance of law and order in the area of the works. This they failed to do. As a result, it claimed, it was unable to attract and retain quality workmen as they were subjected to violence, extortion and intimidation. Where it did manage to attract skilled labour, it had to pay premium rates in an attempt to retain them.

[52] The contractor further contended that it was pressured into hiring unskilled thugs in order to ensure the safety of its workers, the site and the machinery and equipment. It claimed to have also been pressured by certain politicians and area leaders into hiring “locals” even though they were unskilled. These problems, it was claimed, had a severe impact on the quality of work and the time frame for the work to be completed. Several persons had to be hired on the site that did no work but had to be paid. There were frequent work stoppages. It noted that the employer was fully aware of this problem as it was a subject of discussions at several site meetings. It was in recognition of this problem that the employer agreed to provide additional money for this purpose, under the rubric “additional security”. It was claimed that the employer failed to pay promptly despite this agreement, and with full knowledge of the implications, thus creating further difficulties.

[53] These assertions were supported by the evidence of the architect who said that at site meetings, the contractor complained of persons visiting the site demanding work. She could not recall if he spoke of violence and intimidation but recalled that he had said that the security he quoted for was less than what he now had to spend. She told the court that he had written several letters to her requesting additional security. She said there was no provision under the contract for additional security but the contractor complained that his cash flow was being affected. She agreed that she did receive some claims for additional security which she certified.

[54] However, as I understand the law, an employer does not impliedly warrant that the site is fit or that there will be no interference by third parties unless by express provision in the contract. There is no duty on the Government of Jamaica, specific to this contractor, to maintain law and order, which could give the contractor a private right to sue for damages for failure to exercise this duty effectively or at all. However, the question of whether or not an employer becomes liable for interference by a third party will depend on the particular circumstances

and the nature of the interference. So in ***Porter v Tottenham UDC*** *(1915) 1K.B. 776,* the Court of Appeal held that the employer was not liable, as he had no control over the defaulted third party who was a neighbouring land owner.

[55] It has however, been recognized in principle, that a delay due to vandalism could result in an extension of time on the contract if it can be so interpreted under the extension clause in the contract. See ***Wertheimer Construction Corp v United States*** *406 F 1071 2d (1969) case No 380-62*, United States Court of Claims. In that case there was a clause in the contract which exonerated the plaintiff from damages because of delays in the works due to ‘’unforeseeable causes beyond it’s control and without it’s fault or neglect”. A dispute arose which was referred by the parties to the trial commissioner who held that delay resulting from vandalism fell within this clause. The matter was referred to the court and both sides asked the court to adopt the report and enter judgment without hearing oral arguments.

[56] The evidence of the Quantity Surveyor was that he had been made aware of the extortion taking place on the site from outside elements. He said workers tools and salaries were taken from them and that the contractor was pressured into hiring unskilled labour. The attorney for the defendant in rebuttal to this position pointed to condition 2 of the contract. But in my view, condition 2 only meant that the contractor was to satisfy himself that he could do the work according to the plans and specifications based on the supply of labour and materials. It cannot apply to circumstances not in the contemplation of the parties when the contract was made such as extortion, intimidation and vandalism.

[57] In Alval’s contract, extension of time is dealt with under condition 22. Condition 22 states in part;

> “The Contractor shall be allowed by the Authority a reasonable extension of time for completion of the works in respect of any delay in such completion which has been caused or which the authority is

satisfied will be caused by any of the following circumstances, that is to say:

a. the execution of any modified or additional work,
b. the suspension of the execution of the Works or any part thereof under condition 24 hereof;
c. any act or default of the authority;
d. strikes or lock outs of artificers or workpeople employed in any of the building trades in the district in which the works are being executed or employed elsewhere in the preparation or manufacture of materials intended for the Works and such delay is not attributable to any negligence or improper conduct on the part of the contractor;
e. any of the accepted risk;
f. any other circumstances which is wholly beyond the control of the Contractor:

[58] The Authority is defined as the Permanent Secretary in the Ministry or a duly authorized representative. The proviso to clause 22(f) provides in part:

ii. That any such delay has been or will be caused as aforesaid give notice in writing to the S.O. specifying therein the circumstances causing or likely to cause the delay and the actual or estimated extent of the delay caused or likely to be caused thereby;
iii. The contractor shall not be entitled to any extension of time in respect of a delay caused by any circumstances mentioned in paragraph (f) of this condition if he could reasonably be expected to have foreseen at the date of the contract that a delay caused by that circumstances would or was likely to occur;
iv. In determining what extension of time the Contractor is entitled to, the authority shall be entitled to take into account the effect of any authorized omission from the Works;
v. It shall be the duty of the Contractor at all times to use his best endeavours to prevent any delay being caused by any of the abovementioned circumstances and to minimize any such delay as may be caused thereby and to do all that may reasonably be required, to the satisfaction of the S.O. to proceed with the works.

[59] The question raised here therefore, is whether delays caused by intimidation, threats, violence, and extortion coupled with the eventual lockdown of the site would fall to be determined under any of the factors set out in condition 22. The

submission was that these, being matters outside of the control of the contractor, would fall under condition 22 (f). Certainly, Mr. Ivan Anderson, Chief Executive Officer of the National Works Agency, which was the successor to the Ministry of Local Government (Works), Public Works Department, seemed to have accepted that these may appropriately be dealt with under 22 (f). His letter to the contractor dated February 1, 2001 para. 1.5.1, indicated that the employer was willing to consider a claim for extension of time for intimidation, loss of key personnel and difficulty in obtaining labour. There was no indication from him however, how that would be dealt with as the contract had already been terminated, which said determination, he indicated, would still stand. Any extension of time after termination would only be directly referable to the employers claim for liquidated damages. The employer has made no such claim and in the circumstances of the case, rightly so.

[60] It is admitted that it is quite possible to extend time retrospectively after the contract is completed. See ***Amalgamated Building Construction Ltd. V Waltham Holy Cross UDC***. However, it is not possible to extend time after the contract has been determined for breach, prior to completion.

[61] The purpose of an extension of time is to maintain the contractor's obligation to complete within a specified time period. It prevents time being left at large and the employer loosing its right to liquidated damages. It gives the contractor more time to complete and reduces his liability for liquidated damages. Most importantly, as in this case, it relieves the contractor from his obligation to complete on the contract date where there has been a delay due to no fault of his. Time for completion can only be extended where the contract so permits it and is to be done strictly in accordance with the contractual provisions.

[62] On November 24, 2000 the contractor gave notice of delay and requested an extension of time in compliance with proviso (1) of condition 22. The claim for extension of time of 21 1//2 months was made under clause 22(f). There was no

specific claim for extension for the foreseeable delay caused by the shut down of the site in that said month. There was no response from the Authority to this notice of delay and claim for extension of time. There was evidence that a meeting was held where the application was discussed but no decision was taken. The parties were therefore in negotiations.

[63] In February 2001, the employer under the signature of Mr. Ivan Anderson wrote to the contractor making reference to a letter received from him, on January 26, 2001. Mr. Anderson, in his letter, made reference to the claim for extension of time made by the contractor. He pointed out (correctly I might add) that extension of time had already been granted to the contractor for the delay in the removal of the squatters and that no extension of time was warranted for rectification of defects or for cash flow problems. He however, failed to state why no extension of time was granted for matters which fell correctly under condition 22 (f) and for which the contractor was entitled to an extension of time. Neither did he state that the application was refused prior to the decision to terminate.

[64] In his letter Mr. Anderson states, inter alia;

> You will recall that, at the meeting held on 28th November 2000, the Ministry promised to look at your claims for Extension of Time and Loss and Exp (Minute 6.) but that the more urgent matter was the restart of the Works. This is still true but we comment briefly on your claims as follows:
>
> Extension of Time We are willing to examine a claim for Extension of time for the following reasons:
>
> - Intimidation (Clause 22f)
> - Loss of Key Personnel (Clause 22f)
> - Difficulty in Obtaining Labour (Clause 22f)
>
> We would, however, require detailed and corroborated reports of the incidents referred to…

[65] I am unable to fathom what Mr. Anderson was contemplating, since under clause 22 (f) the contractor would be entitled to an extension of time to complete the contract only and at the time of writing Mr. Anderson had already terminated

the contract. Although it is possible to extend after completion so that liquidated damages for delays can be deducted there is no power to extend when the contract was terminated before completion and was completed by a third party.

[66] Extension of time clauses are construed strictly contra proferenten against the employer if there is any doubt as the construction of the provision. See ***Peak Construction (Liverpool Ltd.) v Mckinney Foundations Ltd*** *(1970) 1 BLR 111* (no extension of time provision in contract for employer's delay). In this case condition 22 allocates the risk of non-completion between the parties. It reduces the contractor's risk in relation to delays by entitling him to an extension of time for completion because of delay or possibility of delay based on the circumstances contemplated in the clauses. It is the main provision under which any alteration to the date for completion can be made. The result of its application is to lengthen the period in which the Works must be completed.

[67] The contractor's duty to give notice of delay is not a condition precedent to the Authority's duty to extend time. Where there is a delay or possibility of delay, it is the duty of the Authority to consider whether the reason forms part of the varying circumstances contemplated in the section and whether and how long an extension of time is required. If the contractor fails to give notice of the delay it is a breach of warranty only and the Authority can take it into account in deciding the length of time to extend. See ***London Borough of Merton v Stanley Hugh Leach Ltd.*** *(1986) 32 BLR 51,* judgment of Vinelott J.

[68] Here the contractor gave notice of the delay and applied for an extension of time. It was the duty of the Authority to consider the application and grant such extension as was reasonably necessary. The wording of condition 22 is mandatory not permissive. If the Authority thought the contractor was unduly delayed by factors falling under condition 22 (f) it should have granted an extension and the contract would have continued in force and there would be no power to determine under condition 37.

[69] Where an extension of time clause does clearly cover the delay in question, the normal sense of the contract and the law relating to the approval and certificates of arbitrators and quasi arbitrators will require that if no extension of time is given this will bind the builder, a fortiori if some extra time has been given, subject to any overriding arbitration clause. See ***Jones v St. Johns College (1870) L.R. 6 Q. B. 115.*** So that any decision by the Authority that the contractor was not unduly delayed by any factor under condition 22 (f), would be binding. The contractor would be bound to complete on the completion date or if passed, within a reasonable time fixed by notice. But a decision was required to be taken by the authority either way, before determination.

[70] The contract between the parties at condition 46 provides that "all disputes, differences and questions between the parties, other than a matter or thing relating to condition 29..shall be referred to a single arbitrator". The parties did not arbitrate their dispute. However, either party may commence action in the courts even though the subject matter of the dispute is covered by the arbitration clause. The other side may apply for a stay but where no such application is made the arbitration clause becomes ineffective. In such a case all the powers conferred by the arbitrator under the clause are available to the court.

[71] The parties failed to go to arbitration and the employer failed to apply to the court for a stay on the basis of the arbitration clause. The result is that the decision giving rise to forfeiture, being subject to review by the arbitrator, becomes subject to the same review by the courts. The arbitration clause does not oust the jurisdiction of the courts which may exercise the same powers as that of the arbitrator.

[72] It is my considered view that at the time of termination the contractor was entitled to have his claim for an extension of time under clause 22 (f) considered and be either granted or refused. The power to grant extension of time for delays

when acted on fixes a new date for completion and the contractor is obligated to complete by that time. The evidence is that the work stoppages were substantial, occurring almost monthly and had a significant effect on the operation of the contract. In July 2000 work had stopped on site for approximately four weeks. In a letter to Union Bank the Architect indicated that it was difficult to determine the completion date due to the work stoppage. Work stopped again in November.

[73] In this case, it would appear that after the extension of time granted for delay in delivering the site, the completion date ceased to be relevant. The employer failed to establish a new completion date or a reasonable date for completion. At the time the application for extension was made the employer had a duty to establish a reasonable time for completion taking into consideration the remaining work, any variations or remedial work to be done.

[74] Based on the letter from Mr. Ivan Anderson to the contractor the last known completion date was January 19, 1999. This has not been established by evidence. Be that as it may, the contractor having failed to complete by that time and the contract having been allowed to continue without any new completion date, with negotiations continuing between the parties, time became at large and the contractor's obligation was to complete within a reasonable time or a new time fixed by notice. The questions for the court would be then; was January 2001 a reasonable time to complete what was originally an 18 month contract given all the circumstances? The answer to that would be in the negative given the frequency in work stoppages outside the control of the contractor. Or, was there a new time to complete given and if so was that time reasonable? Again the answer to that would be in the negative, since, before terminating, the employer did not consider what was a reasonable time to complete, in light of the remaining work to be done.

[75] I have also considered what the position would have been if the Authority considered that the actions giving rise to the delay did not fall under the heads in condition 22 and therefore, there was no power to extend time. If I were to accept

that the last known completion date was January 1999, once that completion date had passed and the employer did not determine the contract it waived the right to rescind. The effect of that would be that time becomes at large because there was no new completion date. The effect of time being at large is that the contractor now had to complete within a reasonable time or if notice is given, he must complete within the time given in the notice. This is subject to the proviso that such a time in the notice must be reasonable. Therefore, at the time the notice to proceed efficiently was given, the contractor had a reasonable time within which to complete and reasonable notice to complete should have been given prior to forfeiture.

[76] If the time or date for completion is affected by events which entitle the contractor to an extension of time but the contractual machinery no longer operates, time is at large. This is a rare occurrence. See ***Bernhard's Rugby Landscapes Ltd. v Stockley Consortium*** *(No 2) (1998*). This was a contract to build a golf course. The issue was whether the contractual machinery had broken down and if so what was the effect. The court held that a breakdown occurs when without default or interference by a party to the contract, the machinery is not followed by the person appointed to administer and operate it and as a result, its purpose is not allowed and is either no longer capable of being achieved or is not likely to be. The result is that one party is deprived of a right or benefit.

[77] However, mere non-compliance with the machinery by the administrator is not sufficient, the effect must be that either or both of the parties to the contract, as a consequence of the breakdown, truly do not know their position and cannot or are unlikely to know it. In my view, the Authority failed in its duty to establish one way or another a new completion date or a reasonable time to complete. The contractor's application for extension of time from 1997 made in 2000 showed a lack of knowledge as to how much time had already been extended and to when. The employer's failure to establish a new completion date at any time between 1998 and date of termination shows a total breakdown in the administrative

machinery. It appears to me that the administrative machinery broke down. This is not surprising when it is recalled that the employer changed both agencies and key personnel during the life of the contract. The result is that at the time of forfeiture the contractor was deprived of a benefit accruing to him under the contract.

[78] However, the claim for loss and expenses made by the contractor on November 24, 2000, as a result of delays, sabotage and resulting remedial work had no foundation in law (neither in the contract nor at common law) and is without merit. The entitlement to an extension of time to complete for strikes, lockouts, vandalism, remedial work and the like does not carry any right to a claim for direct loss or expense as these are not the fault of the employer.

[79] The observation made by the House of Lords in ***Davies Contractors v Fareham U.D.C***. (1956) A.C. 696, appears to me to aptly suit this situation. The facts are different but that is of no moment. There was a 22 months delay due to bad weather and shortage of labour but the contractors received the contract price. They however, sued for payment on a quantum meruit basis due to increases in expenses. The House of Lords observed that in a contract of that kind, the contractor undertook to do the work for a fixed price. In doing so he took the risk of the cost being greater or lesser than he expected. They went on to say that if a delay occurred through the fault of no one, that might have been in the contemplation of the parties to the contract, and provision for extension of time might be given for it; if that was so, then the other party took the risk of the delay but it did not take the risk of the of the cost being increased by the delay.

[80] In this case the provision for extension in clause 22 (f) the employer took the risk of the delay occasioned through no fault of the contractor but it did not take the risk of the increased cost occasioned by that delay.

3. Failure by the Employer to pay the Agreed Sums for Additional Security

[81] The next question I would like to consider is whether the cessation of the payments for additional security was a breach of contract? The answer to that lies in whether the payments were made as a result of a simple variation of the original contract supported by consideration. If it were, then the employer in refusing to pay was in breach and it was this breach which resulted in the contractor being unable to complete. In ***Roberts's v Bury Commissioners*** Kelly CB noted that it was a well established rule of law that a plaintiff's breach of contract would be excused by reason of it being caused by the defendant's own breach of the said contract. The defendant's therefore, did not have the right to enforce a provision of the contract in their favour, where such a right arose as a result of their own wrongful act.

[82] However, in this case, on the employer's part, they claimed to have been making these payments as advances to the contractor not under the terms of the contract but as an ex gratia payment to facilitate the orderly hand over of the site and to enable the contractor to continue the work. The payment for additional security was termed an ex gratia payment by the employer as it was outside the terms of the original contract.

[83] These payments appeared on the regular monthly certificate for payment made by the Quantity Surveyor. The question for this court is whether those payments were indeed made ex gratia, that is, without consideration or whether it was made under and by virtue of a variation of the original contract, for consideration.

[84] Parol contracts require consideration. This was the basis of the decision in the leading case of ***Stilk v Myrick*** *(1809) 2 Camp 317*. There is no consideration if all the claimant does is to perform or promise to perform an obligation already imposed on him by a previous contract between him and the defendant.

Contractors frequently seek to qualify their tenders or negotiate mitigation or alteration in the contract conditions. Because the contract documents are usually signed without any alterations in the conditions, the party claiming there was such an alteration or mitigation must show that there was a positive agreement. The parties may agree to vary their contract to the benefit of both of them. Such an agreement usually carries with it its own consideration, unless it is made for the legal or factual benefit of one party only.

[85] But there are authorities which show that the courts have consistently found that consideration existed from promising to do what was already seemingly obligatory. So for instance in the case of ***Ward v Byham*** *(1956) 2 All E R* 318, a mother was held by her promise to have exceeded the duty to maintain her child cast upon her by statute; in promising to look after the child well and ensuring its happiness, as well as allowing the child to decide where she wants to live. This promise was held to be sufficient consideration for the father's promise to pay maintenance to her. See also ***Hartley v Posonby*** *(1857) & EL and BL 872,* where the original obligation had become so hazardous to perform that it discharged the parties from their original contract and freed them to enter into a new agreement.
See also **Glasbrook Brothers v Glamorgan County Council** (1925) AC 270, where police undertook to provide more protection than in their discretion they thought was necessary which was held to be sufficient consideration for the promise of payment.

[86] A variation of the original contract may be supported by consideration even though it confers a legal benefit on one party only, if concomitantly it also confers a factual benefit on the other party. So for example in ***Williams v Roffey Bros. & Nicholls (Contractors) Ltd*****.** *(1991) 1 Q.B. 1***,** a contractor engaged a sub-contractor to do carpentry work on a number of flats under a contract between the contractor and the employer. Twenty thousand (20,000) pounds was paid to the sub-contractor by the contractor. The contractor agreed to make additional payments to the sub-contractor who did not promise to undertake any additional

obligation. The contractor was aware that the original price was too low and that the sub-contractor was in financial difficulties and would not otherwise be able to complete the project on time. His failure to complete on time would have exposed the contractor to penalties for delay under the main contract.

[87] It was held that the contractor's promise to make the extra payments to the sub-contractor was supported by consideration in the form of the practical benefit obtained from the sub-contractors performance of his duties under the original contract between them. The consideration in this case was the factual benefit to the contractor of having the sub-contract performed without delay. It should be noted that ***Stilk v Myrick*** was not overruled but the observation was made that the rigid approach to consideration in that case was no longer desirable or necessary.

[88] In Alvals' case, I find that the agreement to pay additional security was a simple variation of the original contract supported by consideration. The sum tendered for by the contractor was too low to cover the level of security payments required to secure the site. In effect the contractor told the employer that there was a terrible problem of extortion plaguing the site and that it was affecting the smooth hand over of the site, the running of the contract and his cash flow. It would have been difficult, if not impossible, to complete the contract if something was not done about it. The employer in effect said, here is the thing, we will pay you additional security payments to pay these "security operatives" if you promise to take control of the site and continue with the contract. The contract then proceeded accordingly until November 2000.

[89] Consider too, that the contractor could have declared himself unable to carry out this contract, through no fault of his own. He might have terminated the contract but for the assurances given to him that security payments would be made to achieve an orderly site handover and to allow him to be able to continue with the Works. It was his evidence that this was so. He said that after the contract was signed he and the client entered into discussions regarding the occupants and

their removal. He said when he began execution of the contract he was satisfied as to the conditions affecting its execution having been given an assurance by his client. He was aware that there was an exit clause in the contract. He agreed the problem was not sufficient for him to discuss exiting the contract as a result. He said he thought it prudent to stick it out as the future of his business could depend on whether he stuck to the contract or took the easy way out.

[90] The Quantity Surveyor gave evidence that he had heard of the extortion taking place on the site and the violence meted out to workers on the site from outside elements. He said worker's salaries and tools were taken from them and the contractor was pressured into taking on workers. He was also aware that persons were being hired as "security". He indicated that the provisions for additional security were valued by him and certified by the architect. He included the value of security in his valuation after being requested to do so. This was at the request of Mr. Dixon and with consent of the National Works Agency (Public Works Department). It was his job to value the work after the Architect checked and certified it. It was an advance amount agreed to by the parties which he included in the figures. He said he concluded that the payments were made because Mr. Dixon did not have the money to pay for that level of security and also to prevent interference from thugs. He considered it an extremely high level of payment for security.

[91] In the face of all that, it would seem on any objective view of the situation, that the employer's strict compliance with the original contract terms may have resulted in default by the contractor, expensive litigation and a new tender would have had to be made. All of which ironically occurred in any event. The promise to pay additional security to the contractor was supported by consideration in the form of the factual benefit to the employer. The benefit to the employer was to have the contractor be able to take control of the site and finish the contract without interference from third parties. In my view there was a clear oral agreement acted upon by the contractor from which the employer resiled.

[92] However, I am cognizant of the fact that a variation which is not supported by consideration has no contractual effect. So if I am wrong and there was insufficient consideration for the promise to pay the additional security, I will consider the alternative submission made by counsel for the claimant contractor.

[93] Counsel argued that the employer was estopped from claiming that it had a right to determine the contract at any time until and unless a reasonable time had elapsed after the payment of the agreed sums. He cited Chitty on Contracts 26th edition para. 209-215. The learned editors noted there that, for the doctrine to operate, there must be a legal relationship between the parties; a promise or representation by one to the other that he will not exercise his strict legal rights under the agreement; coupled with the reliance by other on that representation or promise. See the doctrine as expounded in the case of ***Thomas Hughes v The Directors, &c., of the Metropolitan Railway Company*** *(1877) 2 App. Cas. P 439* (HL).

[94] In that case, although the court spoke of the application of the equitable principles, the word estoppel was not used any where in the judgment but the effect of the judgment is the same. It prevents a party from insisting upon his strict legal rights, when it would be unjust to allow him to enforce them, having regards to the dealings which have taken place between the parties. See also Lord Denning's application of those principles in his judgment in the case of ***Central London Property Trust Ltd v High Trees House Ltd*** (more well known as the High Trees case). This is the same principle now better known as promissory or equitable estoppel.

[95] The principle under which all courts of equity proceed is that; if parties have entered into definite and distinct terms, involving certain legal results; certain penalties or legal forfeiture and afterwards by their own act or with their own consent, enter upon a course of negotiation, which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be

enforced; or will be kept in suspense; or held in abeyance; the person who otherwise might have enforced those rights, will not be allowed to enforce them where it would be inequitable to do so, having regard to the dealings which have taken place between the parties. This forms the essence of the equitable doctrine of promissory estoppel. It provides a defence to a claim but does not create any cause of action. However, it appears that it may in its effect enable one party to enforce a cause of action which without the estoppel, would not exist, that is, by giving rise to a binding obligation where none existed before. See Snells Principles of Equity p. 558.

[96] So in this case the promise made by the employer to pay additional security would give rise to a promissory estoppel, which would be binding if acted on by the contractor. It is said that the doctrine most commonly applies to promises not to enforce contractual rights, but it also extends to certain other relationships. The equitable doctrine can now be applied to arrangements which might formerly have been regarded as variations ineffective at common law for want of consideration.

[97] There must be a promise or representation which is intended to affect the legal relationship between the parties. The promise must induce the promisee reasonably to believe the other party will not insist on his strict legal rights. There must be reliance in the sense that the promise somehow influenced the conduct of the promisee. Unlike the estoppel by representation of fact, the equitable doctrine operates without any requirement that the promisee must suffer some detriment. It is enough in equity that the promisee has altered his position in reliance on the promise, so that it would be inequitable to allow the promisor to act inconsistently with it.

[98] In the case at bar, the contractor relied on the promise made by the employer to pay additional security to ensure the smooth hand over of the site and the continuation of the project. It is enough therefore that the contractor made efforts to perform the contract even after the original completion date had passed. He

was led to believe that the strict legal rights under the contract had been varied, suspended or held in abeyance whilst this agreement subsisted. It was argued that the employer should not now be allowed to enforce his rights under the contract since it would be inequitable to allow them to do so in light of the agreement.

[99] I pause to note that the authorities suggest that in such a case where there is found to be a promise and a reliance on the promise whether to the detriment of the promisee or not, the employer is not permanently bound. Since therefore, a promissory estoppel is not permanent in effect, the promisor may resile from his promise but only if he gave reasonable notice of this to the promisee. In this way he may have time to resume his former position or place himself in a position as if the promise had not been made. See ***Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd***. (1955) 2 All E R 657, where it was held that the agreement acted in equity to prevent the demand for completion until there was a reasonable notice to the respondent of an intention to resume their strict legal rights.

[100] The privy Council in ***Emmanuel Ayodeji Ajayi v RT Briscoe (Nigeria) Ltd***. *(1964) 3 All ER 556,* noted that the doctrine only applied if the party altered his position in reliance on the promise but the promisor could resile on reasonable notice being given in order that the promisee could resume his position. The promise is final and irrevocable if the promisee cannot resume his position. The Privy Council stopped short of saying alteration must be to the detriment of the promisee. Of course one would imagine that the more detrimental the reliance the more inequitable it would likely be.

[101] Whilst the employer made no express promise that it would not forfeit for delays caused by the extortionist, implicit in the promise to pay additional security is the realization of the effect that extortion and intimidation had on the contract and the implication of such a promise could be said to arise from the discussions between the parties which resulted in the agreement to pay. The Quantity

Surveyor admitted that there were occasions when the security payments were late and whenever payments were late, the “security operatives” would shut down the site. Because of this the site was shut down several times. It was incumbent on the employer to give reasonable notice to the contractor that it intended to stop making the payments before it actually did so. This it failed to do.

[102] The equitable doctrine creates no new cause of action, so the contractor cannot recover the security payments. His cause of action still lies in the original contract. It is defensive in nature and prevents the contractor from being sued under the original contract. The effect of the equitable intervention is to prevent the employer from relying on his right to forfeit, as if the promise had not been made, to destroy the contractor’s cause of action for breach of the original contract. The contractor’s cause of action lies in the original contract and the employer is estopped from asserting, as a defence, that it was entitled to forfeit.

[103] It was also argued that the principle is that once a certificate had been signed the employer was contractually bound to pay the monies. It was pointed out that a certificate had been signed by the Quantity Surveyor, Mr. Smith, on December 14, 2000. He had prepared a certificate (#49) for December. This certificate included a payment for advance wages to the contractor’s employees but not the security payments. The contract required the employer to make payments fourteen days after certificates were submitted. The payment was three weeks late. The late payment resulted in disgruntled unpaid workers abandoning the work site.

[104] In ***Roberts v Bury Commissioners*** *(1869-70) Law Reports Common Pleas 310 at 326*, it stated;

> ***“…for it is a principle very well established at common law that no person can take advantage of the non-fulfillment of a condition the performance of which has been hindered by himself;…and also that he cannot sue for a breach of contract occasioned by his own breach of contract, so that any damages he would otherwise have been entitled to for the breach of the contract to him would***

immediately be recoverable back as damages arising from his own breach of contract."

[105] The failure to pay may cause actual delay in the progress of the works because it impaired the contractor's ability to finance his work. In this case it directly resulted in loss of labour on the site. It was this loss of labour coupled with the closing down of the site which caused the employer to terminate the contract. The employer by its direct actions, therefore, prevented the contractor from proceeding with the contract, and then terminated as a result. They have sought to benefit from their own wrong. The failure to pay the promised sums was an act of prevention by the employer. The result was that the employer was no longer entitled to demand compliance with condition 37(1).

4. The Termination As A Result of the Contractor Failing To Proceed Efficiently With The Works

[106] The claimant's attorney contended that there was a wrongful termination under the forfeiture clause. He argued that the notice was given seven working days before Christmas day and was to expire two working days before Christmas day. He further argued that having regard to the time at which the notice was served, the outstanding monies that were intended to enable the claimant to regain possession of the site and resume the Works and the unlikelihood of any work being resumed before Christmas; in those circumstances, the warning notice was invalid as being given in bad faith. In this regard he cited the case of ***Stadhard v Lee,*** *7 Law Times Reports p 850*, which he said recognized that mala fides was a ground upon which a notice could be invalidated.

[107] The law recognizes that there is usually an implied term in a building contract that the contractor will proceed with reasonable diligence and expedition. This is usually not a fundamental term or condition which if breached would entitle the employer to treat the contract as repudiated; but if the contractor fails to proceed with due diligence, after notice, it may be evidence of an intention no longer to be

bound and will provide justification for the employer to terminate. In fact, most contracts contain express powers to determine if the contractor fails to proceed with the works with due diligence or reasonable expedition.

[108] In this case, it was argued on behalf of the contractor that it was the employer's failure to pay monies due which resulted in the site being closed down by "security operatives" who were not paid. It was further argued that the 7 days notice to recommence works and the subsequent letter of termination was wrongful and given in bad faith. It was submitted that the employer could not effectively terminate because it was not a notice contemplated by the contract and was unreasonable. The dislocation and resulting delays, it argued were outside the contractor's control.

[109] The employer on the other hand contends that the contract was lawfully terminated under condition 37. Mr. Ivan Anderson admitted that he had been advised that the site had been closed down by disgruntled workers. He said they agreed to pay the advance salaries to the contractor's workers but not the additional security, but did not pay until the 24th January 2001, 2 months after the request. The 7 days notice was served 20 days after the 23rd November 2000. He said Alval had other workers and sub-contractors apart from those on the unpaid list that could have been remobilized to work.

[110] He expressed familiarity with the fact that the notice was given at a time when the site was closed down. He agreed it required action within 7 days. He agreed it required the contractor to mobilize and get workers back on the site. He agreed the 7 days was to expire 5 days before Christmas. He accepted that the contractor would have had to close the site on Christmas day and the other public holidays. It is to be noted that the Quantity Surveyor, in his evidence, agreed that most building sites in Jamaica closed operations between Christmas and the New Year. He also agreed he would not have expected work to resume for the rest of that year. He said in his experience as a Quantity Surveyor, he could not expect

the site to be remobilized and work to resume at that site during that period of time stated in the working notice. But in his opinion it was possible that work could have started the first week of 2001.

[111] When the site was closed down in November, it was within the knowledge of all the parties that the site was shut down by the "security operatives" for whom the employer, at the direction of Mr. Ivan Anderson had failed to provide the agreed security sum. The payment was to enable the contractor to achieve an orderly site handover and allow it to continue the Works. Forfeiture clauses are construed strictly and the powers under these clauses must be exercised reasonably: See Keating's Building and Engineering Contracts10th ed. pp 257-258. Clause 37 of the General Conditions of Government Contracts for Building and Civil Engineering Works states:

a. The authority may without prejudice to the provisions contained in condition 38 hereof and without prejudice to his rights against the Contractor in respect of any delay or inferior workmanship or otherwise, or to any claim for damage in respect of any breaches of the contract and whether the date for completion has or has not elapsed, by notice in writing absolutely determine the Contract in any of the following cases, additional to those mentioned in condition 45 hereof
    I. <u>If the Contractor having been given by the S.O. a notice in writing to rectify, reconstruct or replace any defective work or a notice in writing that the work is being performed in an inefficient or otherwise improper manner, shall omit to comply with the requirements of such notice for a period of seven (7) days thereafter or if the Contractor shall delay or suspend the execution of the Works so that either in the judgment of the S.O. he will be unable to secure completion of the works by the date of completion or he has already failed to complete the works by that date</u>. (emphasis mine)
    II.
        a) If the Contractor, being an individual, or in the case of a firm any partner thereof, shall at any time be adjudged bankrupt or have a receiving order or order for administration of his estate made against him or shall take any proceedings for liquidation or composition under any Bankruptcy Act for the time being in force or make any conveyance or assignment of his effects or composition or arrangement for the benefit of his creditors or

purport so to do or if he be comes insolvent or bankrupt or if any application be made under any Bankruptcy Act for the time being in force for sequestration of his estate or if a….

b) the Contractor, being a company, shall pass a resolution or the Court shall make or order for the liquidation of its affairs or a receiver or manager on behalf of its debenture holders shall be appointed or circumstances shall arise which entitle the Court or debenture holder to appoint a receiver or manager.

Provided always that such determination shall not prejudice or affect any right of action or remedy which shall have accrued thereafter to the Authority.

[112] It is clear therefore, that the employer purported to terminate the contract under condition 37.1. The contractor was served with a letter dated December 13, 2000 under the signature of Mr. Ivan Anderson. That letter stated:

You have not carried out any work on the above site since 18th November 2000. You have further indicated that you are unable to finance the contract despite having been granted an advance payment to complete the project. I refer to our meeting of the 28th November where we advised that no further advances could be made to Alval Limited.

You are hereby instructed to return to the site and continue with the works in an efficient manner.

You are hereby notified in terms of condition 37 of the General Conditions of Government Contracts that, if you fail within seven days to continue with the Works in an efficient manner, it is intended to determine your employment under this contract and give effect to condition 39.

[113] The letter of termination was not far behind. Under the signature of Mr. Allan Cochrane and dated 25 January 2001 it stated:

We refer to the Determination Warning letter dated 13th December 2000 signed by the Chief Executive Officer.

At the meeting held yesterday on site it was evident that you had not carried with the works in an efficient manner. A valuation, carried out on 24th January 2001 shows very little work has been carried out since 13th December. You are hereby notified that, in accordance with Clause 37 of the Conditions of Contract, your employment under the contract for May Pen Revenue Centre dated 11th April 1997 is determined from the date of this letter.

> We intend to enter onto the site and engage others to complete this contract. You are hereby invited to send representatives to the Site at 10:00 Hours on Tuesday 30th January 2001 to measure up the works completed and to take inventory of all goods, materials, plant, equipment and temporary works.
>
> It is intended that schedules for the work remaining to complete the Works will be drawn up and others will be engaged to complete the Works.
>
> Under the terms of Clause 38 (1) (b) all temporary works and plant on site may be used by the completion contractor. You are instructed to furnish details of all contracts of sale or service entered into in connection with this contract in preparation for their assignment under the terms of Clause 38 (1) (c) to this organization. You are instructed to co-operate with the completion contractor in these and other matters: should you fail to comply with the conditions of Clause 38 and thereby cause additional cost to the completion contractor the additional costs will be charged to your account.
>
> No further payments will be made to you. When the contract has been completed and the Final accounts agreed the Architect will certify the amount of expenses properly incurred by us and the amount of any direct loss and/or damage caused to us by the determination.
>
> If the amounts so certified, when added to the amounts already paid to you under the contract before determination exceed the amounts which would have been paid if no determination had taken place and the contract had been completed by you before the date for completion the difference shall be a debt payable to us by you.
>
> If the said amounts be less than the amounts which would have been paid if no determination had taken place and the contract had been completed by you before the date for completion the difference shall be a debt payable to you by us.

[114] In construction projects, time, together with cost and quantities, forms an important tripartite regime. It is usually by this means that the success of a construction project is judged. It is usual to name the date by which completion is required. Even if not so named in the contract, the courts will imply that a reasonable date for completion was contemplated by the parties. Obligation to

complete by a certain date is generally backed by a raft of sanctions and failure to complete on time will result in damages due to the employer.

[115] As stated previously, the existence of provisions for extension of time and the payment of liquidated damages will generally be inconsistent with an intention to make time of the essence of the contract despite words in the contract to that effect. In that same vein the existence of a forfeiture clause based on the contractor proceeding with due diligence and or reasonable expedition may also be regarded as inconsistent with other provisions in the contract, depending on the exact wording of the clause.

[116] Forfeiture clause is a loose term used to describe a clause written into a building contract, which gives the employer the right, upon the happening of an event, to determine the contract or to eject the contractor from the site. Where ascertaining whether the right to forfeit has arisen is left to the employer itself, the rule is that the employer must act reasonably. The question of what is reasonable depends on the particular circumstances of the case: See Emden and Gill's Building Contracts and Practice seventh ed. p.303.

[117] The employer exercised the right to forfeiture under clause 37(1), as a result of the contractor's failure to comply with the notice to proceed efficiently with the Works. That clause envisaged four events which could trigger forfeiture. These were; (a) where the contractor failed to comply with a notice to rectify, reconstruct or replace any defective work; (b) where he failed to comply with a notice indicating the work is being performed in an inefficient or otherwise improper manner; (c) where the contractor delayed or suspended the work so that in the view of the supervising officer he would not be able to complete by the date set for completion and (d) where he failed to complete by the completion date.

[118] Two streams of authority coexist as to when the event giving the right to forfeit has arisen. The first is where the event which triggers forfeiture is a delay in

making progress with the works in order to complete on time; in such a case the right to forfeit depends on the time stipulated being still applicable. See ***Walker v London and North Western Rail Company (1876)*** *L. Rep 1 C. P. D. 518; 36 L.T.* 53. This case shows that the question as to whether the right to forfeit has arisen can only be determined within the time fixed for the completion of the works, for then time is the essence of the contract. It is only with reference to the agreed time that the rate of progress can be determined.

[119] If the forfeiture clause can be construed as being dependent on the contract being completed by a stipulated time, forfeiture cannot be made under that clause after the date of completion has passed, the contract is allowed to continue and there is no extension of time clause or no extension has been made under the clause. The effect is that time would be at large and there would no longer be any effective date with which to reference the rate of progress of the works.

[120] However, in the second stream, if the forfeiture clause cannot be so construed, it will be permitted to allow forfeiture for failure to make due progress within a reasonable time after the date for completion has passed. So in ***Henshaw (Joshua) and Sons v Rochdale Corporation***, *(1944) 1 All ER 413,* a contract was made in 1938 for completion in 1940. There was an extension of time clause and a forfeiture clause. By 1941 the surveyor was dissatisfied with the progress of the work and wrote to the builder. On the builder's failure to comply with the surveyors orders they were given forty eight hours notice of forfeiture. The builder sued for breach of contract and claimed the forfeiture clause ceased to apply after the expiration of the completion date.

[121] The court in making its decision distinguished ***Walker*** but did not overrule or depart from it. It said **Walker's** decision was dependent on the terms of the forfeiture clause. That clause was made exercisable if the work was not done at the required speed, that is, the speed required to finish the work on the completion date. In **Henshaw** the contractual date having passed without the surveyor

extending time, time for completion was waived. However, notwithstanding, the forfeiture clause still subsisted and the contractor was obligated to complete within a reasonable time.

[122] The clause in question was so worded that it was held to be equally applicable to completion of the contract within a reasonable time. The court found that the forfeiture clause was not dependent on the work being completed on a fixed date. It provided for the work to be executed with due diligence and expedition as the Surveyor should require. This it said involved the employment of sufficient workmen to execute the work with due diligence and a number of other contingencies, all of which were as much applicable to the completion of the contract within a reasonable time as it was to its completion on the contract date.

[123] The court agreed with the arbitrator that after the completion date had passed without extension of time by the Surveyor, the builder's duty was to complete within a reasonable time. It said the terms of the contract including the forfeiture clause, continued to apply with such modifications as to make it applicable to a reasonable date. It found that the builder was guilty of several serious breaches of contract at the date of forfeiture.

[124] Clause 37(1) is not referable to any completion date. Viewed on its own, it would appear as if the event upon which the right to forfeit arises is not delay in completing on a particular date but a general failure to proceed efficiently with the works. It would appear on the face of it to be a notice which may be given whether or not the completion date has passed. In this respect it would seem to be in line with **Henshaw's** case. However, when viewed in context with condition 10 of the contract it would appear to be more in keeping with **Walkers** case. Condition 10 is headed Progress of the Works. Condition 10 states:

> Possession of the site or the order to commence shall be given to the contractor by notice in writing and the contractor shall thereupon

> commence the execution of the Works and shall proceed with diligence and expedition in regular progression or as may be directed by the S.O. so that the whole of the works shall be completed by the date of completion.

[125] I am of the view that when clause 37(1) is read with condition 10, the inescapable inference is that the rate of progress is directly referable to the completion date. The essence of a due diligence clause is to deal with cases where the contractor persists in a rate of progress which bears no relation to a specific or reasonable date of completion. So that if after notice is given he fails to proceed at a more applicable rate, he will be showing an intention no longer to be bound and his dismissal would be justified. But if the work is stopped for reasons entirely outside his control he does not show an intention not to be bound and he cannot be validly dismissed under the due diligence clause especially where there is an applicable extension of time clause.

[126] On the authority of **Walker** once the completion date had passed and there had been no extension of time and the contract continued, then time was at large, the contractor's obligation then became one to complete within a reasonable time or a time fixed by notice. The forfeiture clause was no longer effective.

[127] On the other hand, even if this case fell squarely within the ambit of the **Henshaw** principles, in my view, it still contemplates a situation where the contractor is on site but the work is not properly organized so as to proceed efficiently and where the progress was slow or there was no work at all. But the situation, whatever it may be, must be at the default of the contractor. In such a case even if the completion date had not yet passed or it had passed and no extension was given, it may become clear to the Supervising Officer that if the contractor does not proceed efficiently he will be unable to meet the completion date or will not complete within a reasonable time.

[128] It seems to me however, that the clause does not contemplate the giving of a notice to proceed efficiently with the works when the site had been closed down through no fault of the contractor. If that were so it would make clause 22 redundant. The words in the contract must be strictly and reasonably construed. To proceed efficiently with the works assumes (a) that work is going on but inefficiently or (b) due to the fault of the contractor no work is going on. But if no work is going on due to the fault of the employer or due to some circumstance entirely out of the control of the contractor and such a happening is something within the contemplation of the parties and provided for within the contract under condition 22, then it seems to me that, in such a case, clause 37 (1) is entirely ineffective.

[129] In **Stadhard v Lee** the provision of the contract which was to be construed by the court contained the words “proceed as rapidly and satisfactorily”. The court agreed that stipulations of that kind should receive a reasonable construction as the court would assume that the party in whose favour it was inserted, intended to achieve only what was reasonable and just. The court will only accept that it is otherwise, if, from the whole tenor of the contract, it showed that the parties intended the provisions to be effected. Then, however unreasonable or oppressive it may be to one side, the court is bound to give effect to it, so long as the defendants were acting bona fide and with an honest sense of dissatisfaction.

[130] The contract and the conditions there under have to be read as a whole. Implicit in clause 37 (1) is the notion that the Authority can only determine after he has fully evaluated and granted the appropriate extension of time, if any, to the contractor under condition 22. Where there has been a delay but no extension of time and the completion date has passed then the right to insist on completion by date has been waived. The result is that neither party is allowed to abandon the contract without giving notice. This then affords the contractor a reasonable time within which to complete the Works. The contractual effect is that there is no

completion date and time is at large. The obligation of the contractor is now to complete within a reasonable time or a time fixed by notice.

[131] In my view it follows that at the time the seven day notice was given there was no completion date, and time was at large. There was no time (or reasonable time) within which to reference the rate of progress. The contractor's duty was to complete within a reasonable time or within a time fixed by notice. The site having been closed down, the authority had a duty to consider what was a reasonable time to complete and fix, by notice, a reasonable date for completion. The issue then became one of reasonableness. In such a case seven days notice in the Christmas season would hardly be reasonable.

[132] In any event the notice to proceed efficiently with the works was a seven days notice. The time expired December 22, 2000. But the contract was not terminated at that time. It was terminated in January 25, 2001. At that time the advance payment on wages had been made, the site had been re-mobilized and work had recommenced. This delay raises the issue of whether the right to forfeit had been waived. See the decision semble in **Re Garrud *ex parte Newitt*** *(1881) 16 Ch. D. 522 C.A* and also see ***Marsden v Sambell*** *43 Law Times report 120 at pp122-123.*

[133] The Seven days notice expired December 22 after which there was no termination. Termination was four weeks later. During the period the contractor had altered his position. The employer had also paid the salary advances due on the outstanding certificate so that the claimant could pay his workmen. They did not pay for the additional security.

[134] If I am wrong in my conclusion in sub-issue 4 on the invalidity of the forfeiture clause and the seven day notice was valid, on December 22 what were the defendant employer's rights at that time? It would seem to me that after the seven days, the employer was entitled to terminate the contract and remove the claimant

contractor from the site. The issue then would be whether the defendant lost the right to avoid the contract by waiting until January before terminating.

[135] In the case of non-completion within time stipulated, forfeiture must take place immediately after the time expired, as allowing the contractor to proceed with the works would be a waiver of the stipulation. So in the case of ***Re Garrud,*** which was a building agreement with a re-entry clause upon default by the builder and for liquidated damages; it was held semble, that if the ground for forfeiture had been the omission of the builder to complete the buildings on the specified completion date and the landowner had after that day made advances of money to the builder for the purposes of the agreement, or had in any other way treated the agreement as still subsisting, he would have waived the forfeiture.

[136] On the facts of that case, time was the essence of the contract which was to be carried out in a workman like manner and in accordance with the plans and specifications. The houses had not been completed within the time specified in the agreement but it was alleged that after the expiration of those times Goddard made advances of money to Garrud under the agreement. The point was made semble because it did not arise for decision since there was a separate ground for forfeiture, on which the judgment was given.

[137] The question of when a party loses the right to avoid a contract was considered by Fry J in ***Marsden v Sambell*.** In considering the issue Fry J noted that the question had been left open by the Court of Exchequer Chamber in ***Morrison v Universal Marine Insurance Company*** *(L. Rep. 8 Ex. 197-205*). The learned Judge decided the question based on two approaches. The first, assumed the right to determine the agreement was to be exercised within a reasonable time from the date when it arose, the second assumed the right was a right to elect any time unless the right of third parties have intervened, or the other party to the contract had altered his position under the belief that the contract still subsisted.

[138] Using the first approach Fry J found that to allow three weeks to elapse before exercising the right of re-entry was unreasonable. Using the alternative approach, he also took the view that the result would be the same because in the three weeks which had elapsed, the defendant had altered his position in the belief that the contract was still subsisting. In either case Fry J took the view that the right to rescind had been lost.

[139] The general principle therefore, is that when the time for exercising the right of forfeiture has elapsed without the right having been exercised, the employer will be treated as having waived his right. In ***Re Garrud*** payment of advances after the failure to complete was held to be a waiver of the right of forfeiture. Also in ***Platt v Parker*** *(1886) 2 T.LR 786, CA.*, it was held that the right to forfeit for failure to complete on a particular day was waived after the defendant continued to make advances to the claimant. When the waiver has taken place the employer cannot go back and revive it: ***Marsden v Sambell.***

[140] In the instant case, the said question falls to be determined and in doing so I will adopt Fry J's approach. If the right to determine was to be exercised within a reasonable time after the seven days had elapsed, was January 25, 2001 a reasonable time to exercise a right which had arisen on December 22, 2000? The warning notice was dated December 13, 2000. Determination was four weeks and five days after the notice. The claimant had in the interim resumed work approximately ten days before termination and the employer had made payment of the advances it had earlier failed to pay.

[141] Under the notice the contractor was required to proceed efficiently with the works. To do so it would have had to remobilize the site under extreme difficulties, the employer having failed to pay the advance wages and the usual security payments. I accept that the site was mobilized in January and that the contractor proceeded diligently with the works thereafter. Four weeks elapsing was more time

than was reasonable to allow before terminating the contract under the forfeiture clause.

[142] It is clear too, that the contractor had altered his position during those four weeks in the belief that the contract was still subsisting. The contract was terminated on January 25, 2001. The employer made the promised payments on January 24, 2001. At that time work was being done on the site with glass being installed, electrical work was being done and manholes were being put in. In ***Marsden v Sambell*** the defendant had laid out money on drainage-pipes and other matters thus altering his position in the understanding that the contract still subsisted. This resulted in the plaintiffs losing their right to rescind.

[143] Mr. Ivan Anderson gave evidence that an audit was done on 24th January 2001 and very little work had been done since December 12, 2000. He could not say when the work was done or what was done during the period. One would think that an audit would give more precise information. It was contended by the attorney for the claimant contractor that no material had been placed before the court to show that at the time of termination the contractor was not proceeding efficiently with the works. I agree.

[144] A party who has made a waiver cannot withdraw it and then immediately hold the other party liable for past acts or omissions done on faith of the waiver. Time will have to be allowed to allow the contractor to be placed in the same position as before to fulfill the contract in the original terms. This requires reasonable notice to be given. See ***Birmingham and District Land Co. v L.N.W. Ry (1888) 40 Ch. D. 286.*** The most common situation in building contracts involving this principle is that of the employer who does not at once exercise his full rights for delay by the contractor where the contract date for completion is past and there is no extension of time given.

ISSUE TWO- THE BONDS

[145] The exercise of a power to forfeit for breach may be invalidated by reason that the breach was caused by the act of the party seeking to exercise the right of forfeiture. Or it may be invalidated by the fact that there was a delay or other conduct recognizing the continued existence of the contract after knowledge of the breach. Where there has been a waiver of the right to forfeit and the employer ousted the contractor in purported pursuance of the power to forfeit, that will amount to a wrongful forfeiture: ***Marsden v Sambell***

[146] Generally the measure of damages in the case of a wrongful forfeiture falls to be determined by the ordinary common law rules. The right of the contractor is to recover such amount of damages as would put him in as nearly as possible the same position as if no such wrong had been committed, that is, not as if there had been no contract, but as if he had been allowed to complete the contract without interruption. See ***Ranger v G.W.*** **Rly** (1854) 5 HLC 72

[147] It was a condition of the contract that the contractor should enter into a performance bond/guarantee in favour of the employer as surety for the proper execution and completion of the contract. In construction contracts such as this one, it is common for a bank to enter into a performance bond or guarantee in favour of the employer, at the request of the contractor. The bank, as bondsman, promises to pay up to the amount of the bond if the contractor fails to perform his contract. Accordingly, the contractor entered into two performance bonds/guarantee bonds with Workers Bank now Union Bank. Upon the employer terminating the contract, they drew down on the performance bonds. It is not disputed that the bonds were paid out by the bank.

[148] On the other hand, the employer denied that it wrongfully drew down on the bonds. It noted that the bonds were posted pursuant to contract and were to be paid upon termination. If the employer exercises his power to forfeit the contract,

unless there is a provision that in that event the liquidated damages are still to run till the date of actual completion, he cannot claim liquidated damages after the date of forfeiture: ***Felton v Wharrie*****.** In this case the employer has rightly not claimed for liquidated damages but it did draw down on the bonds**.** The question is whether in light of the fact that the contractor was not in breach, the employer is liable to repay the sums to the contractor. See keating page 273 and 275 and ***Owen v Barclays Bank*** (*1978)1 ALL ER 1976***. See also*** ***Perar BV-V General Surety and Guarantee Co. Ltd.*** *(1994) CA 66 BLR 77* and the House of Lords decision in ***Trafalgar House Construction v General Surety Guarantee Company*** *1996 AC 199.*

[149] In ***Owen v Barclays Bank***, the court differentiated between an on demand bond and a performance guarantee. An on demand bond is a bond payable on demand without proof of obligations and imposes an obligation to pay on the guarantor. With his type of bond it is irrelevant whether there is a default by the contractor or whether he performed or not. The only defence to it is the question of fraud. A performance guarantee on the other hand, creates a secondary liability which is dependent on the contractor's liability. In this type the employer must show some type of default by the contractor if the call on the bond is to be valid. This is sometimes referred to as a conditional on default bond. In ***Perar BV-V General Surety and Guarantee Co Ltd*** it was held that a default in such a case means a breach of contract. Since the contractor was not in breach the employer was not entitled to the bond. The difference in the two types of bonds was considered by the HL in ***Trafalgar House*** which overruled the Court of Appeal's decision that the standard form bond used in that case was an on demand bond and decided that based on the wording of the bond, it was a guarantee.

[150] In this case, this was a performance guarantee bond and the contract having been wrongfully terminated, the bank had the same defence to payment as the contractor and the employer had no legal right to draw down on the bonds. The

contractor is therefore entitled to the return of the sums paid out by the bank, to the employer, on its behalf, there being no breach of contract.

[151] I find as a fact that on the evidence the employer did call in the bonds and that these were paid over by the bank. The employer is therefore liable to repay the sum of $7,349,500.00 representing the sum which it drew down on for the performance bond/guarantee. The contractor also provided a bank guarantee for the full amount of the mobilization payments. The contractor is also entitled to the return of $2, 264, 893.53 which was the sum the employer collected from the bank for the mobilization bond.

ISSUE 3-THE EQUIPMENT

[152] Forfeiture under express provisions in the contract frequently involves seizure or use of plant and equipment. The contractor's plant and equipment was left behind pursuant to the terms of the contract relating to forfeiture. Condition 38 (1) (b) authorizes the Authority on determination of the contract to take possession of the site and all materials and things thereon. By clause 38 (111), the Authority had the power to sell any such plant and equipment so left behind. Paragraph 5 of the determination letter reminded the contractor of his obligation under condition 38.

[153] It was submitted that having regard to the wrongful termination of the contract, the employer is liable for wrongfully withholding or detaining the contractor's plant and equipment. It was further submitted that it did not matter whether the equipment had been used by the employer or its nominee. The equipment under condition 38 could only have been removed by the written authority of the Superintendent Officer. No such authority was given during the period claimed. It was further submitted that the claimant contractor was therefore entitled to the sums claimed and to recover the cost of repairing the John Deere backhoe.

[154] The attorney representing the employer submitted that it did not wrongfully forfeit the contractor's equipment. He pointed to the letter dated October 24, 2002 from the National Works Agency, another dated February 6, 2004 from Tropical Metals Products Ltd. and a National Works Agency Memorandum dated February 6, 2004 from Conrad Jackson. The equipment was left in January 2001 after determination, in compliance with condition 38 of the agreement. The first correspondence regarding the contractor's equipment was in 2002. The claim is for January 2001 to October 2002, when the first notice was sent to the contractor for removal of his equipment from the site.

[155] It is the law that where, as in this case, the forfeiture was unlawful, the contractor is entitled to damages for any plant seized by the employer, as a result: See Hudson's Building and Engineering Contracts 9th ed. 552; 10th ed. P 712. The court may allow for a reasonable hire rate for the period it remained on site, based on the contractor being deprived of its use elsewhere. The claim in such a case would be based on the assumption that other work was available elsewhere. Otherwise the award would be based on a maintenance and depreciation basis only for it having been kept on site. See ***Bernard Sunly Co. Ltd. v Cunard White Star Ltd*** *(1940) 2 All ER 97;* here the court held that no other basis was to be adopted unless there was evidence to support it. In that case the machine was left idle on the site for a week. The court found that the machine was a chattel of commercial value and there were four possible heads of damages: depreciation; interest on money invested; costs of maintenance; expenditure of wages thrown away.

[156] Evidence was given on behalf of the contractor by Mr. Eglon McIntosh, a heavy duty equipment service repair man. He had been engaged to service the heavy duty equipment operated by the contractor on the site and claimed to have been familiar with them. His evidence was that after the contractor's John Deere backhoe was collected from the site, the engine was found to have seized up, and the hoses were crystallized and needed to be changed. The cost of servicing and

repair amounted to approximately $470, 000.00. This was as a result of its non-use.

[157] The evidence of Mr. Alvin Dixon is that as a result of the termination, his business was virtually destroyed. There is no evidence that had the backhoe been in his possession it would have been used. There is also no evidence of any contracts for which that and the other equipment claimed for might have been used if they had been in his possession. The claim for loss of use therefore fails.

[158] There is some evidence of depreciation in the 175 cfm Compressor. Mr. McIntosh claimed that when he examined it attachment parts were missing from it and the engine was seized up. There is however, no evidence of the value of the compressor, the parts which were missing or cost to repair. There is also no evidence of depreciation in the value of the water tank, cube moulds and slump cone which were claimed for.

[159] On the evidence as presented, I therefore find that the contractor is entitled to the sum of $470,000.00 only, as depreciation in the value of the John Deere backhoe which was left on the site pursuant to condition 38 of the contract.

ISUUE FOUR-THE CERTIFICATE

[160] A very common provision in building contracts is the requirement that the Architect or Engineer is to issue certificates. Certificates are of different types. Interim or progress certificates are issued periodically during the course of the work to ascertain the amount of interim payments to the contractor. An interim certificate properly granted creates a debt due from the employer. He must pay the sum due subject to set off. It therefore follows that if no interim certificate is given by the certifying officer, then there is no debt due. The payments reflected in interim certificates represent an approximate value of the work done or materials delivered to the date of payment. In the absence of any such provision in the contract, these sums are not binding on either side to the contract. They are

therefore subject to readjustment on the final certificate. See Hudson's BC 9th ed., p. 367 and Lord Cairns statement in the case of ***Tharsis Sulpher & Copper Co. v McElroy*** *(1878) 3 App. Cas. 1040* at p. 1045.

[161] The contractor produced in evidence a document purporting to be certificate number 51, dated February 16, 2001, with figures prepared by him personally, with little evidence as to when it was prepared and submitted. I took note of the fact that the original date on the document was deleted and the February dated obviously inserted. This is actually the contractor's accounts. Surprisingly $12,647,713.33 in the contractor's accounts is a claim for additional security which was never paid out by the contractor. The sums for additional security were for payment to third parties, that is, workers claiming to provide additional security at the site. If the contractor never paid these sums from his own resources it remains unclear as to the basis upon which he now seeks to recover this sum.

[162] A certificate can only be given by the person designated in the contract. In this case it was the Supervising Officer, who by definition was the Chief Technical Director of the Ministry of Construction (Works) or his duly authorized representative. The work was valued by the Quantity Surveyor and certified by the Architect employed to the Ministry of Construction (Works). The Quantity Surveyor was bound to value the work according to the contract for the purpose of the final certificate, whether or not the contractor submitted an account. The Quantity Surveyor's evidence, which I accept, is that he received no accounting from the contractor dated February 16, 2001 and there was no certificate for that date. Certificates 1-52 were paid to the contractor by the employer. The evidence which I accept from the Quantity Surveyor is that certificate 52 which was paid, took account of submissions from the contractor.

[163] Again, there being an arbitration clause in the contract, the court may assume the powers of the arbitrator and determine whether a certificate should have been given. See ***Neale v Richardson*** *(1938) 1 All ER 753*. Whilst I accept

that wrongful termination of a builder's employment can have the effect of depriving the builder of a certificate, I find on a balance of probabilities, that there was no certificate dated February 16, 2001 and no accounts submitted with that date for a certificate numbered 51. There already exists certificates 1-51 and a certificate numbered 52 which according to the Quantity Surveyor's notional accounts, was paid. This, it would appear from the evidence, was the final certificate. The claimant contractor has failed to make out a case on this part of the claim.

DAMAGES

[164] A successful contractor is to recover such damages as would put him in as nearly as possible the same position as if the wrong had not been committed. The remedy for wrongful termination is damages measured by the amount to which the contractor would have been entitled if the work had been completed by him. In the case of prevention the builder is entitled to the value of the work done assessed at contract rates, plus his profits on the remaining work. The contractor is entitled to general damages for loss of profits and loss of its retention monies, less any deduction for certified defects.

[165] In this case the contractor had been paid substantial sums on the contract. The evidence from the employer's Quantity Surveyor was that at the time of termination the claimant's proportion of work to complete his part of the contract was $7,433,836.64. The remainder of the work was to be done by sub-contractors. It was submitted that loss of profit was to be calculated at a conventional sum of 10%. This was uncontroverted. So, accepting as I do that this was so, 10% of that figure would be $743,383.66. This is the sum due and owing to the contractor as damages for loss of profits.

[166] According to the Quantity Surveyors notional accounts, the retention money applied by the employer amounted to $3,674,750.00. There is no power to forfeit the retention money which amounts to a penalty. Even if the right to forfeit the

retention money in the contract was valid, it would be exercisable only if the contractor was at fault. The innocent contractor is entitled to this sum less cost of remedying any defects.

[167] The Quantity Surveyor indicated that the projected value of the work to complete after the termination of the contract was $35,391,367.64. This was the contract sum to Tank Weld Limited which completed the contract at a cost of $49, 464,875.14. According to the notional accounts, $11, 956,955.94 of this sum, was for increased cost and variations and a specific sum of $6,549,518.40 for remedial work. This was part of additional payments to Tropical Metal Products for extension of time granted to them on their contract. This was visited upon the claimant contractor and was held to be due and owing to the employer upon completion. The evidence was that the contract was 85% complete at the time it was terminated and that at that time the building works were complete. There is no evidence from the notional accounts of what the certifiable defects were. It refers to variations, increased costs and costs for remedial work.

[168] Increased costs are increases in the cost of materials and variations are works not included in the original contract and were therefore, not included in the original contract price. These were changes made to the works after the termination. While variations cannot be visited upon the contractor it is also true that having determined that the contract was wrongfully terminated, increased costs also cannot be visited upon the contractor. The remedial work is unspecified and uncertified. There is no evidence what remedial work was done by Tropical Metal Products applicable to defective work done by the claimant contractor. The claimant contractor is, therefore, entitled to the retention monies without deductions.

[169] There is a claim for general damages for loss of the claimant's business. No award is made in this category.

THE COUNTER CLAIM

[170] An employer can counter claim for defects as damages which he has sustained whether or not the contract was wrongfully terminated. This is also provided for under condition 30 of the contract. The sum of $ 11,956,955.94 which the employer claimed to be entitled to from the contractor was reduced to $4,607,455.94 after the $7,349,500.00 performance bond collected by the employer, was deducted. This is the sum on the counter claim. Based on my findings and conclusions above, regarding these figures, the counter claim fails.

DISPOSITION

[171] This matter is disposed of as follows:

1. There will be Judgment for Alval Limited on the claim in the sum of $14,502,327.19 with interest at 6% from the date of service of the claim, comprised as follows:
2. $7,349,500.00 –refund of the performance bond/guarantee.
3. $2,264,893.53 – refund of the mobilization funds.
4. $3,674,550.00 –refund of the retention monies.
5. $- 743,383.66 -loss of profits.
6. $- 470,000.00-damage to equipment.
7. On the Counter claim there will be Judgment for Alval Limited.
8. Alval Limited will have its costs to be agreed or taxed.