IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2012/CD-0084

BETWEEN CONSTRUCTION DEVELOPERS ASSOCIATES CLAIMANT

A N D URBAN DEVELOPMENT CORPORATION DEFENDANT

Ms. Carol Davis for the claimant

Mr. John Vassell QC, Mrs. Julianne Mais-Cox and Mr. Courtney Williams for the defendant instructed by Dunn Cox

Heard: **16th and 17th October 2013,**
5th, 7th, 17th, 18th and 21st February 2014,
2nd, 3rd, and 4th July 2014,
13th October 2014, 20th November 2014 and 5th December 2014

Construction Contract- Breach of contract-Whether contract required parties to arbitrate – Whether architect had authority to certify claim – Effect of architect's interim and final certificates- Whether sum due on earlier certificate can be paid on later certificate- Whether payment made gratuitously- Whether oral contract is 'Cost Plus'- Whether claimant entitled to compound interest- Whether claim ought to be determined on *quantum meruit* basis- whether claim statute barred.

SINCLAIR- HAYNES, J

[1] Pursuant to a contract dated May 26, 1988 (the C4 Contract) between Construction Developers Associates Limited (CDA), (claimant) and Urban Development

Corporation Limited (UDC), (defendant), it was agreed that CDA would construct the following and conduct associated works in the volatile area of West Kingston:

(a) Oxford Mall North;
(b) Coronation Square; and
(c) Queen's Mall.

[2] Construction began in or about July 1988 but was plagued by constant violent activity in the area. In or about August 1992, the fragile peace was shattered, as again, violence erupted in the area. The C4 Contract unfortunately, was a casualty. A replacement cost of three million, seven hundred and fifty thousand dollars ($3,750,000.00) worth of tools, materials and hoarding on site was stolen.

[3] Claims were made on West Indies Alliance Insurance Co. Ltd, (the insurers) by the claimant. The insurers however cancelled the policy and refused to honour the claims because of the volatility of the area. The defendant attempted, but likewise, failed to obtain insurance coverage for the site.

[4] The lawlessness, which prevailed in the area, caused the parties to mutually terminate the C4 Contract. Upon the determination of the C4 Contract, the parties agreed orally, that the claimant would provide security for the site the cost of which would be reimbursed by the defendant. That contract was also prematurely terminated as a result of controversy regarding the terms of the contract and the provision of documentation to substantiate the cost incurred by the claimant in providing the service.

[5] The claimant has now instituted legal proceeding against the defendant. Its claim is two pronged. The first is for the sum of one million eight hundred and seventy-five thousand dollars ($1,875,000.00) which is 50% of the value of hoarding, tools and materials which were stolen from the site and the second is for three million eight hundred thousand dollars ($3,800,000.00) under the Security Contract. Interest of thirty-six million two hundred and nineteen thousand six hundred and thirty-nine dollars and eleven cents ($36,219,639.11) and Twenty-five million one hundred and thirty-five thousand six hundred and thirteen dollars and twenty- seven cents ($25,135,613.27) is claimed on the sums of $1,875,000.00 and $3,800,000.00 respectively.

The claim for the sum of $1,875,000.00

[6] Certificate 39 provides the basis for the claim for the sum of $1,875,000.00 Consequent on the disturbance in the area which resulted in the claimant suffering substantial loss of hoarding and construction material from the Spanish Town Road and West Street sites, a claim for the replacement cost of losses was made on Ms. Nadine Isaacs, the architect. That claim totals $1,875,000.00 which represents 50% of the replacement cost of the items lost. On October 1, 1992, the architect included the sum of $1,875,000.00 in interim certificate 39.

[7] An unbridgeable rift has ensued between the parties as to whether it was a term of the contract that the defendant would be responsible for 50% of the replacement cost which amounts to $1,875,000.00. The defendant refuses to pay the said sum. The claimant is however unyielding in its claim that payment of that sum was certified by the architect in accordance with the C4 Contract. It also claims bank interest on the said sum.

[8] In its Particulars of Claim, the claimant alleges that:

(a) By failing to pay the sum of $1,875,000.00 the defendant is in breach of clause 30 of the C4 Contract which states *inter alia* that the architect's certificate of payment must be honoured within fourteen days.

(b) The sum of $1,875,000.00 was borrowed from National Commercial Bank (NCB) in or about October 1992. The loan was transferred to Trafalgar Commercial Bank (TCB) in or about December 1994.

(c) Interest on the said loan accumulated to a sum in excess of the prescribed limit permitted by TCB so that the claimant obtained further loan amounts from Alliance Capital Limited (ACL) to service the said loan.

(d) Interest has accumulated on the principal sum from October 1992 to March 2000 which has resulted in a total of $36,219,639.11 becoming due and owing to Alliance Capital Limited and Trafalgar Commercial Bank.

[9] Regarding the security Contract, the claimant alleges that it was agreed that the defendant would refund all sums which the claimant expended. In order to provide the agreed security, the claimant borrowed the sum of three million, eight hundred thousand dollars ($3,800,000.00) from the bank. The claimant alleges that:

(a) It provided security services from May 1, 1993 to April 30, 1994 at a cost of $4,900,000.00. It submitted invoices totaling $4,900,000.00 for the said expenditure. The defendant paid $1,100,000.00 in partial satisfaction of the said invoices.

(b) A balance of $3,800,000.00 is outstanding. Demand for the said sum was made on March 22, 1995.

(c) The said sum of $3,800,000.00 was borrowed from TCB in or about March 1995. Interest has accrued in excess of the claimants prescribed limit.

(d) Consequently the claimant obtained, subsequent to November 1996, further loan amounts from Alliance Capital Limited, to service the said loan and interest.

(e) The interest accumulated on the sum of $3,800,000.00 for the period March 1995 to March 2000 amounts to $25,135,613.27 which is due and owing to Alliance Capital Limited.

(f) Despite repeated demands for the said sums of $36,219,639.11 and $25,135,613.27, the defendant has failed to pay the said sums.

The Defence

Regarding the claim for $1,875,000.00

[10] The defendant, however, resists the claim. It asserts that there was no agreement pursuant to the C4 Contract for the defendant to be responsible for 50% of

the replacement cost. It contends that all sums which were certified on certificate 39 for payment pursuant to the Contract were paid. The sum of four million three hundred and eighty-five thousand five hundred dollars ($4,385,500.00) was certified on certificate 39. The sum of $1,875,000.00 was not paid because the defendant queried the *bona fides* of its inclusion in a certificate which was issued by the architect under the Contract. The claimant was at all material times aware that negotiations were in train between the parties concerning its *bona fides.*

[11] The defendant further alleges that the claimant was paid two million five hundred and ninety-nine dollars and twenty cents ($2,547,999.20) by way of cheque on October 30, 1992. A balance of one million eight hundred and thirty-seven thousand five hundred dollars ($1,837,500.00) remained. The said sum of $1,837,500.00 was not paid because its inclusion was outside the architect's jurisdiction. That sum was however, later paid gratuitously on certificate 40.

[12] The sum of three million and seventy-seven thousand five hundred and forty-four dollars ninety-six cents ($3,077,544.96) was certified on certificate 40. The defendant paid the sum of ($4,915,048.76) instead. It included the sum ($1,837,500.00) which was payment of 50% of the cost of the hoarding, tools and material less the contractor's levy. Certificate 40 was paid in the following manner, the sum of:

(1) two million dollars ($2,000,000.00) was paid on March 12, 1993;

(2) one million six hundred and sixteen thousand five hundred and forty-five dollars and seventy–six cents ($1,616,545.76) was paid on May 14, 1993; and

(3) one million two hundred and ninety-eight thousand five hundred and three dollars ($1,298,503.00) was paid on June 23, 1993.

The defendant alleges in the alternative that the sum of $1,837,500.00 was paid to the claimant gratuitously. It was under no obligation to do so under the contract. The defendant also contends that the claims are statute barred.

The claim for $3,800,000.00 under the Security Contract

[13] Regarding the claim of four million nine hundred thousand dollars ($4,900,000.00) for providing security pursuant to the oral claim, the defendant contends that it was agreed that the defendant would repay the claimant the sums actually expended in providing the service plus handling charge as a percentage of the actual expenditure. The charge was 20% percent. Payment was subject to the claimant providing the defendant with verification of the expenditure by producing invoices and or other supporting documentation. There was no agreement regarding interest.

[14] On March 22, 1995, the claimant submitted a claim by way of letter demanding payment in the sum of $3,800,000.00 for the period May 1993 to February, 1995. By way of letter dated 14 December 1994, the sum of four million one hundred thousand three hundred and fifteen dollars and thirty-seven cents ($4,100,315.37) was claimed for security and stand-by services for the period May 1993 to December 1994. Included in that amount, was a claim for the sum of $301,709.98 for handling charges. It also included bank and interest charges in the sum of $2,290,055.47.

[15] The defendant alleges that the claims were submitted in breach of the contract which required the attachment of documentation verifying the sums expended and the claims for interest, profit and overheads. The claimant also failed to provide it with its security bills timeously. It contends that the claimant held them for unreasonably long periods which resulted in the exorbitant interest rates. It insists that it is under no duty to pay such interest in the circumstances. The first claim for payment was submitted to the claimant in October 1993. That claim was for the sum of $736,408.00. It included interest charges from May 1, 1993 to September 30, 1993.

[16] The defendant is, however, adamant that no further amount is owing to the claimant as it is not responsible for the high interest incurred on the said loan as a consequence of the claimants neglect in submitting its claims in a timely manner.

Request for reimbursement was made for the first time on October 12, 1993 but without the requisite documentation. In spite of the claimant's breach, the defendant made advance payments totaling $1,100.000.00. The defendant paid the claimant a total of $1,793,879.05.

The Claimant's evidence regarding the $1,875,000.00

[17] The evidence of Mr. Roy Williams, the claimant's managing director, is that pursuant to clause 30, in or about March 1992, the claimant submitted interim certificate 39 to the architect for payment. A claim for replacement and hoarding was included. The claimant, the defendant and the architect held several meetings at which the issue was discussed. Representatives of the claimant and defendant's consultative team which included Ms. Isaacs, the architect and Mr. Horace Wright, the Quantity Surveyor, met in or about September 1992. It was agreed that the defendant would be responsible for 50% of the replacement cost.

[18] Consequent on that meeting and upon examination of the claim, on 1 October 1992, the architect, by way of letter issued interim certificate 39 in the sum of $4,385,500.00. Included in that sum was $1,875,000.00 which represented the replacement cost of the pilfered items. Mr. William's evidence is that the defendant's removal of the sum of $1,875,000.00 from the architect's certificate and its failure to pay the said sum which the architect certified is in breach of the contract.

[19] Clause 30 prevents the defendant from interfering with the architect's certificate. The architect issued her final certificate with the final amount due from the defendant on April 3, 2000. The defendant has not challenged the final certificate. According to Mr. Williams, the defendant's failure to dispute the final certificate is conclusive evidence that the architect's certificate is indisputable. It is his further evidence that the sum attracts commercial interest. The rate is 2% in keeping with the practice of the industry and the practice of the parties during the course of the contract and is compounded.

[20] Mr. Williams is insistent that neither the sum of $1,875,000.00 nor any part thereof was paid on certificate 40. Further, he asserts that the contract does not provide for a payment due on one certificate to be unilaterally incorporated into another certificate. Such payment on certificate 40 would have breached the contractual arrangements, which, he says, is unacceptable in the industry. He contends that since the defendant interfered with the architect's certificate, it was obliged to send a letter with the cheque stating that they were paying a portion of the certificate and withholding the remainder.

The defendant's evidence

[21] The evidence of Mr. Ainsley Bell who was the defendant's Chief Quantity Surveyor at the material time and currently a consultant of the defendant, is that it was reported to UDC that during the weekend of February 15, 1992, there was civil disturbance in the area. Consequently, hoarding was stolen. It was necessary to secure the site so the defendant paid the claimant the sum of $500,000.00 to replace the said hoarding. The claimant however said that other items were stolen and informed that the site was uninsured at the time because the insurer had withdrawn its insurance coverage.

[22] Ms. Nadine Isaacs, the project architect, by way of letter dated October 1, 1992, certified and issued to the defendant interim certificate of payment number 39. The sum of $1,875,000.00 was erroneously included. It was his (Mr. Bell's) responsibility to check the certificates for errors. That claim constituted a 'hardship claim' which did not fall within the types of claim certifiable under the C4 Contract. It was therefore the defendant's responsibility as employer to decide whether it would make a 'hardship payment' to the claimant. Mr. Bell directed payment of the said certificate but omitted that amount. Under cross-examination he said it was understood the defendant was awaiting the ruling of its Board of Directors on the matter.

[23] Ms. Isaacs, by way of letter dated November 16,1992, admitted that the inclusion of the sum for 'civil disturbance' was a recommendation. She therefore accepted his view that the claim did not arise under the contract. According to him, the defendant later accepted Ms. Isaacs' recommendation and subsequently made a gratuitous payment of the claim minus the contractor's levy to the claimant.

Several issues arise for the court's determination. The first is whether there was an agreement for UDC to pay 50% of the loss.

Was there an agreement for UDC to pay 50% of the loss?

[24] Does the inclusion of $1,875,000.00 in Certificate 39 issued by the architect oblige the defendant to pay? The claimant holds firmly to the view that by virtue of its inclusion in the architect's certificate, the defendant is obligated to pay. According to Mr. Williams, the decision taken that the defendant was responsible for 50% of the loss constitutes a variation of the contract pursuant to clause 11 of the Conditions of Contract. That clause allows the architect to sanction in writing variations made by the contractor. On the other hand, the defendant staunchly resists this claim and asserts that such a claim falls outside of the contract and that there was no agreement to pay. It was merely under consideration as a gratuitous payment.

Is there any contractual basis for this claim?

[25] The answer must be ferreted out from the C4 Contract and correspondence between the parties. The claimant insists Clause 11 of the C4 Contract provides for variations. Clause 11 states:

> **Variation Provisional and Prime Cost Sums**
>
> *"11(1)- The architect may issue instructions requiring a variation and he may sanction in writing variation made by the contractor otherwise than pursuant to an instruction of the architect variation required by the architect or subsequently sanctioned by him shall vitiate this contract."*
>
> *(2) The term "variation" as used in these conditions means the alteration or modification of the …quality or quantity of the Works as shown upon the Contract Drawings and described by or referenced to in the Contract Bills,*

and includes the addition, omission or substitution of any work, the alteration…of the kind or standard of any of the materials or goods to be used in the Works, and the removal from the site of any work, materials or goods to be used in the Works, and the removal from the site of any work, materials or goods executed or brought thereon by the Contractor for the purpose of the Works other than work materials or goods which are not in accordance with this contract."

"(6) If upon written application being made to him by the Contractor, the architect is of the opinion that a variation or the execution by the Contractor of work for which a provisional sum is included in the Contract Bills (other than work for which a tender made under clause 27 (g) of these Conditions has been accepted) has involved the Contractor in direct loss and/or expense for which he would not be reimbursed by payment in respect of a valuation made in accordance with the rules contained in sub-clause (4) of this Condition and if the said application is made within a reasonable time of the loss or expense having been incurred, then the Architect shall either himself ascertain or shall instruct the Quantity Surveyor to ascertain the amount of such loss or expense. Any amount from time to time so ascertained shall be added to the Contract Sum, and if an Interim Certificate is issued after the date of ascertainment any such amount shall be added to the amount which would otherwise be stated as due in such Certificate."

Clause 11, in this court's view, does not speak to loss of materials by way of theft.

Recovery of material stolen is provided for by Clause 20 which intended such matters to be dealt with by way of insurance.

[26] Clause 20 provides:

20 (A) (1) The Contractor shall in the joint names of the Employer and Contractor insure against loss and damage by fire, earthquake, lightning, explosion, windstorm, fire, flood caused by earthquake, volcanic eruption, hurricane or by any other cause, bursting or overflowing of water tanks, apparatus or pipes, aircraft and other aerial devices or articles dropped therefrom, riot and civil commotion (excluding any loss or damage caused by ionizing radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel, radioactive toxic explosion or other hazardous properties of any explosive nuclear assembly or nunclear component thereof, pressure waves caused by aircraft or other aerial devices travelling at sonic or super-sonic speeds) for the full value thereof (plus the percentage (if any) named in the*

appendix to these Conditions to cover professional fees) all work executed and all unfixed materials and goods delivered to, placed on or adjacent to the Works and intended therefor, but excluding temporary buildings, plant, tools, and equipment owned or hired by the Contractor or any sub-contractor, and shall keep such work, materials and goods so insured until Practical Completion of the Works. Such insurances shall be with insurers approved by the Architect, and the Contractor shall deposit with him the policy or policies and the receipts in respect of premiums paid; and should the Contractor make default in insuring or continuing to insure as aforesaid the Employer may himself insure against any risk in respect of which the default shall have occurred and deduct a sum equivalent to the amount paid by him in respect of premiums from any monies due or to become due to the Contractor.

Provided always that if the Contractor shall independently of his obligation under this Contract maintain a policy of insurance which covers (inter alia) the said work, materials and goods against the aforesaid contingencies to the full value thereof (plus the aforesaid percentage if any), then the maintenance by the Contractor of such policy shall, if the Employer's interest is endorsed thereon, be a discharge of the Contractor's obligation to insure in the joint names of the Employer and Contractor; if and so long as the Contractor is able to produce for inspection as and when he is reasonably required so to do by the Architect, documentary evidence that the said policy is properly endorsed and maintained then the Contractor shall be discharged from his obligation to deposit a policy or policies and receipts with the Employer by on any occasion the Employer may (but not unreasonably or vexatiously) require to have produced for his inspection the policy and receipts in question.

[27] Ms. Davis' contention that by virtue of clause 20(A)(1), the contractor insures the work as the defendant's agent since the money for the insurance premium is provided by the employer, is in this court's view, wholly untenable. Clause 20, places the responsibility of insuring and replacing the hoarding squarely upon the contractor's shoulders. Clause 20 (A) (1) permits the employer, if he wishes, to insure if the contractor defaults. The fact that the clause entitles the employer to deduct the sum

equivalent to the premiums cannot, in my view, be construed as the contractor insuring as the employer's agent.

[28] Clause 30(1) speaks to certificates and payments. It reads:

> "*The contractor shall be entitled to present at intervals named in the appendix requests for interim payment which shall include the total value of work properly executed on site and of materials and goods delivered upon the site for use in the works excepting that the valuation shall only include such materials and goods as are reasonably and not prematurely brought upon the site and then only if adequately stored and protected. All requests for payment shall be accompanied by such detailed statements of quantities and unit costs as will enable the variation to be properly verified."*

The "material" referred to at clause 30(1) speaks to material taken on site to be utilized in the construction, not material which was stolen or lost in any other manner. In this court's view, there is no contractual basis for the claimant's claim.

Was there a subsequent agreement reached between the parties regarding payment of the $1,875,000.00?

[29] Mr. Bell says that it was common knowledge that the matter was before the Board of Directors as the defendant was awaiting clarification. The correspondence exchanged among the parties is helpful in determining whether an agreement was arrived at for the defendant to pay 50%. A letter dated September 22, 1992 from the claimant to Ms. Isaacs is illuminating. This letter was sent shortly after a meeting on September 18, 1992 with the architect, Mr. Bell, Mr. Karl Binger and Mr. Horace Wright (the Project Quantity Surveyor). The letter reads:

> *"This letter will confirm our telephone discussion of September 21, 1992, in which you advised that resulting from your meeting with Urban Development Corporation this past Friday, September 18, 1992, the Client have indicated that they would consider reimbursing Construction Developers Associates Limited for fifty percent (50%) of their losses due to unprecedented massive pilferage of materials from job site over the weekend of February 15 – 17, 1992 in the amount of Two Million, Five Hundred and Ninety Thousand, Eight Hundred and Fifty Seven Dollars*

and Forty Six Cents ($2,590,857.46), less the sum of Five Hundred Thousand Dollars ($500,000.00), already paid to Construction Developers Associates Limited as per Certificate No. 36[2]. In addition, there is an additional amount of Five Hundred and Fifteen Thousand, Four Hundred and Sixty Dollars ($515,460.00), due for replacement Purlins for those pilfered as per attached invoice from Sure Manufacturing & Roofing Company Limited.

The adjusted theft liability amounts to a total of Two Million Six Hundred and Six Thousand, Three Hundred and Seventeen Dollars and Forty Six Cents ($2,606,317.46)…

In view of the facts enumerated, Construction Developers Associations Ltd. expect full compensation from the Urban Development Corporation for losses of this magnitude, resulting from the outbreaks of hostilities in the area for whatever reason well beyond our ability to handle."

[30] It is Mr. Bell's evidence that major decisions concerning the defendant are made by the Board. Individual employees do not possess the requisite authority to make such decisions. The result of the meeting was that the issue would be considered and a decision would be arrived at by the persons imbued with the authority to make that decision. Mr. Williams' evidence is that he had several contracts with the defendant. It is not farfetched to conclude that he must have been aware that the Board was the ultimate decision maker regarding issues of that magnitude.

[31] On November 2, 1992 UDC's Chief Area Manager, Mr. Karl Binger wrote to the architect and unequivocally registered his disapproval of the inclusion of the said sum as an agreed sum in Interim Certificate number 39 as there was yet no approval from the Board. He wrote:

"There is an important point which both yourself and Mr. Horace Wright seemed to have missed at the meeting held on September 18 regarding the matter of UDC's position on reimbursement to the Contractor for loss due to theft of materials.

As the Project Manager, I took the decision on the spot that the UDC immediately take steps to have the site insured and instructed Mr. Ainsley Bell to start the process.

However, on all the other issues, I clearly stated that the recommendations had to be submitted to the Board for approval. In that regard you were requested to submit your report on the outcome of the meeting which would provide documentary support for the submission of the recommendations to the Board.

Specifically relating to the claim for reimbursement for theft, the recommendation was that the UDC and CDA would share the cost 50/50 on a case by case basis. You were also requested to document the rationale for the recommendation. This was in no way authorization by me for the UDC to pay 50% of all or any claim for loss due to theft of materials to the computer.

I hope this served to clarify any misinterpretation of our position on the matter."

[32] The architect's response to Mr. Binger on November16, 1992, a few days later, clarifies the issue. She replied:

"I have received your letter dated November 2nd 1992, setting out the UDC's position regarding claims for theft.

You may consider the amount of $1,875,000.00 included in Certificate No. 39 as a recommendation for reimbursement.

Copies of correspondence, in connection with the theft and Certificate No. 39 are attached for easy reference.

During the period of the contract, there have been recurrent outbreaks of hostilities although "war" has not been declared. The nature of these hostilities has been of such, that at times military support was deployed by the government.

A number of persons have been killed on and about the site, and bullet marks are visible on various parts of the construction, one occurring on the clock tower while work was in progress. At one stage the entire hoarding was removed by unknown persons, and the site invaded. A significant amount of equipment and materials were stolen when this occurred on the weekend of February 15th to 17th.

At present extraordinary security arrangements are in place. This is as a result of the police being unable to give a commitment to provide security or after a solution to the problem as was ascertained at the meeting with them on March 6th, at which your Mr. Lewis, Mr. Roy Williams and the architect were present.

The insurance company has terminated cover on the project because of its location, and the contractor has stated his inability to obtain insurance under the present conditions. He has also stated that he is considering determination, unless the client assists with the additional security costs obtain insurance and absorb the losses as a result of theft.

Clauses 32 (1) (b) of the conditions provides the contractor with the option of determining the contract under such a condition. If this determination occurs, then we foresee extensive vandalism as a result of inadequate security. We also foresee difficulties in finding a new contractor to complete the works under these conditions, (the site falls on the border line of two rival political territories).

Should the project remain incomplete, it will be an economic disaster to the client, and could possibly provoke enquiries from the Public Accounts Committee.

Because the footnote to Clause 32 states that "the parties (to the contract), in the event of hostilities may at any time by agreement between them, make such further arrangement as may be necessary to address the circumstances, we are of the view that the client could act decisively to avert a determination, and to take all necessary steps to get the project to a stage where it can generate an income.

If both parties to the contract suffer equally when a theft occurs, then both parties will tend to pull together and take the necessary steps to protect their interests from time to time as the need arises. Further, we believe that the contractor will want to complete the work with dispatch and get out of the area.

Our considered opinion is that sharing the cost of theft 50/50 with the contractor, in the long run may eventually see the project to completion, given that certificates are honoured in accordance with the contract.

An incomplete project is of value to no one, while at the same time the income from the completed facility will be needed to assist in repaying the loan.

The contractor has asked me to arrange a meeting with the UDC to further discuss the matter. Please let me know when you will be able to meet with him, the undersigned and other parties to whom this letter is copied.

[33] Her response, in this court's view, puts it out of the reach of doubt that the parties did not arrive at an agreement regarding payment of 50% of the loss. Evidently the architect recognized that by including the claim for $1,875,000.00 she had erred.

Without protest, she relegated its inclusion to a mere recommendation. The general tenor of the letter is one of sensitizing the defendant to the lawlessness that existed in the area, which resulted in the termination of the contractors insurance.

[34] She informed the defendant that the contractor indicated his plan to determine the contract in light of his inability to obtain insurance. She also pointed out that clause 32(1) (b) of the conditions entitled the contractor to do so in the circumstances and if the defendant failed to assist with insurance and the contractor terminated, financial losses to the defendant would result. She obviously accepted that the responsibility to insure was that of the claimant.

[35] The question at this juncture is: what is the effect of the architect's statement that the inclusion of the said sum in Interim Certificate number 39 is a mere recommendation? Does that statement constitute a withdrawal of the challenged sum from the certificate? There is merit in Mr. Vassell's submission that if the architect intended its inclusion to have the legal effect of certification under the contract she would have so stated and insisted on payment. Moreover, as Queen's Counsel submitted, nothing in the contract prevented her from withdrawing same as a certified claim and allowing it to stand as a recommendation.

[36] The claimant relies on the architect's letter of June 7, 1993 to Mr. Karl Binger as evidence of an agreement reached by the parties. Ms. Isaacs wrote:

> *"The contractor has brought to my attention that the amount of $1,875,000.00 included in Certificate No. 39 for replacement of hoarding, theft etc. remains unpaid. On discussing the matter with Mr. John Pereira I now understand that Mr. Bell deducted this amount from the Certificate because the theft claim has not been agreed with your Board as set out in your letter dated November 2nd 1992 and because the amount has been certified it becomes due to the Contractor.*
>
> *I have a copy of the Certificate "as paid" and note that the value of work has been reduced by the above amount.*
>
> *It was my understanding that the 50% was agreed as stated in the Notes of Meeting held on September 18th, subsequently, the item was costed and included in Certificate No. 39. Following this your objection was*

voiced and you were then asked to state same in writing, which you did in your letter of November 2nd – one (1) month after the Certificate. As requested by you in that letter, the Quantity Surveyor and I made recommendations for settlement of the theft claim and stated our reasons in your letter to you dated November 16th, 1992.

Attached is a chronology of events and copies of relevant correspondence which indicate that there has been enough time for the matter to have been brought before your Board, either between February to November 1992 or November 1992 to March 1993."

[37] The penultimate and final paragraphs of Ms. Isaacs letter suggests that the matter was not settled. Her recommendations with supporting documents should have been placed before the Board. She opined that there was ample time for it to have been taken. Although not expressly stated, the inescapable conclusion is that it was not. This leads inexorably to the conclusion that the result of the meeting on September 18,1992 was that the matter was to be referred to the Board, the body possessed of the authority to deal with such matter which fell outside the remit of the contract. By including the sum in her interim certificate she was apparently under the misapprehension that the matter had been sent to the Board.

[38] On January 21, 2000, however, Ms. Vivalyn Downer, the defendant's Director of Legal Services wrote to the claimant's attorney and expressed, *inter alia*, the following:

"*It is acknowledged that the sum of $1,875,000.00 was indeed certified by the architect in relation to losses due to civil disturbances. Our records indicate however that there seemed to be continuous disagreement as to whether the employer should pay 50% of the loss or 100% bearing in mind the nature of the claims and the contractual risks involved. There being no resolution of this, the amount was not paid."*

[39] In that letter, Ms. Downer took no issue with the fact that the sum was indeed certified for payment of 50%. The issue she expressed was whether the defendant was responsible to pay 100%. This letter was penned approximately ten years after the architect withdrew the item and left it to the discretion of the defendant. Ms. Downer apparently obtained her knowledge from the records. The source of her information was

either faulty or misunderstood by her as it was never an assertion by either CDA or UDC that the claim, at that stage, concerned a dispute whether the UDC was responsible for 100%. Indeed the sum certified by the architect represented 50%.

The effect of the sum being certified

[40] Ms Davis submits that both the interim certificate and the final certificate of the architect cannot at this stage be challenged. She relies on Clause 30 paragraph 8 which deems that the work certified was the certificate issued by the architect as completed in accordance with the contract. She submits that once the architect's certificate is certified, the defendant loses any right to challenge the final certificate if the challenge is not brought within 14 days as mandated by clause 35. No written request for the appointment of an arbitrator was given as stipulated by the contract.

[41] The pertinent question however, is whether the claim for $1,875,000.00 can be construed as work done in accordance with the contract. It is important to examine paragraph 8 of clause 30. The paragraph states:

> *Unless a written request to concur in the appointment of an arbitrator shall have been given upon clause 35 of these Conditions by either party before the Final Certificate has been issued or by the Contractor within 14 days after such issue, the said certificate shall be conclusive evidence in any proceedings arising out of this Contract (whether by arbitration under clause 35 of these Conditions or otherwise) that the Works have been properly carried out and completed in accordance with the terms of this Contract and that any necessary effect has been given to all the terms of this Contract which require an adjustment to be made to the Contract Sum, except and in so far as any sum mentioned in the said certificate is erroneous by reason of fraud, dishonesty or fraudulent concealment relating to the Works, or any part thereof, or to any matter dealt with in the said certificate*.(emphasis mine)

[42] The words underscored are instructive. The sum of $1,875, 000.00 claimed has nothing to do with works properly carried out or not. It does not concern any adjustment to the term of the contract which requires an adjustment to the contract sum. If the sum claimed was challenged on the basis that work was not done in accordance with the contract, the defendant would have been barred from challenging the inclusion of the

sum in the certificate, not having complied with the requirement to give notice to appoint an arbitrator.

[43] The sum however does not relate to work which the claimant carried out. It concerns a loss of material by way of theft, a matter which was wholly the responsibility of the claimant. Its inclusion in the certificates, interim and final, was *ultra vires* the architect's power as it was not authorized by the contract. At all material times, the architect and the defendant recognized this fact as both considered its inclusion as a matter merely for consideration. This is evidenced by the alacrity with which the architect withdrew the same and advised that it was included for the defendant's consideration.

[44] Mr. Vassell contends that the claim does not concern the final but rather the interim certificate. The court therefore has the power to interfere and set aside an interim certificate on the ground that it does not import legal obligation. Further, he submits, that the claimant's statement of claim does not speak to a final certificate. For this proposition he relies on the House of Lords case of **Beaufort Developers (NI) Ltd. v Gilbert – Ash NI Ltd. and another** [1998] 2 All ER 778. It is palpable from a reading of the Statement of Case that it is predicated on the architect's Interim Certificate 39.

[45] Paragraphs 5, 6 and 7 of the Statement of Claim state:

> *"(5) The Plaintiff says pursuant to the C4 contract, the Defendant's Architect certified in certificate of payment number 39 that the Defendant shall pay, inter alia, to the Plaintiff 50% of the said replacement cost, that is, $1,875,000.00.*
>
> *(6) The Plaintiff states that the Defendant paid the total amount as certified by the Defendant's Architect in certificate of payment number 39, SAVE AND EXCEPT the sum of $1,875,000.00 representing 50% of the said replacement cost.*
>
> *(7) The Plaintiff further states that the Defendant by refusing to pay the full amount of the certificate of payment has breached the C4 contract*."

[46] In this court's view, whether the claim related to an interim or final certificate is immaterial. The crux of the matter is whether the architect acted *ultra vires* her authority

thereby rendering its inclusion void. This court is of the view that it is imbued with power to enforce the terms of contracts. If the inclusion of the impugned sum was contrary to the terms of the C4 Contract, the court in my view has the power to enforce the terms agreed by the parties. I find support in Lord Hoffman's comment in **Beaufort Developers (NI) Ltd. v Gilbert – Ash NI Ltd. and another** [1998] 2 All ER 778, at page 791 he said:

> *"It is true, as Bingham MR remarked… "It is not for the court to decide whether the Contractor made a good bargain or a bad one; it can only give fair effect to what the parties agreed."*

[47] Lord Lloyd of Berbick said:

> "*Interim certificates granted by the architect in the course of a building contract are an important part of the contractual machinery. But there is nothing in the present contract to make interim certificates conclusive; nor was there in the Crouch case. So there is no need for the contract to confer on the courts the power to open up and revise interim certificates. The power already exists, as part of the court's ordinary power to enforce the contract in accordance with its terms.*
>
> *Then can it be said that the jurisdiction of the courts to open up and revise interim certificates is impliedly excluded by the terms of the arbitration clause? I do not pause to consider whether such an ouster of the court's powers would be effective in law; on any view it would require the clearest of language. I can find no such language in clause 41.4. Since an arbitrator's powers, unlike the powers of the court, are derived ultimately from the contract under which he is appointed, it is by no means unusual to find his powers spelt out in longhand. Thus under the old law (until changed by section 30 of the Arbitration Act 1996) an arbitrator had no power to rule on his own jurisdiction. Since he could not pull himself up by his own boot straps, he could not decide whether a valid arbitration agreement had ever come into existence. But the High Court can rule on its own jurisdiction. Similarly an arbitrator could not rule on a question whether the contract ought to be rectified. So it is not surprising to find the parties conferring on the arbitrator an express power to rectify the contract. But it would be hopeless to argue that because the parties had by clause 41.4 conferred on the arbitrator an express power to rectify the contact, they had by implication curtailed the power of the court to rectify the contract. By the same token, the courts power to open up and revise interim certificates is not excluded by the express power to open up and revise certificates conferred on the arbitrator.*

For these reasons, and those given by my noble and learned friend Lord Hoffmann and Lord Hope, with which I agree, I would hold that the Crouch case was wrongly decided, and, like them, would allow the appeal."

[48] The learned author of **Halsbury's Laws of England (**5th edition) Vol. 6 at paragraph 333 made it plain that:

> *"**Ultra vires certificates.** The certificates of architects and engineers are only conclusive as to matters entrusted to them, and if the certificate is ultra vires as to any matter it is to that extent not conclusive. Thus, it may be conclusive as to quantity and not as to liability, or vice versa.*
>
> *Again, if there is no power in the contract to vary the work to be done, a valid certificate cannot be given for work done at variance with the contract, even though the variation was made on the instructions of the architect, and is equivalent value to that which should have been done."*

[49] At page 118 and 119 of **Keating on Building Contracts,** 6th edition, the authors said:

> *"The architect's power of certifying under a contract cannot extend to matters which have arisen under a new and independent contract…If the architect is merely required to certify his satisfaction with no express requirement for a written certificate, an oral statement of satisfaction is sufficient. In all cases it must be clear that there was an intention to issue the certificate in question and that it was in substance what the contract required. The ordinary rules of construction apply so that the test of intention, it is submitted, is objective."*

[50] The Canadian high court case of **James Moore & Sons Ltd v University of Ottawa** (1975) 5 O. R. 162 is also supportive of this view. The defendant in that case was an educational institution. The plaintiff submitted a tender to construct a building at the institution. The tender included taxes which were in force at the date but excluded taxes imposed after the date of the tender. The written contract however provided for a reduction in taxes. Subsequent to the date of tender, taxes on building materials increased. The architect assured the plaintiff that the defendant would meet the increase in tax. This assurance was verbal.

[51] The architect included in its certificate, an amount which represented the increased tax. The defendant resisted the claim. Justice Morden held that the architect lacked the authority to add to the written contractual document and could not certify an amount that was not due under the contract. The plaintiff however succeeded in restitution as it had paid the increased taxes which the defendant recovered.

[52] Morden J, in an oral judgment said:

> *Further, in my view, at this point, prior to the entering into of the contract, the architect had no authority to bind the owner to this additional term. I refer to Hudson's Building & Engineering Contracts, 9th ed. (1965), at pp. 77-8:*
>
> > *An architect or engineer in private practice has no implied authority to make a contract binding on his employer, or to vary or depart from a concluded contract.*
>
> *With respect to the latter part of this sentence, a footnote in Hudson says, supra: "Hence the need for the express authority on the variation clause."*
>
> *By para. 1 in the instructions to bidders the architect could interpret the drawings or specifications, but he could not, in my view, add to the contract.*
>
> *The provision in the contract documents which comes closest to the point at issue is para. 5 of the instructions quoted above. However, it deals expressly and only with the situation of a tax reduction. It says nothing as to tax increases. This situation is not, in my view, covered expressly or by implication in the documents. There was no subject-matter for the architect to interpret.*
>
> *Reference is then made to the custom of the trade being that such increases would be paid to general contractors. In short, there is no evidence of such a custom which could be regarded as part of the bargain between the plaintiff and the defendant. While the evidence may go to the length of indicating that it was the usual practice for such payments to be made to general contractors, it appears from the evidence of Mr. Lithwick that such result flowed from written terms to that effect, certainly in the case of one other architect or general contractor. If this were an established trade custom it would not have been required to have been documented in writing and neither, it may be observed, would Mr. More have found it necessary to proceed to obtain the oral undertaking of Mr. Le Fort, except out of an abundance of caution.*

[53] **The Tharsis Sulphur and Copper Company v McElroy & Sons and Others** [1877-1878] 3 AC 1040, a decision of the House of Lords is also instructive in this court's view. The head note adequately summarizes the court's decision. It reads:

> *"A contract for the construction of large iron buildings for a lump sum, contained a clause, inter alia, that no alterations or additions should be made without a written order from the employers' engineer, and no allegation by the contractors of knowledge of, or acquiescence in, such alterations or additions on the part of the employers, their engineers or inspectors, should be accepted or available as equivalent to the certificate of the engineer, or as in any way superseding the necessity of such certificate as the sole warrant for such alterations and additions. During the execution of the contract the contractors alleged, it was impossible to cast certain iron trough-girders of a specified weight, and subsequently they were allowed to erect girders of a much heavier weight; and the actual weights were entered in the engineer's certificates issued from time to time authorizing interim payments. On the completion of the work the contractor claimed a considerable amount in excess of the contract price for the extra weight of metal supplied:-*
>
> *Held, reversing the interlocutor of the Court below, that the engineer's certificates were not written orders, and the claim was therefore excluded by the terms of the contract."*

Conclusion and findings

[54] The architect's authority was circumscribed by the C4 Contract. The inclusion of the sum of $1,875,000.00 in the architect's interim certificate was not authorized by the Contract or any subsequent agreement. Its inclusion was therefore *ultra vires* her authority and does not oblige the defendant to pay. Ms. Isaacs was aware that the defendant, through Mr. Bell and Mr. Karl Binger, were seeking the permission of the Board to assist gratuitously in the face of hardship experienced by the claimant consequent on the civil disturbance. It is palpable from the statements contained in the correspondence above that such a payment was intended as a gratuitous payment in the face of hardship.

I now address the issue of whether the sum of $1,875,000.00 was indeed paid gratuitously. Mr. Bell asserts that it was but Mr. Williams is adamant that it was not.

Was the sum of $1,837,500.00 paid on certificate 40?

The claimant's evidence

[55] Mr. Williams' evidence is that there can be no addition to another certificate. The alleged payment could not have been certified because it would have exceeded certificate 40. Further, he asserts that there is no contractual link between certificates 39 and 40. It is Mr. William's evidence that the sum of $550,000.00 does not relate to certificate 39 as there is no contractual connection. He says that if that sum was paid it was paid on another project.

[56] He is unable to say whether the defendant paid the sum of $2,547,999.20 with respect to certificate 39, as he received no letter stating that they were paying a portion of the certificate 39. Mr. Williams however denies receiving a cheque for that sum His evidence is that the purpose of that payment was never conveyed to him. He is unaware as to whether it was communicated that the disputed payment was being made on Interim Certificate 40.

[57] His evidence is that if that sum was paid, it was against other matters. In re-examination he explained that 'other matters' related to payment of workers whose services were terminated as a result of the termination of the C4 Contract It is also Mr. Williams' evidence that at no time prior to the filing of its defence in this action did the defendant allege that it paid the said amount on certificate 40. At all material times, the defendant accepted that it had not been paid. The dispute between the parties concerned the defendant's obligation to pay. There were several discussions between the parties at which they attempted to settle the matter. At those discussions, the defendant accepted that the sum was not paid.

[58] The claimant wrote to the defendant by way of letters dated 6 and 8 October 1999 and complained about the defendant's failure to pay the said sum. The defendant did not respond to the letters. It was only at the point of disclosure that the defendant produced a document, which referred to certificate 40 which is stamped and endorsed as paid by the defendant. Mr. Williams, however, asserts that the endorsements and stamps on the document are all internal to the defendant. The claimant was unaware of the existence of the document before disclosure. According to him, nothing on certificate 40 indicates that the defendant paid the sum of $1,875,000.00 to the claimant. He insists that the sum was not paid on certificate 40 and if it was paid, it was paid in respect of another project.

[59] It is his further evidence that the claimant was engaged in a number of contracts with the defendant. In addition to the C4 contract, they were engaged in the Kingston Pen Gully, Coronation Truck and Car Park, Kingston Transportation Center and Coronation Market Administration Building (West Kingston). Those projects ran concurrently. Payments were made on the Architect and Engineer's certificates.

[60] The defendant, he says, often paid on an ad hoc basis without any communication with the claimant. It was therefore difficult to identify which payment related to which certificate or contract. He exhibits a copy of letter dated March 15, 1990 to support his contention that the defendant held retention sums in respect of all the contracts between the claimant and the defendant including the Bus Terminal and Truck and Car Park.

The defendant's evidence regarding payment on certificate 40

[61] It is Mr. Bell's evidence that a calculation of payments made on certificate 40 reveals that that certificate 40 was overpaid in the exact amount of the sum claimed for loss of hoarding. It is his evidence that the value of certificate 40 was three million and seventy-seven thousand five hundred and forty-four dollars and ninety-six cents ($3,077,544.96). The total amount paid on certificate 40 was four million nine hundred and fifteen thousand and forty-eight dollars ($4,915,048.00). The additional payment of

one million eight hundred and thirty-seven thousand five hundred and three dollars and eighty cents ($1,837,503.80) (which is the sum claimed less the contractor's levy) represents the balance which was outstanding on certificate 39.

[62] It is his evidence that on the July 5, 1993, he received interim certificate 41 dated July 5, 1993, from Ms. Isaacs which is evidence that certificate 40 was settled. It is also his evidence that on the 14 July 1993, he and Mr. Williams attended a meeting at the UDC and heard Mr. Williams confirm at that meeting that the claimant had been fully paid up to Certificate 40.

Assessment of the evidence

[63] It is noted on certificate 40, that an advance payment for $2,000,000.00 was made followed by a subsequent payment of $1,616,542.77. The actual cheque provided was for the payment of $1,616,545.76 and not $1,616,542.77. There is therefore approximately a $3.00 difference between the cheque amount and what is stated on the certificate. There is indeed an overpayment on certificate 40 of $539,000.80. The amount claimed was $3,077,544.96. The total payment on certificate 40 was $3,616,545.76. This is evident from both the internal UDC documents and certificate 40.

[64] The internal document attached to certificate 40 states that payment for the loss was recommended and it plainly states that that payment was a decision to be taken by the Board. It is however unclear and unhelpful as to which amount was paid if any. It is useful to quote:

> "*The cost of rehoarding has been calculated by the Quantity Surveyor to be $550,000.00. This when added back to the amount previously deducted presents an undisputed amount of $1,616,542.77 which I am now recommending for payment.*
>
> *The payment of the remainder is a decision which the Project Manager feels should be taken at Board Level."*

[65] It is significant that on the internal document it is noted that the amount paid included an amount for $550,000.00 which represents part payment on the amount withheld from the sum of $1,875,000.00 on certificate 39. The sum of $539,000.00 is the result of the application of contractor's levy of two percent (2%). Payment of the balance was subject to the Board approval.

[66] Ms. Davis submits that the over-payment of $539,000.80 was for hoarding which was blown down by high winds and has nothing to do with the claim for $1,875,000.00. She relies on the letters to the defendant from the architect and Mr. Roy Williams dated March 15 and 19, 1993 respectively which state that the hoarding on the site at West Kingston Markets was blown down as a result of high winds. Mr. Williams' letter was accompanied by an estimate for the replacement of the hoarding. Mr. Williams also asserts that the overpayment was for the payment of the workers who were made redundant.

[67] Mr. Vassell, on the other hand submits that the sum of $1,837,500.00 was paid to the claimant on certificate 40. The sum of $1,875,000.00 was subject to the contractor's levy of 2% which amounts to $37,500.00. The sum of $1,837,500.00 represents the sum of $1,875,000.00 minus the contractor's levy. It was accepted by Mr. Williams that the sum which ought to have been paid on certificate 39 was in fact $1,837,500.00 and not $1,875,000.00. The sum of $4,385,500.00 was claimed on certificate 39 but only $2,547,999.20 was paid. The sum of $1,837,500.00 was not paid on certificate 39.

[68] During the trial the defendant was unable to produce the cheques for the $2,000,000.00, $1,298,503.00 and $1,616,545.76. Mr. Bell was however able to produce the defendant's bank statement which supports his evidence that a sum of $1,293,503.00 was debited from the defendant's account in June 1993. Mrs. Nadine Neita, NCB's Assistant General Manager, Corporate Banking testified that the sum was debited from the defendant's account. The payee's name does not however appear on the statement.

[69] The sum of $ 2,000,000.00 was paid on certificate 40. Payment of the said sum was denied by the claimant in its Amended Further Reply. Although Mr. Williams initially denied payment, under cross-examination he said it was probably paid. He eventually acknowledged receipt of a payment of the said sum but said it was made in respect of another project. On the defendant's case, the said sum was included on certificate 40 as an advance

[70] The sum claimed on certificate 40 was $3,077,544.96. If the sum of $2,000,000.00 is removed as having been advanced, the sum remaining is $1,077,544.96. The defendant's evidence is that the sum of $1,616,545.76 was paid to the claimant's account on May 14,1993. Payment of this sum was denied by the claimant in its Amended Reply and the defendant was required to prove payment of the same. Under cross-examination Mr. Williams told the court that the claimant 'probably received a cheque for that amount but it would have been payment on another account.

[71] The payment of the sums of $2,000,000.00 and $1,616,545.76 amount to an overpayment of certificate 40 by the sum of $539,000.80. If the overpaid sum of $539,000.80 is taken from the sum of $1,837,500.80 (that is the sum removed from certificate 39 minus the contractor's levy), the remaining amount is $1,298,500.00. Mr. Vassell submits that payment of that sum ($1,298,500.00) was payment of the remainder which was removed from certificate 39. With the payment of that sum, the defendant settled both certificates 39 and 40.

[72] Indeed on a simple calculation, those sums uncannily add up to a sum which satisfies both certificates. Certificate 39 was for the sum of $4,385,500.00 and certificate 40 was for the sum of $3,077,544.96. Added together, the sum is $7,463,044.96. A calculation of the sums paid to the claimant's account between October 1992 and June 1993 amounts to the sum of $ 7,463,047.96 with a negligible difference of $3.00.

[73] Mr. Bell asserts that Mr. Williams was present at a meeting concerning the C4 Contract at the offices of UDC on 14 July 1993 at which Mr. Williams confirmed that the claimant was fully paid up to certificate 40. Mr. Williams could not recall attending a meeting at the offices of the UDC. His evidence is that he attended a meeting at Holborn Road where he submitted a letter from the bank confirming interest rates.

[74] The minutes of a meeting held at the defendant's office on 14 July 1993 states that Mr. Bell was in attendance and that Mr. Williams confirmed that certificate 40 was fully paid up. Regarding the 'Civil Disturbance Losses', the minutes state that "*The contractor advised that there would be more claims arising out of these incidents".*That statement leads to the conclusion that the claim for the sum of $1,875,000.00 was satisfied but there would be other claims.

[75] It is true that Mr. Williams was not a signatory to the minutes nor is there evidence that he even had sight of the minutes prior to the trial. Those observations notwithstanding, the evidence is that the sum of $1,298,503.00 was debited from UDC's account. Apart from Mr. Williams' *ipse dixit* that payment on one certificate cannot be made on another, there is nothing in the Contract which precludes payment on another certificate nor was the court directed to any authority in support of that proposition.

[76] The maxim, 'He who asserts must prove' succinctly states what ought to be the result in circumstances where there is such a sharp divergence in the evidence. The burden rests on the defendant to prove that it paid the said sum on certificate 40 towards the sum of $1,875,000.00 which was removed from certificate 39. It must also prove that the sums of $1,298,503.00 and $1,616,545.76 which were debited from its account were paid to the claimant's account in satisfaction of the balance which remained on the sum of $1,875,000.00. Mr. William's evidence under cross-examination is that if those sums were paid, they were paid to the workers as redundancy payment as a result of the termination of the contract. Not a tittle of evidence was provided to support this assertion.

[77] This court, on a preponderance of possibilities, cannot accept Ms. Davis' submission that the over payment of $539,000.00 was made for replacement of hoarding which was lost as a result of high winds Not a scintilla of evidence is before the court that the approval of the architect was obtained to make these payments nor is there any agreement that the defendant agreed to pay same. Ms. Davis' theory as to the reason for the overpayment of the sum of $539,000.00 does not satisfy this court that it was made for the purposes stated, that is as payment for damage to hoarding as a result of high winds. It also conflicts with Mr. Williams' evidence that it was used to pay the workers who were made redundant.

[78] Mr. Vassell has demonstrated with almost mathematical precision that the sum removed from certificate 39 was in fact paid on certificate 40. This court therefore finds that it is more probable that the sum removed from Certificate 39 was gratuitously paid. In the circumstances, the claimant is not entitled to interest because the payment was made gratuitously**.**

Defendant's application to re-open the case

[79] Three days after the close of the trial, three cheques were found. The defendant, in the face of vehement opposition from the claimant sought the court's permission to have the case reopened and for permission to tender into evidence the three cheques. The defendant averred that in spite of diligent searches over a protracted period, it was unable to locate the said cheques. It contended that no prejudice would result to the claimant as copies of the cheques were disclosed prior to and during the course of the trial. The defendant also contended that the cheques were found on October 14, 2014 and parties had only concluded their submissions in the matter on October 13, 2014 and decision was reserved, the court was therefore not yet *functus officio.*

[80] Ms. Annette Biggs, UDC's Senior Finance Manager, deponed that UDC disposes of documents after six to seven years. The UDC was unable, in spite of

diligent and painstaking searches over several years to find the cheques. The difficulty was exacerbated by:

(a) the volume of documents which are stored in the defendant's archive; and
(b) the fact that unknown to her, files relating to the Finance Department were removed from the archive and stored haphazardly.

[81] In July 2014 the defendant found twenty unmarked boxes in a shop which it had rented to a third party. This shop is away from the offices of UDC. The boxes were wet and in a state of decomposition. To prevent total disintegration, the boxes had to be dried and carefully handled before they could be searched. The process was difficult, time consuming and tedious. On 14 October 2014, the original cancelled cheques were found and soon thereafter, on 17 October 2014 the court and the claimant's attorney were informed.

Ruling

[82] Ms. Davis, in opposition to the re-opening of the case, relied on the English Court of Appeal case of **Choudhoury and others v Ahmed** [2005] EWCA Civ 1102 and the case of **Jamaica Public Service Company Limited v Enid Campbell and Marie Clare** unreported JMCC Comm 12 case which was delivered on 17 April 2013. This court is of the view that those cases are distinguishable. The applicants in those cases willfully refused to call the witnesses at the trial. Both parties relied on the *locus classicus* English Court of Appeal case of **Ladd v Marshall** [1954] EWCA Civ 1 in which Denning LJ, as he then was**,** adumbrated the conditions which must be fulfilled to justify the reception of fresh evidence or a new trial. He said:

> *"The principles to be applied are the same as those always applied when fresh evidence is sought to be introduced. In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence*

must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible."

[83] This court holds the view that the circumstances of the instant case justify the re-opening of the case to allow the reception of the cheques. The three conditions adumbrated by Denning LJ in **Ladd v Marshall** have been satisfied. The claimant instituted proceedings on April 1, 2000 which was more than six years after payment of the said cheques. The defendant was entitled to form the view by then that such cheques would no longer be needed. It is not unreasonable, considering the lapse of time to accept that such cheques could have been misplaced in the manner averred by Ms.Biggs. I accept Ms. Biggs' evidence of the claimant's unrelenting search over many years and its painstaking efforts to retrieve the cheques from decaying boxes.

[84] Further, the cheques can influence the outcome of the case. The said cheques were, according to the defendant, used to make the payments on the C4 Contract which is denied by the claimant. The claim is that payments of the sums were not made and if made, they were made in relation other projects. The following cheques were tendered into evidence and were paid as follows:

(a) cheque number 000281 in the sum of $2,000,000.00 dated March 12, 1993 and paid on March22, 1993;
(b) cheque number 000286 in the sum of $1,616,545.76 dated 14th May 1993 and paid on May 18, 1993; and
(c) cheque number 000296 in the sum of $1,298,503 dated June 25, 1993 and paid on June 25, 1993.

Ms. Davis contends that those cheques were payments on other contracts. This court, however, holds to the view expressed above and finds that the production of the said cheques strengthens the defendant's case.

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The Security Contract

[85] There is also a sharp divergence in the claim of the parties regarding the oral agreement between the parties for the claimant to continue to provide security. The only agreement between the parties is that the contract was 'Cost Plus'. There is dissention as to: what constitutes the 'plus' in the agreement; the amount which has been paid and whether interest ought to be paid. There is also disagreement as to whether interest ought to be simple or compound.

[86] CDA claims that invoices totaling the sum of four million nine hundred thousand dollars ($4,900,000.00) including handling charges and bank charges in the sum of $301,709.98 for providing security pursuant to the oral claim were submitted to the defendant. Of that sum, it claims that the defendant has only paid $1,100,000.00 and the sum of $3,800,000.00 remains outstanding. It is CDA's claim that it borrowed the sum of $3,800,000.00 from the bank in or about March 1995 to finance the Security Contract. The defendant's failure to compensate the claimant has resulted in the claimant exceeding its credit limit and being charged high interest rates.

Mr. Williams' evidence

[87] Mr. Williams' evidence is that consequent on the mutual determination of the C4 Contract, he was requested by the defendant to provide security for the site. He and the officers of UDC entered into discussions pertaining to the provision of security as requested. The contract was 'cost plus'. The 'plus' however was not agreed or discussed. It is his evidence that it was neither discussed nor agreed that the 'plus' was 20% for overheads and profit (handling charge). His understanding was that the "Plus" would have been governed by the practice in the industry which included interest and profit. His evidence is that he borrowed from the bank to provide the security services. The interest of $25,135,613.27 which has accrued constitutes a part of the cost.

[88] He asserts that the claimant duly submitted invoices to the defendant for the services provided as follows:

(a) on 10 October 1993, it submitted a bill for $736,408.68;

(b) on 10 December 1993, it submitted a bill for $641,501.77; and

(c) on 10 March 1994, it submitted a bill for $1,024,750.25.

The only payments the claimant received were:

(a) The sum of $500,000.00 in November 1993; and

(b) $600.000.00 in February 1995.

The total amount received was $1,100,000.00. The claimant is therefore entitled to recover interest which it paid to the bank as a result of the defendant's failure to pay in a timely manner.

[89] It is also his evidence that on 15 December 1994, the claimant provided the defendant with a spreadsheet, which detailed the charges from May 1, 1993 to December 15, 1994 as $4,100,315.37. He says that that figure included sums which were due on invoices 1-3, therefore, the balance was actually $3,600,315.37. According to him, the defendant took no issue with the spreadsheet and paid the sum of $600,000.00 in or about February 1995. In breach of the contract, the defendant failed to pay the invoices in a timely manner and the claimant terminated the contract.

Mr. Bell's evidence

[90] Mr. Bell is however adamant that the "Plus" element was discussed and agreed. It is his evidence that subsequent to the discussion, about the claimant providing security, he and Mr. Williams had a conversation on the telephone. In that conversation it was agreed that the "plus" would have been 20% which is a margin for profit which was later called handling charges. It is his evidence that it was agreed that the claimant would be reimbursed upon presenting bills that were paid. There was no agreement to pay interest or bank charges. It is also his evidence that the claimant failed to provide the defendant with proof of payment in spite of repeated requests from the defendant.

What is a 'cost plus' contract?

[91] In determining what is a 'cost plus' contract, it is helpful at this juncture to examine the definitions given by the learned authors on the matter. The author of

Hudson's Building and Engineering Contracts at page 438 defines a cost plus contract thus:

> ***(b) Contracts on a cost-plus basis***
>
> > *"Cost-based contracts involve reimbursement of the contractor's total cost plus a stipulated fee or profit, often expressed as a percentage. These contracts will normally be used only where the extent and nature of the work is not known with sufficient precision at the time of contracting to enable prices to be obtained, since they have a number of unavoidable disadvantages which well-advised owners would not usually accept.*
> >
> > **Keating on Building Contracts 6th Edition at page 83 said*:***
> >
> > ***Cost plus percentage contracts.*** *Such contracts sometimes contain an elaborate description of the method of calculating the cost. Where they do not and there is a simple agreement to pay a percentage upon the cost of labour and materials, "cost" means, it is submitted, the actual cost honestly and properly expended in carrying out the works."*

[92] The learned authors of **The American Jurisprudence 2nd Edition Building and Construction Contracts** define 'cost plus' contracts as follows:

> ***"****A "cost-plus contract" is one under which one party undertakes to play all the costs incurred by the other party in the performance of his or her contractual duties, plus a fixed fee over and above such reimbursable services. [1] Under a cost-plus contract, the contractor is not entitled, in addition to the percentage called for in contract, to charge for his or general or overhead expense, [2] such as salaries, telephone services, and office supplies; [3] for his or her own time in superintending the work; [4] or for the cost of doing over the work that was not properly done. [5] On the other hand, the construction contractor under a cost-plus contract is entitled to charge for materials and supplies furnished, [6] the wages of the workers, [7] the salaries of superintendent, [8] and for the premiums for accident and indemnity insurance.[9]*
>
> *Where a contract to build a house provided that the contractor will receive the cost of the work and material plus 20% and the contractor is specially authorized to contract any or all of the work, the contractor is entitled to 20% above the price paid to the subcontractors.[10]*

Under a cost-plus contract, the cost that the owner is obligated to pay the general contractor does not normally include the cost of obtaining a substitute performance in the event to a subcontractor's breach.[11]

*Under an abandoned **cost**-plus contract, the contractor is entitled to charge for the reasonable value of his or her services.[112]*

[93] **The Third Edition of The Building Contract Dictionary** at page 106 defines a 'cost reimbursement contract' as

***Cost reimbursement Contract** A type of contract by which the contractor receives all his costs together with a fee. There are four common variations:*

- *Cost plus percentage: The contractor is paid the actual cost of the work reasonably incurred plus a fee, which is a percentage of the actual cost, to cover his overheads and profit. This form of contract is often used for maintenance work or for work where it is difficult to estimate the work to be done or for emergency work. It is possible to invite tenders on the basis of the percentage but there is no incentive for the contractor to make good progress or to save money because his fee rises with the total cost of the job. The Joint Contracts Tribunal (qv) has produced a suitable form of contract – the Standard Form of Prime Cost Contract (PCC 98).*

- *Cost plus fixed fee: Similar to the cost plus percentage contract and used for similar situations. The important difference is that, because the fee is a fixed lump sum, the contractor has more incentive to finish quickly and maximize his profit as a percentage of turnover. It is usual for some indication of the total cost to be given to tenderers. The Standard Form of Prime Cost Contract (PCC 98) is applicable.*

[94] **The FIDIC- Federation Internationale Des Ingenieurs- Conseils conditions of Contracts for Works of Civil Engineers Construction Part 1 General Conditions with forms of tender and agreement** 4th Ed. 1987 reprinted 1992 defines 'cost' thus:

"*Costs" means all expenditure properly incurred or to be incurred whether on or off site, including overheads and other charges properly allocable thereto but does not include any allowance profit.*

Was the contract Cost Plus?

[95] Distilled from the definitions given above, if the oral contract between the parties to provide security was indeed a cost plus contract, the claimant was required to provide the service at his expense and be reimbursed by UDC for what he reasonably expended plus a percentage of that cost**.** The issue is whether the claimant has satisfied the court on a balance of probabilities as to the formation of a contract in respect of the 'plus element'.

[96] Under cross-examination, Mr. Williams' evidence is that there was no discussion regarding the 'plus'. The discussion was to undertake security for the site on a cost plus basis. The details were not discussed. He denies having had discussions with Mr. Bell. He denies having had a long discussion with Mr. Bell at which it was determined that the plus over cost would have been 20%. He denied that he agreed to 20% at any meeting with Mr. Bell.

[97] In the claimant's spreadsheet of December 1994, there was a claim for handling charges which Mr. Bell said was at a rate of 21%. In the earlier claims, 1, 2 and 3, the claimant claimed 30% for overheads and handling charges (profit). In the spreadsheet there was no claim for profit. Mr. Williams' evidence is that its omission was an error**.** Under cross-examination he accepted that he unilaterally chose 30% for overheads and profit.

[98] It is also Mr. Williams' evidence that the Security Contract is governed by Clause 11 4-D of C4 Contract. That section reads:

> *"Where work cannot properly be measured and valued the Contractor shall be allowed day-work rates on the basis of prime cost of materials used and labour and plant employed thereon together with percentage additions to each section of the prime cost at the rates set out by the Contractor in the Contract Bills and recorded in the appendix to these Conditions. Provided that in any case vouchers specifying the time daily spent upon the work (and if required by the Architect the workmen's names) and the materials and play employed shall be delivered for verification to the Architect or his authorized representative not later than the end of the week following that in which the work has been executed."*

[99] If Mr. Williams' evidence is to be accepted, there was no formation of a contract as the issue of what constitutes the 'plus' was not agreed. His evidence is that the agreement was negotiated by himself and Mr. Binger. Mr. Bell's evidence is that the parties agreed that the 'plus' was 20% and that the understanding was that all costs incurred by the contractor plus 20% which was a margin for profit should be paid to the contractor. On Mr. Bell's evidence there is the requisite element of accord which is necessary for the formation of a 'cost plus' contract. If either party's evidence on the matter has failed to satisfy the court on a balance of probabilities, the court must resort to determining the value of the service the claimant provided on a *quantum meruit* basis. See **Trietel, Law of Contract** (13th edition) paragraphs 22-019 to 22-020 (pp1143-1144).

[100] Mr. Williams' evidence regarding the agreement of the parties on this issue is inconsistent. Under cross-examination he testified that in addition to the cost, he applied 20% in his calculation and that percentage was broken up into two parts. He said it included bank charges and overheads and profit. That version of evidence supports Mr. Bell's evidence that the 'plus' was in fact agreed at 20%. Many years have elapsed since the parties entered into the contract. It is understandable that memories fade. This court, however, finds Mr. Bell's evidence on this issue to be more reliable than Mr. Williams'. This court therefore accepts Mr. Bell's evidence that the parties agreed that the 'plus' element was 20% which included overheads and profit which was later referred to as handling charges. This court also accepts Mr. Bell's evidence that it was he and not Mr. Binger who entered into the arrangement with Mr. Williams via a telephone conversation.

Has the claimant justified its claim?

Failure to submit invoices

[101] It is Mr. Williams' evidence that there was no agreement between the parties regarding the time the invoices were to be submitted. He asserts that the defendant was well aware that the invoices would include interest and an overhead and profit component. He says that it is standard billing practice in the construction industry. His

evidence is that the defendant has never questioned any of the billed items and has never requested a meeting to query the amounts billed. The defendant has failed to settle the claimant's invoices for the security services it provided.

[102] It is, however, Mr. Bell's evidence that the defendant repeatedly requested documents to substantiate the claim. He says Mr. Williams was invited to a meeting at Medallion Hall at which the issues of the claimant's unsubstantiated claims were moot. Mr. Williams denied this assertion and says that at the meeting at Medallion Hall, the defendant only queried interest. This court also accepts Mr. Bell's evidence that Mr. Williams attended a meeting at Medallion Hall at which the issue of unsubstantiated claims was live**.**

[103] It is important at this juncture to point out that Mr. Williams' recollection of a meeting at Medallion Hall varies. Mr. Williams initially did not recall attending a meeting at Medallion Hall but later under cross-examination, he told the court that he "probably' attended a meeting at Medallion Hall in April 1994. He says that it was possible that he could have attended a meeting at the Medallion Hall Hotel in 1994 to discuss the final account but denied that issues pertaining to Security Contract were discussed. He asserts that the question of the Security Contract never arose. At that meeting he says the claimant was requesting payment.

[104] This court accepts Mr. Bell's evidence that the defendant did question the claims and requested meetings to query the amounts billed. It is also Mr. Bell's evidence, which I accept, that Mr. Williams was invited to a meeting at the UDC to discuss the absence of bills but he failed to attend. Again, on this issue, this court finds that Mr. Williams' recollection of the matter is not as reliable as that of Mr. Bell's.

Late submission of claims and invoices

[105] The claimant's first request for reimbursement was made on October 12, 1993 for security services provided from May 1, 1993. The sum claimed was for $736,408.68. The claim was not accompanied by the required documentation to substantiate the claim. Two further demands were made as follows:

(a) December 10, 1993 for the period October 1, 1993 to December 9, 1993 for the sum of $405,093.09. The sum of $190,190.00 was for security.

(b) March 10, 1994, for the period December 10, 1993 to February 28, 1994 for the sum $383,248.48. The sum of $228,228.00 was the cost of security.

These claims were also not accompanied by documentation substantiating the actual expenditure. The claimant, on its own evidence did not submit its bills in a timely manner. This supports Mr. Bell's assertion that he repeatedly requested verification and Mr. Williams promised to provide same but failed to fulfill his promise.

[106] On Mr. Williams' evidence, the bills were not submitted in a timely manner. The reason he proffered for not submitting the invoices for April until October was that he was aware that UDC was experiencing serious financial problems. Assuming that was indeed so, keeping the claims for such a protracted period resulted in the demand for high interest rates and penalty charges. Mr. Williams is an experienced business man. He must be fixed with knowledge that exorbitant interest rates would result which would serve to exacerbate the defendant's financial difficulty.

[107] He agreed that it was open to the claimant to submit the bills as they were received. He however, said there was no gain to him in doing so as "*He was paying for the cost of money".* When pressed, he said that the money he borrowed went to the bank so there was no gain to him**.** Further, it is Mr. Williams' evidence that the loans were not all taken to provide the security service. Under cross-examination he said: "*I did not borrow money specifically to do that."* He has provided the court with no evidence of the sums borrowed to provide security for the site.

[108] Mr. Bell's evidence is that although the claimant failed to submit the supporting documentation with its claim, in anticipation of the production of the documentation, UDC advanced the following sums to the claimant:

(a) the sum of $500,000.00 in November 1993;

(b) The sum of $600,000.00 in February 1995; and

UDC received some supporting documents in March 1995. Upon receipt of same, it engaged in a reconciliation exercise and paid the claimant a further sum of $693,879.05 on October 5, 1995.

[109] Mr. Williams disavows any knowledge of a cheque for the sum of $693,879.05 which Mr. Bell asserts was paid on October 5, 1995. According to him the last payment the claimant received was for $600,000.00. Ms. Davis submits that there is no documentary evidence to prove that the sum of $693,879.05 was paid.

[110] Mr. Bell is however insistent that a further sum of $693,879.05 was paid. The defendant was unable to produce the cheque for the sum $693,879.05 but produced its bank statement for the period which stated that the sum of $693,879.05 was debited from its account. The statement does not reflect the payee but the sum debited is the exact amount the claimant asserts to have been paid.

[111] Mr. Williams was requested to provide the statement from the claimant's bank for that period. He testified that the claimant's records were destroyed by rain. The claimant also removed its business in 2001 and in the process its records were misplaced. Understandably, he was unable to provide his original bank statements for that period as almost two decades have since elapsed. His evidence is that he made efforts on several occasions to get the statements from the bank which would determine whether he received a cheque for that amount but was not successful.

[112] It is his evidence that he telephoned the bank's customer service representative several months before the commencement of the trial. She informed him she would get back to him but she failed to do so. He has since tried without success to reach her on the telephone**.** He also went to the bank on other business and enquired about the statement He handed the matter over to his attorney who wrote to the bank's customer service representative on November 15, 2013 but she has failed to respond. There is a lingering doubt as to whether sufficient efforts were indeed made. The defendant also requested its statement from the said bank for the same period and received it.

[113] In his supplemental witness statement, it is Mr. Williams' evidence that the claimant submitted invoices for payment for the services. At paragraph 40 of his supplemental witness statement of May 6, 2013 Mr. Williams stated that:

> *"The defendants raised no issue with the details provided in the spread sheet. On or about February 1995, they paid the sum of $600,000.*
>
> *We presented a final spreadsheet to the defendants on or about February 1995. This spread sheet covered the entire period from 1 May 1993 to 28 February,1995. All supporting documents were presented to the defendants with these spread sheets, and up to the date of filing their defence, they made no complaint as to the documentation provided…*
>
> *However we received no further payment from the defendants.*
>
> *The claimant duly submitted with each invoice and spread sheet full documentation in support of each invoice and spread sheet presented.*

Under cross-examination, he also insisted that the defendant did not express any concern regarding the details provided in the spreadsheet and took no issue with supporting documentation. He however admitted that the defendant questioned interest.

[114] Mr. Williams denied that up to the time of the meeting at Medallion Hall he had not submitted any document to substantiate the claims and that it was agreed that he would withdraw claims 1, 2 and 3 and submit proper documentation. He was adamant that the claimant had provided all supporting documents.

[115] Under cross-examination however, Mr. Bell's evidence is that the first 3 claims were in fact withdrawn and a fourth was provided with substantiating documents. In the circumstances it is very likely that he was indeed asked to withdraw the first three claims and provide a claim with supporting documentation.

[116] Mr. Williams accepted under cross-examination that the sum of $500,000.00 which the defendant paid to the claimant was an advance payment. He, however, disagreed that the advance payment was made because of the claimant's failure to submit the documentation. He denied that Mr. Bell explained to him that without the documentation he could only make advances hence only $500,000.00 was paid.

[117] It is noteworthy that on Certificate of Recommendation Number 2, dated February 6, 1995, for the sum of $600,000.00, for Standby Security, the said sum was described as an advance. This is supportive of Mr. Bell's evidence that the sums of $500,000.00 and $600,00.000 were made as advance payments because of the claimant's failure to provide the necessary substantiative bills. Moreover, the letters from Mr. Williams submitting his bills were without any documentation supporting his claim. On October 21, 1993, Mr. Williams, on behalf of the claimant, wrote to UDC and attached a bill for Standby and Security Claim for the C4 Project. The bill was entitled 'Claim number1' and was a claim for providing security services on the C4 project from May 1, 1993 to September 30, 1993. There were no bills attached to the said claim.

[118] Similarly, on March 10,1994 he wrote to the defendant and attached Claim number 3 for standby supervision and providing security service on C4 Project from December 10,1993 to February 28, 1994. No invoices accompanied the claim. On December 14, 1994, by way of letter, the claimant submitted its claim for security and standby services for the period May 1, 1993 to December 15, and 1994 for the sum of $4,100,315.37. A spreadsheet for claims 1, 2, and 3 was attached. Bank interest charges were included in the sum.

[119] The claimant admitted that there were errors in the three claims so it submitted two spreadsheets. The first was withdrawn and a second spreadsheet was provided on which it relies. Supporting documentation was attached. The UDC received the first spreadsheet in December 1994 and the second in February 1995. The amount claimed as the cost of providing security, standby supervision and the cost of rental of scaffolding for the period May 1993 to February 1995 totaled $1,867,225.21.

[120] Both spreadsheets contained errors and there were significant discrepancies between the two spreadsheets. Some of the figures in each were different. In the December 1994 sprea sheet, the figure for standby supervision for January 1994 was $12,178.57. For the same period on the second spreadsheet the amount was $24,357.14. There were also discrepancies for February to December for the standby security. For example, the charge for November 1994 on the December 1994

spreadsheet for standby supervision was $11,785.72 whereas on the February spreadsheet, the amount claimed for the same period was $51,392.24.

[121] Quite apart from the discrepancies and inconsistencies in the claimant's spreadsheets, its invoices contained errors. Not only are there errors and inconsistencies, regarding its claim for security service provided by JPS, the claimant's claims also include unsubstantiated charges for back up security, standby supervision and scaffold rental.

[122] Mr. Bell's evidence is that a claim for scaffolding is not justified. Indeed the claimant has not provided this court with any evidence of payment for scaffolding rental. Under cross-examination, Mr. Williams accepted that he did not provide the defendant with documents for the rental of the scaffolding. He said his failure to do so was an oversight. Mr. Williams was also unable to provide any information about the nature of and arrangement for its rental. Nor was he able to say from whom they were rented. This court finds that the claimant has not justified its claim for scaffolding. Regarding the claim for back- up security and standby supervision, the claimant has also not produced evidence of payment as required by the contact.

The invoices from Jamaica Protective Services (JPS)

[123] The claimant provided invoices from JPS amounting to $876,908.57. Of this, only $482,290.14 was stamped as paid. There was no evidence that $394,618.43 was paid. This court accepts the defendant's evidence that the agreement was that the defendant would repay the claimant sums it actually expended together with 20% for handling charges. Twenty percent (20%) of $482,290.14 is $96,458.03. The amount which was payable to the claimant was $578,748.17. On that calculation, assuming that the defendant only paid the sum of $1,100,000.00, it would have overpaid by $521,251.83. This court however finds that the sum of $693,879.05 was indeed paid. It is the finding of this court, that the claimant was paid a total of $1,793,879.05. The claimant was therefore overpaid by $1,215,130.88.

[124] This court finds that there is no evidence that the unstamped invoices were not generated by JPS for security service provided by the site. The dates on those invoices correspond to the period claimed while the contract was extant. In the circumstances the court accepts that security was provided for that period by JPS. The claim for the JPS stamped and unstamped invoices is for $876,908.57. Twenty percent of that sum is $175,381.71. The amount payable on that calculation is $1,052,290.28. Even on that calculation the defendant has overpaid the claimant. The claim for scaffolding was $225,320.59. If that claim was included, the defendant would also have been overpaid.

The claim for interest

[125] Mr. Bell's evidence is that the claimant has not justified its claim for interest charges for expenditure. He has neither justified the sum claimed nor the basis for claiming. There was no prior demand nor was any sum overdue. He points out that on October 12, 1993, the amount claimed for back- up and standby security was $418,418.00. Interest, overhead and profit charges were added. The defendant took the decision not to pay the interest or late charges as those charges cannot be attributed to any fault or delay in payment by the defendant. The defendant paid the claimant the sum of $1,793,879.05 in respect of the security claim. It is his evidence that the defendant has discharged its liability to the claimant.

Ruling

[126] At the trial, the claimant belatedly claimed compound interest. It is his evidence that the practice of the industry is that interest is compounded. His evidence is that he was paid 2% compound interest on the Coronation Truck and Car Park. In support of his claim for compound interest he also relies on: demand letters from NCB, ACL and TCB. To further strengthen his claim, the following bank personnel were called on his behalf:

> (1) Mr. Hugh McCalla, manager of Receivables Management unit of First Caribbean Bank whose evidence that compound interest is applicable to all charging accounts at rates of 40% to 50%.

(2) Mr. Desmond Franklyn Hardy, retired banker who worked in Corporate Banking unit of NCB whose evidence is that interest at that time was compounded and that the practice of compounding continues. He also identified the signature of the author of the demand letters which were sent from the bank to the claimant.

Short shrift can be made of his claim for compound interest. It was not pleaded. The claimant's claim is for interest, not compound interest. But has he justified his claim for interest?

[127] There is no evidence that the loans relate to the Security Contract. Significantly, upon being asked how much money he borrowed, Mr. Williams' evidence is that he did not borrow money specifically for that. There is not a shred of evidence that the claimant borrowed from TCB and that the loan was guaranteed by ACL and TCB. The law on the matter is settled. A claim for special damages must be specifically proven. The claimant has failed to prove its claim for interest.

[128] Moreover, his assertion that interest was agreed, conflicts with his evidence that there was no discussion regarding the details of the 'plus' element of the contract. He is insistent that the details of the contract were not discussed. On that evidence there was no agreement that:

(a) he should borrow to provide the security;

(b) the defendant would be responsible for the finance charges including interest.

[129] Having accepted Mr. Bell's evidence that the parties agreed that the defendant would be responsible for all the costs incurred by the contractor and that the 'plus' element was 20% which was the margin for profit, this court finds that the figure of 20% covered profits and overheads (handling charges). In any event, assuming that there was an agreement regarding the payment of interest, as alleged by the claimant, the defendant could not in the circumstances be saddled with interest that would have accrued as a result of the claimant's neglect in requesting payment and in supplying

documentation promptly. Mr. Desmond Hardy's evidence is that the interest that was charged suggests that the claimant had exceeded its overdraft limit and was charged penalty fee as a result. Any claim for interest accrued in the circumstances must fail on the basis of its remoteness.

[130] The claim for $3,800,000.00 and interest for "*balance of the cost of the site security*" is for special damages which must be specifically proven. Lord Goddard's statement in **Bonham –Carter v Hyde Park Hotel, Ltd** (1948) 64 TLR which has been accepted and repeatedly echoed in our court makes this plain. At page178 He said:

> "On *the question of damages I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages it is for them to prove their damages; it is not enough to write down the particulars and so to speak, throw them at the head of the court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it."*

Are the claims statute barred?

[131] Having decided that the claimant has not proven its case, the determination of this issue is now rendered otiose. I will nevertheless examine this aspect. The claimant instituted proceedings against the defendant on April 5, 2000. The defendant, in its defence has pleaded that the claims are statute barred by virtue of the **Limitation Act** 1623, 21 James 1 Cap.16 and the **Limitation of Actions Act** 1881.

[132] In response , the claimant, in its Amended Reply to Further Amended Defence asserts that the matter is not statute barred as the parties had agreed, pursuant to clause 35 to refer certain matters to arbitration and such matters have yet to be arbitrated. The claimant further asserts that by virtue of the defendant's conduct, it is estopped from alleging that the claim is statute barred. Ms. Davis, postulates that time began to run from the year 2000 at the date of the issue of the final certificate.

133] Mr. Vassell however submits that the claimant's pleadings allege a breach of the interim and not the final certificate. He submits that Clause 30 (1) of the Contract

requires that an interim certificate be paid within 14 days. Any breach by the employer of this provision, he submits, creates a cause of action.

[134] He submits that the Interim Certificate No. 39 was issued by the Architect on October 1, 1992 and delivered to the Defendant shortly after. Time, he postulates, would have begun to run at the expiration of 14 days after the issue of the interim certificate. The claim would have become statute barred 6 years thereafter in October 1998.

The Law

[135] Cooke JA, in the case of **Ricco Gartmann v Peter Hargitay** SCCA Civil Appeal No. 116/2005 at page 5 said:

> *"By section 46 of the Limitation of Actions Act, the Limitation Act 1623 of England:*
>
> > *"has been recognized and is now esteemed, used, accepted and received as one of the statutes of this island."*
>
> *By that Act of 1623 the appellant had to bring his claim.*
>
> > *"Within sixe yeares next after the cause of such actions or suit, and not after."*

The law imposes upon the claimant the duty to prove that its action was instituted within the limitation period. Ralph Gibson L J in the case of **London Congregational Union Inc. v Harris and Harris (a firm)** [1988] 1 All ER 15 at page 30 enunciated:

> "*The onus lies on the plaintiffs to prove that their cause of action accrued within the relevant period."*

[136] The character and consequence of a defence of Limitation is explained succinctly and effectively by Stuart Simes, in his work**, *A* Practical Approach to Civil Procedure***,* 8th edition in his statement as to the nature and effect of a limitation defence. At page 56 he said:

> *'Expiry of a limitation period provides a defendant with a complete defence to a claim. Lord Griffiths in Donovan v Gwentoys [1990] 1 WLR 472 said, "the primary purpose of the limitation period is to*

protect a defendant from the injustice of having to face a stale claim, that is a claim with which he never expected to have to deal'. If a claim is brought a long time after the events in question, the likelihood is that evidence which may have available earlier may have been lost, and the memories of witnesses who may still be available will inevitably have faded or become confused. Further, it is contrary to general policy to keep people perpetually at risk.

Ruling

[137] This court agrees that the claim is predicated on Certificate 39 and not the Final Certificate. The claimant's Statement of Claim and Amended Reply to Further Amended Defence speak to Certificate 39. There is no reference to the Final Certificate in either. It is necessary to refer verbatim to the claimant's pleadings. Paragraphs 5 and 6 of its Statement of Claim read:

> "*The Plaintiff says, pursuant to the C4 Contract, the Defendant's Architect certified in certificate of payment number 39 that the defendant shall pay, inter alia, to the Plaintiff 50% of the said replacement cost, that is, $1,875,000.00.*
>
> *The Plaintiff states that the Defendant paid the total amount as certified by the defendant's architect in certificate of payment number 39 save and except the sum of $1,875,000.00 representing 50% of the said replacement cost.*

Paragraph 1 of its Amended Reply to Further Amended Defence reads:

> *With regard to paragraph 4 of the Further Amended Defence, the Claimant says that the sum of $1,875,000.00 was certified by the architect in accordance with the contract and included in Certificate No. 39 and the said sum has to date not been paid by the Defendant."*
>
> *Paragraph 2 states likewise:*
>
> *The Claimant also agrees that the sum of $2,547,000.20 was paid towards the sum certified for payment on Certificate number 39 leaving the sum of $1,875,000.00 unpaid.*
>
> *Paragraph 3 reads:*
>
> *"The Claimant joins issue with the Defendant and says that the balance due and payable on Certificate #39 is $1,875,000.00 and not*

$1,387,500.00 as stated by the Defendant in its Further Amended Defence."

.

[138] However Mr. Vassell's submission that time began to run at the expiration of fourteen days is untenable. By virtue of Clause 30, if either party to the contract had any issue concerning the work or a need for an adjustment to the contract sum, the required notice of fourteen (14) days would have been necessary. The claimant took no issue with the certificate nor did the defendant. It is this court's view that time could not have begun to run at that time as neither the claimant nor the defendant had registered any complaint. There being no challenge to the interim certificate, the claimant would have expected that with the issuance of the final certificate, payment would have been made.

[139] This court however is of the view that time began to run at the point in time when the defendant indicated that it was not going to pay the sum claimed. That point was November 2, 1992. It was pellucid from Mr. Binger's letter to the architect (supra) that the defendant was not accepting liability. From November 2, 1992 to April 2000, eight years plus would have elapsed. The claim has therefore been filed well outside the limitation period.

[140] Although the court has no doubt that Mr. Binger's letter of November 2, 1992 is the relevant date, Ms. Isaacs' letter dated March 21st, 1994 to Mr. Bell is also an incontrovertible rejection by the defendant of liability. Paragraph 4 of that letter states:

"You will note that the Contractor has not accepted my adjudication of two (2) claims. The claims for Civil Disturbance Losses include thefts which took place during the period when the works were not insured – for reasons already documented. Neither the UDC nor the Contractor have accepted the recommendation of the Quantity Surveyor and myself to bear the responsibility equally for replacing the stolen materials.

The claim for damages regarding the title can only be settled through direct negotiations between the UDC and the Contractor failing which, only an arbitrator or the court can make a judgment and award damages.

> *Where the Contractor has not accepted my adjudication, the Contractor has intimated to me* verbally that he intends to pursue the matter by arbitration.

[141] The architect's assertion that the contractor intended to pursue the arbitration route at that point would have been a decision outside of the procedure stipulated by the contract. Unfortunately, the arbitration's proverbial boat "had already sailed." Even if the applicable date could be considered March 21, 1994, the claimant's claim which was filed on April 5, 2000 would have been almost a month out of time.

[142] In light of the foregoing:

The claim is dismissed.

Costs to the defendant be agreed or taxed.

Special Certificate awarded.