JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEALS NOS. 82/81 & 2/82

BEFORE: THE HON. MR. JUSTICE ZACCA - PRESIDENT
THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE ROSS, J.A.

BETWEEN:	HADLINSTON CONSTRUCTION CO. LTD.	-	PLAINTIFF
A N D :	CASILLA DEVELOPMENT LTD.	-	DEFENDANT
A N D :	HAROLD MASSOP	-	1ST DEFENDANT APPELLANT
A N D :	CASILLA DEVELOPMENT LTD.	-	PLAINTIFF/ RESPONDENT
A N D :	GOLDSON BARRETT JOHNSON (A FIRM)	-	2ND DEFENDANT APPELLANT
A N D :	EARL A. RICHARDS	-	3RD DEFENDANT

Messrs. C. Daley and A. Lee-King instructed by Daley, Walker and Lee-King for the appellant Goldson, Barrett, Johnson (A Firm)

Messrs. R.N.A. Henriques, Q.C., and N. Wright for the appellant Harold Massop.

Dr. Lloyd Barnett and Dr. Adolph Edwards for the respondent.

April 30; May 1-4, 8, 10, 18, 1984;
and November 18, 1985.

KERR, J.A.:

In a trial before Parnell, J. there was a consolidation of two actions:

(i) Suit No. C.L. H033 of 1974 - between Hadlinston Construction Company Limited (the contractor) and the Casilla Development Limited (the employer/respondent) for moneys due under a building contract for breach of a termination agreement in relation to the said contract and a counter-claim by the employer for breach of contract and

(ii) Suit No. C.L. C257 of 1975 between the employer and the appellants and one Earl Richards as architect, quantity surveyor and engineer, respectively for breach of their duty and of their contracts of employment in respect of the housing development project the subject of the contract between the employer and contractor and counter-claims by Massop and Richards for amounts due for work done.

After a trial lasting forty-eight days and extending over three years, Parnell, J. found for the respondent in both actions:

> In (i) above, judgment on claim and counter-claim - and the counter-claim for "$4,315 together with contribution for breach of the main contract" amounting to $99,665.59, and on (ii) above, judgment on claim jointly and severally for $115,750 less the total fees properly payable immediately prior to the start of the construction such fees to be assessed by a judge if not agreed.

It is from the judgment in (ii) above that Goldson, Barrett, Johnson (Quantity Surveyors) and Massop (Architect) appealed.

The Casilla Development Limited was a family affair. George Bernard, his wife and two sons were the Directors and Shareholders, George Bernard being Managing Director. The Company was registered on August 3, 1972. Shortly before the Company was founded, George Bernard had a discussion with Massop concerning his plans to erect an apartment complex on a site on Hermitage Road, St. Andrew and his desire to have him as architect for the project. Massop after visiting the site, by letter dated July 30, 1972, confirmed his agreement to be the architect and set out therein his terms and conditions of service and these were formally accepted by Bernard. Among the conditions was that the architectural services should be complemented by commissioning an approved structural engineer and quantity surveyor. By letter dated 31st August, 1972 an offer was made by the respondent to and accepted by the Firm of Quantity Surveyors then Goldson, Barrett and Partners but subsequently renamed as appearing on the Records.

In December 1972, Richards accepted employment with the Company as structural engineer. By the joint endeavours of the experts the preliminaries including drawings, plans and specifications and estimated costs were completed. Tenders from construction contractors were invited. The Company accepted that of Hadlinston Construction Company Limited who had earlier entered into a contract to build a retaining wall on the site. A full and formal building contract was executed between the employer and contractor, Bernard signing on behalf of the employer and Headley Feanny, Managing Director, for and on behalf of the contractor. The contract provided for completion date January 1974 and at a cost of about $216,000.00. The project was plagued with difficulties - cash flow problems with the employer, scarcity of certain materials, and incompetence on the part of the contractor. Despite an extension of completion date to March 1974, matters came to a head with a termination agreement in February 1974.

The learned trial judge with concise clarity outlined the controversy between the parties and the tactical positions and manoeuvres at the trial thus - (pp. 317-8 - Vol. I):

> "1. The contractor is contending that it executed the contract up to a point when a mutual termination agreement was entered into. Mr. Feanny has therefore, claimed - on behalf of his company - an amount of nearly $44,000 under the mutual termination agreement and a sum of nearly $27,000 in relation to work done in building the stone retaining wall. In answer to this, the employer has rejected the claim on the ground that insofar as the apartment complex is concerned the contractor failed to produce any result in accordance with proper workmanship and skill. Dangerous structures were erected which would require a total demolition of what was erected. And insofar as the retaining wall is concerned, the employer has contended that the contractor has failed to produce a result in accordance with drawings and specifications. A worthless structure was erected as a substitute for what was expected. There is a counter-claim including a prayer for the return of nearly $42,000 which was paid to the contractor for work done and payments made in accordance with valuation certificates.....

"2. The employer maintains that each of the professional defendants (architect, quantity surveyor and engineer) was negligent in carrying out the assignment allotted and undertaken by each of them. There is a catalogue of particulars of negligence imputed against each defendant. There is an allegation that in reliance on statements, representations and advice given to the employer by the professional advisers, money was paid to the contractor and a termination agreement was made. But the structures erected were dangerous and useless and uneconomical to repair and remedy. A claim for damages is made. Particulars of special damage are outlined.

3. In answer, each defendant has denied the negligence alleged. The first and third defendants have counter-claimed for monies due and owing under the agreement of service with the employer. The second defendant did not file any counter-claim. No witness was called for the second defendant. Counsel rested his case on the evidence given by other witnesses during the proceedings. The particulars of the counter-claim are as shown hereunder:

First Defendant

'6% of $216,000 being the original estimated cost of construction:	$12,960
Amount received to date:	$ 9,000
Balance due:	$ 3,960'

Third Defendant

'1¼% of $216,000 being the original estimated cost of construction	$ 2,700
1¼% of $12,100.50 being the estimated cost of construction of additional retaining wall	$ 151.25
Amount received to date:	$ 1,875.00
Balance due:	976.25'

In the reply and defence to the counter-claims, the employer has rejected each of them and has joined issue on the defence raised."

George Bernard gave evidence of visiting the site in April, 1974 after a heavy breeze and found the walls of certain buildings blown down.

As a result, the respondent/company sought the opinion of Mattis, Domain, Beckford and Associates Ltd., Consulting Engineers,

and their terms of reference were - (p. 186 - Vol. II):

> "1. To make a detailed inspection of all the buildings now under construction on the site.
>
> 2. List defects and prepare a report with Cost Estimate on the repairs.
>
> 3. Arrange for concrete cores and photographs to be taken as necessary."

They filed a comprehensive report and at the trial Oswald Mattis, Chartered Engineer gave evidence of his findings and opinion. His evidence which was accepted by the learned judge was to the effect that on visual inspection he found the following amongst other defects - (p. 333 - Vol. I):

> "(1) Blocks were laid badly out of level;
>
> (2) Cold joints seen in the concrete;
>
> (3) Honey-combing in several areas;
>
> (4) Bulging and twisting concrete;
>
> (5) Members poured out of line and level;
>
> (6) Concrete poured with paper stuff in the joints,
>
> (7) Concrete poured with exposed re-inforcement;
>
> (8) Drawings and specifications called for ½' diameter steel bars but 3/8' used instead."

As a rough test he hit a beam with a bit of steel and the beam started to crumble. Core tests were made to ascertain the strength of the concrete. The core tests produced the following results - (p. 334 - Vol. I):

> "(1) 20% of the test was of extremely low strength.
>
> (2) 10% was about 2/3 of the designed strength.
>
> (3) 23% was about ½ of the designed strength.
>
> (4) 30% was about 1/3 of the designed strength.
>
> (5) 17% was about 1/6 of the designed strength.
>
> (6) About 6 cores were unable to be tested. When the machine went into the concrete, it started to crumble.

"(7) The four highest readings were 2413; 2185; 2056 and 1668.

(8) The four lowest readings were 915; 889; 875 and 820."

These tests were well below the minimum of 3,000 psi required in constructions of this nature and by the terms of the building contract. Mattis was of the opinion that the whole works should be condemned and that the defects referred to by the architect at Site Meeting No. 8 held on the 9th of February, 1984 were minor compared to those he Mattis found.

George Lechler, a graduate in Civil Engineering and a member of Professional Institutes here and abroad - corroborated Mattis as to the poor strength of concrete on the basis of core tests made by him.

Both experts were of the opinion that good concrete improved with age while poor concrete deteriorated. Subsequent and comparative tests showed deterioration. As to the future of the buildings on the site he expressed himself in guarded language thus - (p. 335 - Vol. I):

> "I would not quarrel with the view that the buildings should be demolished. I believe that is what should be done. The average strength of the 9 cores taken recently was 1440 which is just 48% of the stipulated strength. If the strength is less than 85%, then further testing is to be done. But this is less than 50% which is a very serious matter."

And later - (p. 336 - Vol. I):

> "I personally would not live in those buildings but they could have some use as storing. I would never recommend that the buildings be used for habitation."

The retaining wall was also condemned by Mattis.

The learned trial judge visited the locus in quo and in the course of his judgment observed - (p. 338 - Vol I):

> "..... And an impartial and intelligent layman would condemn every building which was constructed. The 'half-inch carpenter' of Jamaica who flourished in the thirties when I was a boy, would have suffered a nervous shock on his seeing what was constructed under the heading of a house. Every

"rule in the book was broken; almost every direction in the contract document was manifestly ignored."

He accepted Mattis' opinion that the state of the buildings at that stage of construction was due to:

(1) Lack of proper construction programming.

(2) Deficiency of skilled labour on site and/or control of such labour.

(3) Lack of adequate site supervision.

In that regard the learned judge found the site meetings informative - (pp. 338-9 - Vol. I):

"(1) .....

(2) Engineer to be contacted so that they may be an inspection before the pouring of any concrete.

(3) Contractor must comply with contract documents and all instructions given to him by the consultants involved.

(4) All materials used must be of acceptable standard in keeping with contract.

(5) A competent foreman or representative must always be present on the job.

(6) Job lacked competent supervision and programming."

The first question raised by Mr. Daley was relevant to the nature of the action brought against the appellants. It was a question common to both appellants and Mr. Henriques adopted such of Mr. Daley's argument as was relevant to Massop and added his own contribution. The question is relevant, in my view, to the ambit of the duties owed by the appellants to the respondent as well as to the damages recoverable.

Mr. Daley submitted that the action in the instant case was founded on contract. The allegations as described in the pleadings were in support of an action for negligent breach of contract and not the tort of negligence. Accordingly, the learned trial judge erred in law in finding expressly or by implication that the quantity surveyor was a joint tortfeasor. In support he referred to Charlesworth on Negligence (4th Edition) 1962 paragraphs 1004-7

and to dicta in the following amongst other cases: Bagot v. Stevens Scanlon & Co. [1964] 3 All E.R. p. 577.

Mr. Henriques submitted that although the actions were consolidated there were distinct and separate contracts. Suit (i) above was for breach of contract between employer and building contractor and the appellants were not a party to that contract; that on the assumption that there was an agreement between the respondent and Massop the learned trial judge failed to appreciate that the appellant could only be liable in contract and not in tort. Each expert was under a separate contract specifically related to his area of expertise and the services he was expected to provide and accordingly a defendant could only be liable if the employer established a breach of that particular contract. The learned trial judge therefore erred in finding the three experts jointly and severally liable.

Dr. Barnett contended that the claim was based on both contract and tort; that Mr. Daley's submission so far as it suggested that where a professional man has a duty in contract he cannot be sued in tort was inconsistent with modern developments of the law of torts as exemplified in such cases as Donoghue v. Stevenson [1932] A.C. 562 and Hedley Byrne & Co. v. Ltd. Heller & Partners Ltd. [1964] A.C. 465. The duty in tort, which arises generally is fixed by the law and not by the contract of the parties so that if the contract has no limitation a party is not exempt from the general law by the mere fact that there is a contract. In this regard he referred to Sutcliffe v. Thackrah [1974] 2 W.L.R. 295, Esso Petroleum Co. Ltd. v. Mardon [1974] 2 W.L.R. 594, and Batty v. Metropolitan Realisations Ltd. [1978] 2 W.L.R. 500.

At the outset, I am of the view that the cases of Donoghue v. Stevenson and Hedley Byrne v. Heller (supra) are unhelpful. In both cases there was no contractual relationship between plaintiff and defendant. The action rested upon the good neighbour principle enunciated by Lord Atkin in Donoghue v. Stevenson at p. 580:

> "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

On the nature and causes of action against professional men for negligence in the performance of their professional duties we were adverted to the following passage from Charlesworth on Negligence 4th Edition paragraphs 1005-7:

> 1005:
>
> "The distinction between contract and tort turns on the origin of the duty. In contract the duty arises from the agreement of the parties; in tort it is independent of agreement and is imposed upon the parties by the law. The duty in tort may also be covered by a duty in contract, and the question then arises, is the duty in tort superseded by the duty in contract, or is there a choice of remedies open to the injured party? The answer is that there is a choice of remedies, but where the defendant has protection under a contract, it is not permissible to disregard the contract and allege a wider liability in tort'."
>
> 1006:
>
> "Apart from the possible overlapping of contract and tort, it remains to be considered whether a professional man does owe any duty in tort. Generally, the duty to take care only arises when the result of a failure or omission to take care will cause physical damage to person or property. From this it appears that while doctors, dentists, barbers, plumbers and the like have a duty in tort, such people as solicitors, architects, accountants, surveyors, bankers and stockbrokers have no such duty."

1007:

> "Regarding the duty as a contractual one, the standard of care and skill which can be demanded will depend on the terms of the contract. In the absence of a special contract to the contrary the care and skill which can be demanded must not fall below that of a person of average competence in that calling; the contract, however, may be that a higher degree of skill is to be exercised."

In Bagot v. Stevens Scanlan & Co. [1964] 3 All E.R. p. 577:

> "Architects, whose employment by the plaintiff included supervision by the architects of the construction of drains, were sued by the plaintiff for breach of duty to exercise reasonable care and skill in that supervision. The supervision ended more than six years before the writ was issued. The architects admitted that, if the damage (viz., cracking of drain pipes and settlement of the premises) occurred at all, it occurred within six years before the issue of the writ. It was conceded that if the cause of action lay in contract only it arose more than six years before the writ was issued. On a preliminary point of law whether the action was statute-barred under s. 2(1)(a) of the Limitation Act, 1939,
>
> Held: the duty of the architects to exercise reasonable care and skill, where the failure (as here) was to do the very thing contracted to be done, arose out of contract alone, and, in cases of professional relationships, such a duty did not arise also independently of contract, accordingly, the action was statute-barred."

In giving the judgment of the Court, Diplock, L.J. said at p. 580:

> "It seems to me that, in this case, the relationship which created the duty on the part of the architects towards their clients to exercise reasonable skill and care arose out of the contract and not otherwise. The complaint that is made against them is of a failure to do the very thing which they contracted to do. That was the relationship which gave rise to the duty which was broken. It was a contractual relationship, a contractual duty, and any action brought for failure to comply with that duty is, in my view, an action founded on contract. It is also, in my view, an action founded on contract alone."

It is trite law that obligations under a contract are neither incompatible with nor exclusive of a wider duty, the breach of which would give rise to an action in tort. Thus if A employs B as his chauffeur, it is an implied term of his contract

to perform with the skill and competence of a chauffeur but independent of his contractual obligations there is the duty to persons generally (including his employer) to drive with reasonable care and for breach of such a duty causing injury to any person an action in tort would lie - Lister v. Romford Ice and Cold Storage Co. Ltd. [1957] 1 All E.R. p. 125. However in such cases there must be expressed or implied in the pleadings and proved by evidence the existence of this wider duty and a breach of such duty with consequential damage.

I am fortified in so holding by the following passages: In Jarvis v. Moy, Davies, Smith, Vandervell & Co. [1936] 1 K.B. 399 at p. 405:

> "The distinction in the modern view, for this purpose, between contract and tort may be put thus: where the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract, it is tort, and it may be tort even though there may happen to be a contract between the parties, if the duty in fact arises independently of that contract. Breach of contract occurs where that which is complained of is a breach of duty arising out of the obligations undertaken by the contract."

It was after quoting this passage with approval, that Lord Diplock in Bagot's case delivered the passage quoted ante. Later in dealing with submissions along lines similar to Dr. Barnett's, Lord Diplock went on to say (p. 580):

> "Now, I could accept that there may be cases where a similar duty is owed under a contract and independently of contract. I think that on examination all those will turn out to be cases where the law in the old days recognised either something in the nature of a status like a public calling (such as common carrier, common innkeeper, or a bailor and bailee) or the status of master and servant. There it can be properly said, as it was in such cases as Lister v. Romford Ice and Cold Storage Co., Ltd. that, independently of contract, there existed from the mere status a relationship which gave rise to a duty of care not dependent on the existence of a contract between the parties; but I do not think that that principle applies to professional relationships of the kind with which I am concerned here, where someone undertakes to exercise by contract his professional skill in relation to the matter. I think that the authorities are much too strong against that and are binding on me in the capacity in which I am sitting here today."

He then referred to Steljes v. Ingram (1903) 19 T.L.R. 536 and cited with evident approval the following passage:

> "Looking at the case in another way - (a) the case was not launched for a breach of duty; (b) assuming that an architect's profession is one to which it may be said that appropriate duties are attached by the general law (which I doubt), it is not alleged nor do I know that the particular acts complained of would be acts which fall within that general scope of duty; and (c), lastly, if they were, that might be reason enough to support an action in tort where the forms of action were material, but not enough to make the substance of the matter tort."

What is the position in the instant case? The following paragraphs from the Respondent's Statement of Claim are relevant and informative - (pp. 17-19 - Vol. I):

"1. .....

5. In or about July 1972 on or after August 31 and up to and including April 9, 1973 the plaintiff employed the first Defendant for reward as Architect to prepare plans, drawings and specifications for works, namely, the construction of an apartment complex together with all related facilities at Hermitage Road, St. Andrew, and to superintend the carrying out of the said works, and the first Defendant accepted the said employment.

6. It was an express or implied term of the said agreement by which the first Defendant was employed as architect that he would render professional services to the Defendant through the execution of the said works and, in particular, would so superintend the erection of the buildings that they would be suitable for their purpose and comply with the building laws and regulations and the plans and specifications prepared by him, and that he would direct and co-ordinate the architectural, engineering and surveying work, and that he would not approve and/or accept and/or certify in respect of any defective work and/or defective material and that he would give good and/or sound advice and reliable reports and/or accurate information to the plaintiff.

"7. In or about September 1972, the Plaintiff employed the firm of B.L. Goldson and Partners for reward as Quantity Surveyors to render complete quantity surveying services, and, in particular, to prepare bills of Quantities describing the said works and providing standards for their measurement and to value and measure the quantity and quality of the said works. This Agreement was confirmed by letter dated September 5, 1972. The second-named Defendant replaced the said firm as the party to this Agreement and/or was assigned the benefits and liabilities under the said Agreement and continued to act as such.

8. It was an express and/or implied term of the said agreement by which the second Defendant was employed as quantity surveyors that they would render professional services to the Defendant throughout the execution of the said works, and, in particular, would so conduct the necessary surveys, inspection, inquiries and measurements as to ensure that all materials and workmanship would conform with the Building Contract and/or Bills of Quantities, that all work would be accurately and properly measured and valued and that the Plaintiff would not be required to pay for defective work or materials and/or that they would give good and/or sound advice and reliable reports and/or accurate information to the Plaintiff.

9. In or about December 1972 the Plaintiff employed the third-named Defendant for reward as structural engineer to execute the structural engineering of the said works and to supervise the general construction of the project. This Agreement was confirmed by letter dated December 15, 1972.

10. It was an express and/or implied term of the said Agreement that he would so execute the structural engineering and supervision that the buildings would be sound stable and/or free from structural defects.

.....

15. The Defendants were guilty of breach of their duty and of their contracts with the Plaintiff."

Then follows "Particulars of Negligence and/or Breach of Duty."

The Learned trial judge opened his written judgment thus - (p. 315 - Vol. I):

> "These actions which have been consolidated, arise out of a contract. There is also a sound in tort."

In determining whether or not there was a contract of employment between the architect and the employer, Parnell, J. considered the conduct and correspondence between the parties and the letter incorporating certain conditions from the "Blue Book" in relation to the general duties of architects. I shall deal later with the evidence on this aspect of the matter. Here it is enough to say that although the form of the pleadings was undoubtedly influenced by the case of Sutcliffe v. Thackrah (post) the equivocal reference "breach of their duty and of their contracts" by itself would be insufficient to determine whether the pleadings are in tort as well as in contract. It will therefore be necessary to consider the submissions as to the ambit and scope of the duties owed by professionals such as the appellants and the evidence tendered, to ascertain if there existed any wider duty independent of contract of which the appellants were in breach. In passing I note with interest that although Parnell, J. referred to the appellants as tortfeasors yet when he came to assess damages he expressed himself as relying on the rule in Hadley v. Baxendale (post) as to remoteness and measure of damages for breach of contract.

However, before so doing by the preliminary nature of a certain submission made on behalf of appellant Massop I feel constrained to deal with it here and now. The arguments were in support of the following Grounds:

> That there was no enforcement contract between the appellant and the respondent as at the date when the purported agreement was entered into, the respondent was a non-existent entity as a matter of Law as it was not incorporated at the date of the agreement and the learned trial judge erred when he held inter alia:
>
> (a) That the said agreement which was a nullity could be ratified so as

> to become enforceable as a matter of Law as it is contended that an agreement which is a nullity is incapable of ratification; and
>
> (b) There could not be a novation as there was no evidence of a new agreement.

Mr. Wright submitted that Massop's contract was with Bernard and as it was prior to the incorporation of the Company it could not be ratified. He cited in support the following cases: British Home Ass. Corp. Ltd. v. Patterson [1962] 2 Ch. 404 and in Re Northumberland Avenue Hotel Co. [1886] 33 Ch. 19.

Dr. Barnett's concise reply was to the effect that a new contract may be inferred (see Natal Land and Colonization Co. Ltd. v. Syndicate Ltd. [1904] A.C. 120 and that in the instant case there was cogent evidence to support that finding.

The question was raised before the learned trial judge who dealt with it in the following manner - (p. 319 Vol. I):

> " Tactical move by first defendant
>
> On behalf of the first defendant, Mr. Wright with a display marked with industry and ingenuity, made a move with two prongs. Firstly, he argued that his client did not make any agreement with Casilla Development Company since it was not a legal person at the time when Mr. Bernard consulted him. Any agreement concluded was between Mr. Bernard personally and himself. And since a company after its incorporation cannot legally ratify what was done before its incorporation, his client should be dismissed from the suit. If this prong had found favour with the court, then the counter-claim would have been withdrawn."

And later gave his reasons for rejecting the submissions thus - (pp. 341-3 Vol. I):

> "(1) Mr. Bernard said that when he visited the house of Mr. Massop, everything concerning the proposed complex was discussed. That a private company (Casilla Development Co. Ltd.) was being formed was one of the points outlined. Within four days of Mr. Massop agreeing by letter dated 30.7.72 to be the Architect of the complex, the company was incorporated, i.e. on August 3, 1972. I have already found in Mr. Massop's favour

"that in the discussion the booklet showing the 'conditions of engagement' of an Architect in Jamaica was shown to Mr. Bernard. And on the other hand, I find against him that Mr. Bernard informed him during the course of the discussion that it was a private company which would own and operate the complex.

(2) In the letter of acceptance, Mr. Massop informed Mr. Bernard that a Quantity Surveyor and a Structural Engineer would be required. And on the 31st August, 1972, Mr. Bernard wrote to the Quantity Surveyors offering them the appointment as Quantity Surveyor on the recommendation of Massop.

(3) On the 5th September, 1972, the Quantity Surveyor addressed a letter to Casilla Development Ltd. accepting the appointment.

(4) On the 15th December, 1972, the third defendant wrote a letter to Mr. George Bernard under the heading: 'Hermitage Court Development' accepting the position of Engineer to the project. The first paragraph of the letter reads:

> 'Your Architect - Mr. H. Massop and myself have discussed the Engineering requirements of the above-mentioned project and I have agreed to execute the Structural Engineering for the project.'

Would the Quantity Surveyor on the 5th September know that he was dealing with a company but the engineer about three months after still in the dark although both were 'briefed' by the same Architect?

(5) On the 15th November, 1972, the employer and contractor entered into a written agreement for the building of a retaining wall adjacent to the complex. In the agreement, it is plainly stated that Casilla Development Ltd. was the employer. The Engineer (Mr. Richards) has admitted that he was the Engineer for this additional job. He has counter-claimed for work done on the construction of the retaining wall. Would he have started or completed his responsibility under this agreement without enquiring about the said agreement and asking for a copy of it? My answer is in the negative.

"(6) When the Architect was cross-examined on the 21st June, 1979, he told Mr. Macaulay, that he prepared some of the drawings (Nos. 1-27) and the Engineer prepared drawings marked (200-207) and one of the two stone walls. The drawings are all dated January 25, 1973. (1-27) and the top one is marked 'Casilla Development Limited.'

(7) The agreement between the Employer and the Contractor is dated April 9, 1973. The preamble to the agreement shows clearly who the employer is, i.e. Casilla Development Ltd. Mr. Massop is a witness to the agreement.

(8) The report on tenders dated March 1973 and prepared by the Quantity Surveyors is clearly marked on the outside 'Casilla Development Ltd. Hermitage Court Housing Development.'. Two letters dated 22.3.73 and written by Geo. W. Bernard, Managing Director on behalf of Casilla Development Ltd. were sent to the Architect on the subject of the report and by the 28th March, the engineer sent in a bill for professional services in connection with the engineering and working drawings.

I find that the evidence is overpowering that after the date of incorporation, both the Quantity Surveyors (who did not contest the issue) and the Structural Engineer knew quite well that in connection with their respective appointments concerning the Hermitage Court project they were dealing with Mr. Bernard as the authorised agent of a company. And in respect of the Architect that after the date of incorporation there was a novation in terms of his own letter dated July 30, 1972 wherein his services were to be rendered to the company and not to Mr. Bernard. The point taken is not only unpalatable but it is to be regretted that it was ever advanced."

In Re Northumberland Hotel - (p. 16):

"A written agreement was entered into between W. of the one part and D., as trustee for an intended company, to be called the N. Company, of the other part, that W., who was entitled to an agreement for a building lease from the Metropolitan Board of Works, should grant an underlease to the company, and that the company should erect the buildings. The company was registered on the following day. The memorandum did not mention the agreement, but the articles adopted it, and provided that the company should carry it into effect. No fresh agreement with W. was signed or sealed on behalf of the company, but the company took possession of the land, expended money in building, and acted on the agreement, which they considered to be binding on them.

> "The Company failed to complete the buildings, and the Metropolitan Board re-entered. The company being in course of winding up, the trustee in bankruptcy of W. took out a summons to be allowed to prove for damages against the company for their breach of the agreement:-
>
> Held (affirming the decision of Chitty, J.) that the agreement having been entered into before the company was in existence, was incapable of confirmation, and that the acts of the company, having evidently been done under the erroneous belief that the agreement between W. and D. was binding on the company, were not evidence of a fresh agreement having been entered into between W. and the company on the same terms as the written agreement, that there was therefore no agreement between W. and the company, and that the summons must be dismissed."

In delivering the judgment of the Court, Cotton, L.J. said at p. 20:

> "It is very true that there were transactions between Wallis and the company in which the company acted on the terms of that contract entered into with Wallis by the person who said he was trustee for them. But why did the company do so? The company seem to have considered, or rather its directors seem to have considered, that the contract was a contract binding on the company. But the erroneous opinion that a contract entered into before the company came into existence was binding on the company, and the acting on that erroneous opinion, does not make a good contract between the company and Mr. Wallis, and all the acts which occurred subsequently to the existence of the company were acts proceeding on the erroneous assumption that the contract of the 24th of July was binding on the company. In my opinion that explains the whole of these transactions."

In the Privy Council case of the Natal Colonization Co. Ltd. v. Syndicate, in dealing with the question of pre-incorporation contracts, Lord Davey said (p. 126):

> "It is clear that a company cannot by adoption or ratification obtain the benefit of a contract purporting to have been made on its being before the company came into existence..... But the facts may shew that a new contract was made with the company after its incorporation on the terms of the old contract."

Now the proposition that a company cannot ratify or adopt a pre-incorporation contract as stated and illustrated by the cases cited by Mr. Wright is well settled. However, his submissions ignored the realities. As the learned trial judge found at the pre-incorporation discussion with Bernard, appellant Massop was informed of the imminent formation of the company to undertake the project. Accordingly, the arrangements were of a preliminary and reconnoitring nature. In any event, from Massop's conduct, including his convening and conducting site meetings for the respondent/company, his directions to the contractor as regards defective work, his communications and relationship with the other experts, his letters to the company and above all his tendering of a bill on the respondent for moneys due and owing for services rendered under a contract of employment, the inference that he entered into the employment of the respondent as architect in relation to the building construction by the contractor, Hadlinston Construction Company Ltd. was inescapable. Then to further render his position indefensible he counter claimed for "moneys due and owning under an agreement". He cannot have it both ways. A counter claim is a definite and distinct action resting on its own positive averments. Indeed the facts of the instant case are clearly distinguishable from the Northumberland Hotel case. It could not reasonably be said that either party was under the impression that they were operating under a pre-incorporation contract. The finding of the learned trial judge that there was a new contract between the respondent and Massop but on the same terms and conditions as arranged with Bernard rested upon clear and cogent evidence. The counter claim was incompatible with his contentions. Counsel no doubt in keeping with his instructions and within the ambit of his duty consistently put forward this argument here and in the Court below. It is enough to say that there is no merit in this ground of appeal.

I now return to the arguments in relation to the duties and obligations owed by the appellants to the respondent. In this regard for the Quantity Surveyor the grounds argued may be summarised thus:

1. That the learned trial judge failed -

   (i) to identify any breach of duty on the part of the Quantity Surveyor and

   (ii) to properly direct himself on the law and facts as they appertain to the liability of the appellant.

2. Not only was there no evidential basis for the finding of liability against the Quantity Surveyor but that such a finding was contrary to the evidence of the experts.

Mr. Daley submitted that from the evidence the Quantity Surveyor was not responsible for the quality of the work nor was it his duty to say whether or not work was satisfactory. His duties were to consult with the architect in respect to bills submitted by the contractor, to measure and evaluate the work and to make such deductions for unsatisfactory work to which his attention was adverted by the architect. It was the architect to say whether or not the work was satisfactory and in keeping with the stipulations in the contract. In resting his judgment on team work and so holding the Quantity Surveyor responsible for the quality of the work the learned trial judge erred. In respect to the payments on interim certificates, these were not made on the basis of his assessment but on the architect's certificate.

For Massop, the following ground outlined the arguments presented by Mr. Henriques:

> The learned trial judge erred when he found the appellant liable as there was no evidence that he was guilty of a breach of contract or any terms thereof, or further, if there was any breach, which is denied, that

> the breach resulted in defects in the construction of the project or that the respondent sustained any damage in consequence thereof.

He submitted that the architect fully performed all his contractual obligations in accordance with the terms of his engagement and the incorporated conditions in the "Blue Book". All visible defects and those pointed out by others were recorded; that Mattis' evidence ought not to be relied on in relation to visual defects as in January when appellant made his report the form boards were in place, whereas in June when Mattis inspected they had been removed. The engineer was responsible for structural integrity and there was no evidence that he pointed out defects to Massop. Massop recommended termination of contract when there was material to justify such a recommendation.

Dr. Barnett in reply submitted that there was no challenge to the evidence that the work was extremely poor. The architect's challenge was limited to mild disagreement on the opinion of the experts that the buildings should be demolished. Architect, Engineer and Quantity Surveyor were employed to ensure that the contractor complied with the Drawings, Bills of Quantities and specifications so that money would not be paid out by the employer for worthless work. The employer was entitled to expect that individually the consultants would each use reasonable care and skill in the performance of their functions and that collectively as a team they would monitor, assess and value the work and advise the employer. In respect to the Quantity Surveyors they undertook "complete quantity surveying services." He argued that the words "assess", "value", and "price", as they relate to the Quantity Surveyors' duties incorporate quality as well as quantity. It would be a breach of his duty to give stipulated value orprice to work that clearly did not meet the specifications or give value to work

that to a man of his skill and training was apparently defective. In that regard a member of a professional team cannot close his eyes to matters which endanger his employer - see Money Penny v. Hartland ((1826) 2 C & P 378).

It is indeed fair to say that although in his judgment the learned trial judge was strongly influenced by the concept of team work, he did consider the relative contractual duties of the experts.

With respect to the architect he considered the guidelines in the "Blue Book" of the Royal Institute of British Architects and the different stages defined therein and in particular the construction stage thus (pp. 344-5 - Vol. I):

> "1. .....
>
> 3. Under this heading, there are several obligations of the Architect. The following may be noted:
>
> (a) Analysing and reporting on the results of the approved method of placing the main contract and making recommendations to assist in the final selection of the Main Contractor with the assistance of a Quantity Surveyor if necessary.
>
> (b) Assisting the contractor to prepare a works progress schedule.
>
> (c) Giving periodical supervision and inspection as may be necessary to ensure that the works are being executed in general accordance with the contract.
>
> (d) Advising the client on the progress and quality of the work.
>
> (e) Checking contractor's application for payment (with the assistance of a Quantity Surveyor if necessary).
>
> (f) Certifying the final completion of the works."

And went on to say inter alia (p. 345):

> "Guidelines are for the purpose of regulating the conduct of the professional man in the discharge of his duties. His

> "professional body sets the standard and prescribes the norm."

And quoted with approval the following from Emden and Gills Building Contracts and Practice, 7th Edition p. 385:

> "Architects and engineers are bound to possess a reasonable amount of skill in the art or profession they exercise for reward, and to use a reasonable amount of care and diligence in the carrying out of work which they undertake, including the preparation of drawings and specifications."

And the following statement of Sutcliffe v. Thackrah (1974) 2 W.L.R. at p. 320:

> "No one denies that the architect owes a duty to his client to use proper care and skill in supervising the work and in protecting his client's interests. That, indeed is what he is paid to do."

And then expressed himself thus (p. 347 - Vol. I):

> "But with the knowledge, suspicion and observation of Mr. Feamny which Mr. Masson had and made before any substantial portion of the work was done, he was under a duty to protect himself as architect. And the duty was either to show the courage and strength of a Daniel and advise a termination forthwith of the contract or to take action whereby supervision of the construction was more often and minute."

And later:

> "The casual approach of Mr. Masson to his assignment in the construction of a complex where an alert architect would have sensed some trouble ahead, may be inferred from his own evidence which he gave on June 20, 1979. He was being questioned by the Court:
>
> > 'I did not keep a record of the number of visits I paid to the site during construction. I did not take an estimate of the time I spent on the project ..... I would not say that during construction I visited the site at least once per week. It was less than that. Site meetings were once per month. My visit was at least twice per month during construction; once for site meeting and at least another occasion during the month.'
>
> This revelation is frankness at its best. But it is self-damnation in all the circumstances of the case."

He then considered the evidence of Massop's witness, Herbert Robinson. Robinson is a graduate of Montreal University and was a former President of the Jamaica Society of Architects and who had about twenty-three years practice and in relation to the architect he accurately summarised his evidence thus - (pp. 348-9 Vol. I):

> "(1) Where on a construction site, an architect, surveyor and engineer have been appointed, all three professionals are required to work as a team.
>
> (2) Q: 'If the competence of the contractor is in doubt by the architect what should be done in those circumstances?
>
> A: In the interest of the work an incompetent contractor ought not to remain on the site. So that the architect would recommend to the owner that the contract be determined. In other words, get rid of the contractor.'
>
> (3) The structural engineer is responsible for the structural design and integrity of the building. The 'integrity' in general terms is the same as stability.
>
> (4) Q: 'When a Quantity Surveyor signs a document as at p. 48 of exhibit 2 (Valuation Certificate for payment to contractor), has he to take into account, the materials used?
>
> A: Yes - also the materials used in terms of the amount of cement and the mix of the concrete.'
>
> (5) It is not the province of the Quantity Surveyor to see the concrete. His duty is to see that the contract is conformed with.
>
> (6) Supervision by the architect does not necessarily mean constant supervision at the site. One visit at least in every ten days, is accepted practice."

The learned trial judge then went on to say (pp. 349-351 Vol. I):

> "The architect, surveyor and engineer were working as a team. That is what was required; that is why the three of them were employed

"and for which they were paid. Although there was reason for Mr. Bernard to suspect the competence of Mr. Feanny before the contract was awarded, nevertheless by accepting the contract, the contractor was implying that it (through its managing director) had the proper skill and care to undertake the construction. There was also an implication - if not a warranty - that the materials used would be fit for the purpose for which they were used and were of good quality.

But the work which was produced by the contractor both in the construction of the complex and of the retaining wall, has turned out to be worthless and unfit for the purposes intended. When the mutual termination agreement was executed on February 7, 1974, each of the three consultants failed to advise the employer adequately or at all. The long list of defects outlined in site meeting No. 8 condemns each of them. It is eloquent testimony of the negligence displayed by them inasmuch as what was said to be 'minor defects' were only a small part of a larger problem. And that problem was that as was suspected, from the start, the contractor was not competent to do the job undertaken. Nevertheless he was given almost a free hand to demonstrate his incompetence to the damage of the employer. Lack of adequate supervision; lack of co-ordination; lack of reasonable examination of the different stages of construction, indeed lack of interest of what was going on except the regular bellowing at the site meeting touching the incompetence of Mr. Feanny - all these have contributed to the conclusion which the independent, reliable, fair and knowledgeable experts have arrived, namely, a complete destruction of what has been constructed. And I think each of these consultants will have a lot to regret about this unfortunate affair.....

The serious defects in the construction which Mr. Mattis has outlined with meticulous care and which to a large extent were confirmed by the architect and the engineer at the stage where the mutual termination agreement was conceived, indicate at least the following:

(1) The integrity of the buildings was non-existent. This aspect fell under the control and supervision of the engineer;

(2) The employer was called upon during the construction period to pay for worthless work measured by the surveyor and certified by the architect;

"(3) The 'defects' pointed out by the consultants at the date of the termination of the contract and which were said to be remediable at a cost of about $3,000 amounted to the painting of a mischievous and misleading picture. This means that the team work, unison and collaboration among them had gone astray, while the care and skill which they were required to show had been put in abeyance."

Now Mr. Daley's submissions rested upon the duties of a Quantity Surveyor (i) as described by the expert witnesses in the case, (ii) the opinions expressed in authoritative works and (iii) as illustrated, defined and propounded in dicta from the decided cases.

As to (i) above we were asked to consider in addition to Robinson's evidence certain relevant evidence given by appellant Mattis and for easy reference I quote the following excerpts - (pp. 261-2 Vol. 1):

"FXXD (Mr. Daley):

Q: Would you agree that in the usual R.I.B.A. Agreement, the duty of a certifier is the architect?

A: Where the architect is engaged for that services, yes.

An Engineer is sometimes engaged as a certifier.

I agree that in certifying and documenting in-put of labour, workmanship and quality of material are important.....

Q: Is the Certifier concerned at any time with the quality of material used (which is discernible)?

A: If this is asked in the context where the architect is offering full services then he would be responsible to his client of the total services of his employees which would include Q.S. and engineer.

Q: But independently of this is the Q.S. concerned with in-put and materials?

A: Yes to the extent of the value."

Pages 285-6 Vol. 1:

> "The onus was not on me to list all the defects (site meeting 8). People responsible for their areas should point out their defects. The Engineer did point out defects.
>
> The Q.S. did not - not his area."

On the relative duties of Quantity Surveyor, Architect and Engineer, there was much more from Robinson than the judge's short summary would indicate thus - (pp. 273-4 Vol. 1):

> ".....
>
> The structural engineer is responsible for the structural design and integrity of the building - the integrity in general terms is the same as stability. But the contractor is the party responsible for the structure of the building. If the contractor builds in accordance with the design and specifications and the building suffers a structural failure, then clearly this could be the fault in the design. Where the contractor does not follow the design and specifications then he is responsible.....
>
> "XXD (Daley)
>
> .....
>
> Matters in the competence of an Eng., the Q.S. would consult the engineer and matters which are in his own competence the Q.S. would take a decision on it. The Architect would consult the engineer and not the Q.S. in matters pertaining to the integrity of the structure.
>
> Q: Apart from the structural work and electrical work, the general co-ordination is that of the Architect?
>
> A: Each man has his responsibility but they work as a team.
>
> The Q.S. is the adviser on costing and cost planning, availability of materials and cost.
>
> I would not really put the quality of the work on the Q.S.
>
> Where work is defective, it is the particular man in whose area the fault is found who is to point it out. .....

"FXXD:

.....

The Q.S. assesses the work done when bills are submitted for building.

If ¼" steel is used when 3/8" steel is required the Q.S. should seek clarification.....

Q: When a Q.S. signs a document as at P. 48 (Exh. 2) has he to take into account the materials used?

A: Yes, also the materials used in terms of amount of cement; the mix of the concrete.

TO COURT: The Q.S. is a Q.S. and not a Quality Surveyor. There may be Quality Control people where the concrete is made.

FXXD: The ultimate value of the work must depend on the quality. The work could be useless if the quality of the work is bad. The value is for a certain type of work."

Mattis, the respondent witness in evidence said that an interim certificate upon which payments are made during construction is based on satisfactory work done by measurements up to a certain point and that in such a case it would require the Quantity Surveyor to measure it. The architect and engineer are in charge of the construction.

Next we were asked to consider Exhibit 6 put in by Mattis setting out the general duties of a Quantity Surveyor as understood in the construction industry - which document according to Mattis sets out in summary form the duties and responsibilities of a Quantity Surveyor.

In Exhibit 6:

Duties described - paragraphs (a), (b) and (c) are preliminary pre-contract services and are not directly relevant. The construction duties are as follows:

"(d) assessing, during building operations, the value of work done, and recommending the architect as to payments on account;

(e) reporting through the architect as to the financial effect of alterations, proposed or ordered;

"(f) preparation of the final account, on the basis of which the architect certifies final payment."

As an application of those general duties in relation to the contract between the respondent and the contractor we were referred to the following amongst other terms in the Building Contract so far as relevant:

"Clause 9 is as follows:

All variations authorised by the architect and subsequently sanctioned by him in writing shall be measured and valued by the surveyor who shall give to the contractor an apportunity of being present at the time of such measurement as the contractor may require ..... and shall be made in accordance with the following rules:-

(a) the prices in the Bills of Quantities mentioned in Clause 2 of the conditions shall determine the valuation of extra work of similar character executed under similar conditions as work priced therein ..... etc."

"Clause 12:

Any defects ..... within the defects liability period ..... and shall be due to material or workmanship not in accordance with this contract shall within a reasonable time ..... after receipt of the Architect's written instructions in that behalf be made good by the contractor."

"Clause 24:

Certificates and Payments - At the period of Interim Certificates named in the Appendix to these conditions interim valuations shall be made whenever the Architect considers them necessary and the contractor shall, subject to clause 21 of these conditions, be entitled to receive ..... a certificate from the architect stating the amount due to the contractor from the employer ..... Clause (21) ..... the full value of the work and materials shall be certified by the architect ..... Clause (d) ..... amount retained ..... shall be paid to the contractor upon the issue of the Architect's Final Certificate."

At site meeting No. 1 held April 14, 1973, the following is worthy of note - (p. 42 - Vol. 2):

"A. The Purpose of the Meeting

1. The purpose of this meeting was to introduce all parties involved in this project, and to briefly review the purpose, goals, and organization of this project.

2. At this meeting there was an opportunity not only for those who will be working together on this project to become familiar with each other, but also to clarify responsibilities, and identify potential problems.

B. Review of Variation Orders

1. The Architect stated that all variation orders must be recommended by the Architect and approved by the Owner in writing.

2. The Architect will request, from the contractor a price-add or price-deduct for each variation order."

Page 44 Vol. 2:

"The Quantity Surveyor will make a recommendation for monthly payment. The Architect will then certify same on approval, for the owner's payment.

The Architect informed Mr. Bernard to communicate all his questions and requests through the Architect to the Contractor. Mr. Bernard's cooperation is strongly requested so as not to cause any delay of this project."

Of the authoritative works to which we were referred it is enough to refer to the following passage - Halsbury Laws of England 4th Edition para. 1105:

".... The complexity of works of construction is such that it is necessary to calculate the amount of brickwork or excavation etc. required to complete them in order to enable a contractor to offer to complete the works for a firm price. The results of the calculations are known as bills of quantities and it is the function of the quantity surveyor to prepare them. The quantity surveyor will also often be required to measure and value the work executed during the progress of the contract and for the purpose of the final account. Where the contractor

> "has a claim for payment under the provisions of a contract, the quantity surveyor may be required to ascertain the sum due but he is not normally given the power to determine whether or not a sum so ascertained is due to the contractor. A valuation by a quantity surveyor will not fetter the jurisdiction of a certifier."

Emden and Gills on Building Contracts and Practice, 7th Edition p. 425:

> "Whilst acting in computations for interim certificates he (the Quantity Surveyor) is performing a purely ministerial duty and this nature of his work continues until he computes the amount for final certification with a super-added quality, which may upon certain happenings arise, when he has to rely upon his own knowledge and skill only in estimating the amount due to the contractor."

Hudson's Building and Engineering Contracts, p. 171:

> "The employment of Quantity Surveyors is attractive to architects because they enormously reduce the administrative work of the architect both at the tender stage and during the currency of the contract."

In Sutcliffe v. Thackrah and Others (supra) - p. 295:

> "The plaintiff employed the defendants, a firm of architects, to design a house for him. Subsequently, he entered into a contract with a firm of builders to build the house. The contract was in the R.I.B.A. standard form. The defendants were appointed architects and quantity surveyors. During the carrying out of the works they issued interim certificates to the builders. Before the builders had completed the works the plaintiff turned them off the site, and another firm completed the works at higher cost. The original builders subsequently went into liquidation. The plaintiff brought an action against the defendants for damages for negligence and breach of duty in supervising the building of the house and in certifying for work not done or improperly done by the builders. The official referee held that the plaintiff had been justified in turning the builders off the site and that the defendants had over-certified sums due to them. He awarded the plaintiff damages. The Court of Appeal reversed his decision."

On further appeal to the House of Lords, it was held - p. 295:

> "..... allowing the appeal, that in issuing interim certificates an architect did not act as an arbitrator between the parties and was accordingly liable to an action in negligence at the suit of the building owner."

The main question on appeal was - p. 297:

> "..... whether an architect appointed as such for the purposes of a building contract in the Standard Royal Institute of British Architects Form of Control (1963 edition, 1965 issue) was exempt from liability at the suit of the building owner in respect of loss caused by his negligent over-certification in interim certificates for payment under clause 30(1) of the conditions of contract."

Condition 30(1) reads - p. 304:

> "At the period of interim certificates named in the appendix to these conditions the architect shall issue a certificate stating the amount due to the contractor from the employer, and the contractor shall, on presenting any such certificate to the employer, be entitled to payment therefor within the period for honouring certificates named in the appendix to these conditions. Interim valuations shall be made whenever the architect considers them to be necessary for the purpose of ascertaining the amount to be stated as due in an interim certificate."

The case for the respondent was that there was a rule of law which absolved architects from liability for negligence in issuing certificates, that his duty was only to act honestly and that in issuing certificates he owed no duty to his client to exercise care or professional skill.

The Court of Appeal in allowing the appeal felt itself bound by the decision in Chambers v. Goldthorpe (1901) 1 K.B. 624 where it was held by a majority of the Court of Appeal that an architect was not liable for negligence in ascertaining the amount due to the contractor under a building contract. The decision rested on the insecure basis that the architect in issuing interim certificates was functioning in an arbitral capacity and

was not liable to the owner even though he was negligent. En route to overruling Chambers v. Goldthorpe, Lord Reid in the course of his judgment said at p. 299:

> "Now I can come to the position of an architect. He is employed by the building owner but has no contract with the contractor. We do not in this case have occasion to consider whether nevertheless he may have some duty to the contractor: I do not think that a consideration of that matter would help in the present case. The R.I.B.A. form of contract sets out the architect's functions in great detail. It has often been said, I think rightly, that the architect has two different types of function to perform. In many matters he is bound to act on his client's instructions, whether he agrees with them or not; but in many other matters requiring professional skill he must form and act on his own opinion."

And later, p. 299:

> "For some reason not clear to me a theory has developed and is reflected in many decided cases to the effect that where the architect has agreed or is required to act fairly he becomes what has often been called a quasi-arbitrator. And then it is said that he is entitled to an arbitrator's immunity from actions for negligence."

And later, p. 300:

> "There is nothing judicial about an architect's function in determining whether certain work is defective. There is no dispute. He is not jointly engaged by the parties. They do not submit evidence as contentious to him. He makes his own investigations and comes to a decision. It would be taking a very low view to suppose that without his being put in a special position his employer would wish him to act unfairly or that a professional man would be willing to depart from the ordinary honourable standard of professional conduct."

And per Lord Morris of Borth-y-Gest at p. 301:

> "There was a contract between the building owner and the architect. There was a contract between the building owner and the contractor. Under the former contract the architect was employed by the owner and was to be paid by the owner to perform certain duties both preliminary to and in connection with the second contract, i.e., that made between the owner and the contractor. Prima facie, but subject to some exceptions, a person who is employed to perform certain duties will be liable to pay damages if he causes loss as a result of negligence in the

> "performance of those duties. Brett J. in Turner v. Goulden (1973) L.R. 9 C.P. 57, 60-61 said that where
>
> > 'a person undertakes to carry on a business for reward, he is bound to bring to the exercise of it an ordinary degree of skill, and to act with reasonable care and diligence. For a default in either respect, an action will lie against him.'
>
> If in a building contract an owner makes a promise to a contractor as follows, 'I will pay you whatever sum my architect certifies as being payable to you,' then the owner will be obliged to pay the certified sum to the contractor. But if the architect has, by negligence, overstated the sum payable and if loss results to the owner, is there any reason why the architect should not be liable to his employer, the owner?"

And after analytical examination of a number of cases said at p. 310:

> "When certifying, or when valuing, the respondents were, in my view, not exercising arbitral functions."

And concluded, p. 314:

> "The circumstance that an architect in valuing work must act fairly and impartially does not constitute him either an arbitrator or a quasi-arbitrator. The circumstance that a building owner and contractor agree between themselves that a certificate of an architect showing a balance due is to be conclusive evidence of the works having been duly completed and that the contractor is entitled to receive payment does not of itself involve that the architect is an arbitrator or quasi-arbitrator in giving his certificate. Chambers v. Goldthorpe (1901) 1 K.B. 624 was wrongly decided. The fact that in the present case the architect had (in an interim certificate as to the amount due) to record the total value of work properly executed and of materials and goods delivered did not constitute him an arbitrator. He incurred liability for his negligence in over-certifying."

In this cited case, the defendant was both architect and quantity surveyor. The judgment was concerned with the defendant's role as architect over-certifying payments to the contractor.

As regards to the building owner there was clearly a contractual relationship. As regards the contractor because

of the bar presented by privity of contract an action by the contractor must rest upon a general duty independent of contract. If, as seems beyond argument, there was a duty to prepare certificates upon which both parties would rely there was clearly a general duty independent of contract in relation to the contractor (Hedley Byrne v. Heller). Chambers v. Goldthorpe was clearly out of step with the modern development of the tort of negligence and their Lordships in Sutcliffe's case unhesitatingly overruled that decision.

But this in my view does not remove the necessity of a plaintiff seeking to rely on this wider duty to prove its existence and the breach of such duty with consequentially recoverable damages.

In the instant case although the quantity surveyor is in a sense part of a team, on the evidence his work was complementary to that of the architect. From the cases and references to authoritative works, I am of the view that when an expert is engaged on a project to perform a polytechnical role - e.g. as architect, engineer and quantity surveyor as is often the case in small projects, the expectation as to reasonable skill and competence in each role must be met. On the other hand where, as here, the project is one in which specialists are engaged, and the work of one is merely complementary to the other, the area of responsibility is determined by the expectations as to skill and competence in the particular role.

It was conceded by Dr. Barnett at the trial that the quantity surveyor has no duty of supervision or inspection. Despite the endeavours of the architect to relieve himself of supervising duties the evidence points clearly to a role of supervision in him. Structural integrity was the concern of the engineer. There is no evidence that in assessing the

quantities submitted to him for pricing the quantity surveyor erred in his assessment or that he failed to obey the architect's instruction in deducting from the bill amounts for defective or unsatisfactory work. Equally it is clear from the evidence that it is on the architect's certificate that interim payments were made. It was not open to the quantity surveyor to assess for payment work condemned by the architect and conversely it would be an incursion into the architect's field of responsibility to refuse to measure work passed by the architect. In the instant case there was an architect with supervising duties, and an engineer for structural integrity and site supervision. Prima facie therefore, the quantity surveyor would not be liable for structural defects or for payments made on interim certificates under the hand of the architect because those are not within his duty and obligations under the contract.

Dr. Barnett in a valiant endeavour to establish a duty beyond the contractual obligations of the quantity surveyor argued that the defects were so patent that he ought to have advised the employer and that in assessing the defects in the termination agreement was evidence of negligence. Now the evidence clearly established that as architect Massop's role made him the adviser to the Company on the progress and quality of the work. The site meetings record a number of complaints made to the Managing Director. It was no part of the quantity surveyor's duties to make any such reports or tender advice. Massop's liability flowed from his want of diligence and his negligence in not making the inspection as a competent supervising architect should make and certifying payments for work which has since been proven worthless. The quantity surveyor had neither the means of knowledge nor the authority to overrule the recommendations or complaints of the architect. The duty

of advising the respondent as to the quality and progress of the work and of the defects was the architect's.

I can find no evidence of this wider duty on the quantity surveyor or of any breach of contractual duty as would make him liable. His area of responsibility was separate and distinct and there was no evidence of failure in the discharge of the responsibilities and duties as quantity surveyor.

With respect to Massop the trial judge found that his role involved supervision and inspection. In Florida Hotels Property Limited, Defendant/Appellant and Mayo and Another, Third Parties/Respondent, (1965) 113 C.L.R. 588 - architects retained to give such periodical supervision and inspection as might be necessary to ensure that certain works were generally executed in accordance with the plans and specifications, made no arrangements that they should be notified of the completion of formwork or of the placement of reinforcement during the construction of a suspended swimming pool, nor did they give instructions that concrete should not be poured before inspection of the formwork and the reinforcement in position. Certain reinforcing mesh was improperly laid by employees of the building owner, with the result that the reinforcing strength of the mesh was substantially reduced. Concrete was poured in the absence of the architects. Later, when the formwork was prematurely removed at the direction of the building owner, a concrete slab formed where the defective reinforcement was laid collapsed severely injuring an employee of the building owner. It appeared that because of the inherent weakness for want of proper reinforcement the slab would have collapsed whenever the formwork was removed.

It was held that the architects were in breach of their obligation to the building owner to supervise the work

with due care and skill; further that the possibility of liability of the building owner to workmen flowing from the lack of supervision of the work by the architects must be taken to have been fairly within the contemplation of the parties and accordingly, the architects were liable as third parties, to indemnify the owner for the damages reasonably paid by him to the injured workman. The respondents had submitted that no substantial damages could be awarded against them for the breach of their obligation to supervise the work because (i) there was no evidence before the trial judge in the third-party proceedings that the appellant was under any liability to the plaintiff in respect of the injuries he had received and (ii) even if there was such evidence, the liability of the appellant was not damage for which the respondents could be responsible because of their breach of contract.

In the course of his judgment on which three of the other four judges simply concurred, Barwick, C.J. said with respect to the first limb of the submission (p. 597):

> "Undoubtedly, it was essential to the success of the appellant's cause of action against the respondents under the second count that its liability to the plaintiff should be established as against the respondents. The usual course of trying the issues between the plaintiff and the defendant, and those between the defendant and the third party at the same time, results, if the plaintiff succeeds, in a verdict which binds the third party, the issue of the defendant's liability to the plaintiff having been decided both against the defendant and the third party. But the separate trial of the issues between the appellant and the respondents in this case necessitated proof in those proceedings of the liability of the appellant to the plaintiff."

And further (p. 597);

> "But, in my opinion, there was ample evidence given in the appellant's case to establish the liability of the appellant to the plaintiff for breach of the appellant's duty to the plaintiff as his employer. There was, in my opinion, no substance in the respondents' contentions to the contrary."

And on the alternative question thus at (pp. 598-9):

> "But, in my opinion, the possibility of liability of the appellant to its workmen flowing from the consequences of lack of supervision of work of the kind in question must be taken to have been fairly within the contemplation of the parties. His Honour, the trial judge, found the lack of supervision to be the cause of the collapse of the slab and the removal of the formwork but the occasion for it; because of the inherent weakness for want of proper reinforcement, it would have fallen down whenever the formwork was removed; and with this conclusion I respectfully agree. Of course, vis-à-vis the plaintiff the premature removal of the formwork was negligent on the part of the appellant. But this would not prevent the appellant recovering from the respondents for their breach of contract simply because they are therefore joint tortfeasors with the appellant. It would be otherwise if the effect of the respondents' breach of their obligation to the appellant had become spent and no longer causally connected with the plaintiff's injury. But that is not this case. The intervention of the appellant's act in removing the timber, though it occasioned the injury to the plaintiff, will not avail the respondents. The respondents, in my opinion, are liable to the appellant for the amount which the appellant reasonably paid to the plaintiff in discharge of its liability to the plaintiff for the consequences of the collapse of the slab. The amount actually paid in this case to the plaintiff is agreed to have been reasonable. There is therefore no need to discuss the question whether judgment for the plaintiff by consent in proceedings in which the respondents had not participated, would have afforded any evidence as against the respondents of the amount of liability of the appellant. No doubt a judgment after contest in such proceedings would. Accordingly, in my opinion, the amount payable by the appellant to the plaintiff was recoverable from the respondents as damages for their breach of their contractual obligation to supervise the work of construction of the swimming pool."

Windeyer, J. in his contribution at p. 600 quoted with evident approval the following statements of Lord Kyllachy in the Scottish Court Sessions Case, Jameson v. Simon (1899) Court of Sessions at p. 216:

> "I cannot assent to the suggestion that an architect undertaking and being handsomely paid for supervision, the limit of his duty is to pay occasional visits at longer or shorter intervals to the work, and paying those visits to assume that all is right which he does not observe to be wrong."

These words may appropriately be applied to the facts of the instant case. Comparatively minor defects were duly noted by the architect while major ones passed "unheralded and unsung."

On the question of liability the learned trial judge had this to say - (p. 351 Vol. I):

> " Result so far
>
> (1) On the facts, I find that the claim of the contractor against the employer must fail. And on the counter-claim, the employer must succeed.
>
> (2) As between the employer and the three consultants, I find that negligence has been established against each of them and that each is jointly and severally liable for the damage which has been sustained.
>
> (3) The counter-claim of the first and third defendants must be dismissed.
>
> No architect, surveyor or engineer may recover any payment for services performed without reasonable care and skill. And where the client or employer has paid for work from which no benefit has been derived, the payee may be compelled to refund what he has received on the ground that the consideration has wholly failed.
>
> As far as the drawings and designs are concerned, it has not been pleaded or suggested that there was any lack of care and skill on the part of the architect or the engineer in their preparation. And this stage of the work is different from the construction.
>
> I hold, therefore, that in accordance with the arrangement, what the employer paid the architect and engineer incidental to the preparation of drawings, designs and specifications and what was paid to the surveyor for the preparation of bills of quantities, was money properly payable and receivable. Credit must, therefore, be given to them for the amounts received."

What then is the extent of Massop's liability? The easiest way out would be to treat all - including the contractor, as joint tortfeasors and award a global sum. In my view that would not be right in principle nor just according to the facts of this case. The contractor was in breach of his contract to the extent that his "jerry built" houses were not only unfit for human habitation but the defects were irremediable and demolition the recommended cure.

It cannot be said that the cause of action with respect to the contractor is the same as that of the experts. As the judgment stands it would amount to making the experts vicariously liable for the breach of contract by the contractor.

With respect to the damages flowing from Massop's breach of contract I am mindful of the rule in Hadley v. Baxendale (1854) 9 Exch. 341 at p. 354 as considered and applied in Victoria Laundry (Windsor), Ltd. v. Newman Industries Ltd. (1949) 1 All E.R. 997 by Asquith L.J. at p. 1003:

> "In order to make the contract-breaker liable under either rule" [in Hadley v. Baxendale] "it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting comtemplate, not the breach of the contract, but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result: ..... Nor, finally, to make a particular loss recoverable, need it be proved that on a given state of knowledge the defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could foresee it was likely so to result."

Applying those principles the damages for which the appellant Massop as supervising architect would be liable include (i) the amounts paid out for defective work upon the faith of his certificates and (ii) the amounts payable to the experts for carrying out the tests and making their reports.

On this aspect, I accept the following findings and awards made by the trial judge - (p. 357 Vol. I):

"(1)	To the Architect	-	$ 9,000.00
(2)	To the surveyor	-	$ 4,849.40
(3)	Making prints	-	$ 183.89
(4)	To the Engineer	-	$ 2,500.00
(5)	To Surveyor Marks	-	$ 200.00
(6)	Feasibility study	-	$ 600.00
(7)	Caribbean Drilling & Boring Ltd.	-	$ 2,502.80
(8)	To Surveyor Prendergast	-	$ 250.00
(9)	To Surveyor Miller	-	$ 25.00
(10)	To Mattis Associates	-	$ 8,486.50
(11)	Watchman services	-	$ 800.00
(12)	To contractor	-	$ 41,428.00 "
			$ 70,825.59

Further, there is no good reason to disturb the finding by the trial judge that based upon the evidence of Mattis and the other experts the buildings are unfit for human habitation and that demolition is the recommended course.

If this is so then the architect in permitting the construction to proceed to that stage, despite glaring faults, must be held responsible for the costs of demolition of $25,000.00.

With respect to the wall this was a separate contract and on the evidence we are not satisfied that liability should be imposed on the architect.

Accordingly, I would allow the appeal by Coldson, Barrett, and Johnson, set aside the judgment against them and order that judgment be entered in their favour against the respondent company with costs here and in the Court below to be taxed or agreed.

I would dismiss the appeal by the appellant Massop but vary the amount of the judgment by substituting for "$113.705", the figure $95,825.59 less the total fees properly payable prior to the start of construction, such fees to be assessed by a judge if not agreed.

Costs of this appeal to be the respondents to be taxed if not agreed.

ZACCA, P.:

I concur.

ROSS, J.A.:

I concur.