IN THE SUPREME COURT OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. H033 of 1974)
SUIT NO. C.L. C257 of 1975) Consolidated

BETWEEN	Hadlinston Construction Comp. Ltd.	Plaintiff
A N D	Casilla Development Ltd.	Defendant
	A N D	
BETWEEN	Casilla Development Ltd.	Plaintiff
A N D	Harold Massop Goldson, Barrett & Johnson (a firm) Earl Richards	Defendants

Tried: 1976: September 20 -24
1977: November 28 - 30
1978: July 24-28
November 6 - 10
1979: February 5 - 9
June 4-8; 11-15; 18-22,
November 19-20
1980: February 25-29;
March 3-5.

Derek Jones for Hadlinston Construction Company
Dr. Lloyd Barnett & Dr. A. Edwards for Casilla Development Company
and
Norman Wright and (later led by R. N. A. Henriques) for Massop
U. Daley & Lee Hing for Goldson, Barrett & Johnson
B. Macaulay, Q.C., & Alton Morgan for Richards.

October 30 ,1980

Parnell, J.

These actions which have been consolidated, arise out of a contract. There is also a sound in tort. The pleadings in each of the claims, appear to be simple and clear. The story which was told is not difficult to comprehend. And yet it took 48 days of hearing during which time there were changes in representation for some of the parties. Over a period of nearly 3½ years, the contest was waged.

Building Contract

One of the numerous documents put in evidence in this case, is a voluminous building contract. The rights and obligations of the parties are said to be found within its pages. The nature of the project undertaken is outlined in reasonably clear language.

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There is a solemn arbitration clause in the contract wherein any dispute or difference arising under the contract :

"shall be and is hereby referred to arbitration."

No doubt while noting the arbitration clause, the parties have proceeded on the basis that a Judge of the Supreme Court is more competent to deal with a "dispute" or a "difference" under a building contract than by a professional and impartial person named as arbitrator and mentioned in paragraph 29 (C-22) of the building contract. Waiting for nearly six years since filing suit for the court to give a decision can do no harm although a certain amount of urgency is involved. If the arbitration clause had been followed, the time for waiting would have been shortened considerably. But as the jurisdiction of the Supreme Court cannot be ousted in a dispute between parties in Jamaica, a reference to the court has been made and, therefore, it must wrestle with the complaint which has been put in issue.

Brief history of the complaint

Hadlinston Construction Company Limited (hereinafter referred to as the "Contractor") was at the material time engaged as a builder. The managing director is Mr. Headley Feanny who has had over twenty years experience in the building industry. In September, 1976, Mr. Feanny was 34 years old. With over 20 years experience at the time he gave evidence, means that he was a very young "teenager" when he started. He grew up with an uncle who served the Public Works Department as a Superintendent. In due course, Mr. Feanny obtained a diploma at the College of Arts, Science and Technology (C.A.S.T.). At the trial, he was positive in his stand:

> "There is absolutely nothing in the construction that I cannot do..... I am not guessing it. I am a competent builder and contractor."

Casilla Development Limited (hereinafter referred to as the "employer") was at the material time engaged in the development of an apartment complex at Hermitage, St. Andrew. This location is outside the limit of the building regulations which the City Engineer supervises. Mr. George Bernard is the managing director of the development company.

On the 9th April, 1973, the agreement touching the construction of the apartment complex was executed by Mr. Bernard on behalf of the employer

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and Mr. Feanny on behalf of the contractor. Mr. Harold Massop, an architect and the first defendant in the second action, was a witness to the agreement. The face of the agreement shows that the employer:

> "has caused drawings showing the work to be done to be prepared by Harold V. Massop and has caused Bills of Quantities describing the work to be done to be prepared by D. L. Goldson and Partners."

Another person who witnessed the execution of the agreement is Mr. Lloyd Tulloch a member of the firm of quantity surveyors mentioned in the agreement. The third defendant Mr. Earl Richards is sued as being the engineer engaged by the employer in the construction process.

Subsidiary agreement

A separate agreement was made between the employer and the contractor whereby the latter was required to construct a retaining wall hard by the premises on which the apartment complex was to be constructed. The employer has contended that the engineer was additionally employed to supervise and control the engineering aspect of the construction of this retaining wall.

Controversy outlined

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 signed by the Architect (Massop and the quantity surveyors (the second defendant).

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 prceedings. 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. As I shall refer to in greater detail in due course, I am to point out at this stage, that in respect of the third defendant, a lengthy "no case" submission was made on his behalf by Mr. Macaulay. Having elected to stand on his submission and being

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unable to approbate and reprobate at the same time, leave was sought to withdraw the counter-claim above outlined. The court ruled against the no case submission and refused leave for the counter-claim to be withdrawn. That was on the 38th day of the trial. As a result of the ruling, Mr. Macaulay took no further part in the proceedings except to ask that his right to address the court in the final stages be preserved. And he kept his word. There was a final address for the third defendant.

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. The second prong was by way of an application seeking a stay of the proceedings so as to allow an arbitration clause to be put into effect. That was a clear sign of hindsight. But wisdom shown after the event is not necessarily an impressive exhibition. The application was being made on the 8th day of the trial and several steps taken by his client since suit was brought had the effect of barring any reliance on the arbitration clause - if any - between the employer and the architect or between Mr. Bernard and the architect. There is an 18th century proverb which states:

"we hate delay, yet it makes us wise."

The move was rejected and the hearing continued. Whereas an opportunity was given by these tactical moves during the hearing for a display of scintillating wit and courageous advocacy, I am not satisfied that precious time was saved thereby. During a hearing which is pregnant with points considered to be alluring for the tactician and the skilful, the court may find that counsel may attempt unwittingly to draw it off the scent. And what is thought to be an attractive fly, may form the subject of a prolonged debate - an exercise which in the end cannot possibly give any assistance to the solution of the issues.

Contractor's claim examined

The selection of the contractor for the building of the apartment complex was by way of tender. The quantity surveyors submitted a report on the tenders. There were six contenders. The three lowest tenders had their priced bill of quantities. The quantity surveyors examined the bills carefully; commented on them and ended as follows:

> "In the light of the foregoing remarks and after final assessment of the tenders submitted we recommend that the tender submitted by either Hadlinston Construction or L. & K. Construction Limited be accepted. I suggest, however, that the final decision be made in consultation with the Architect."

The three lowest tenders were as shown hereunder:

	Contractor	Amount	Construction period
1.	L. & K. Construction Ltd.	$217,557.90	nine months
2.	Hadlinston Construction	$216,000.00	nine months
3.	R. V. Campbell & Ass.	$208,904.49	nine months

On the 22nd March, 1973, Mr. Bernard addressed a letter to Mr. Massop in these terms:

> "Dear Sir,
>
> Re: Hermitage Court Housing Development
>
> Following the results and report on the Tenders handed to us yesterday by Messrs. E. L. Goldson & Partners, the Directors of the company went through each carefully and have selected Hadlinston Construction Co. Ltd., as contractors.
>
> We are sure this will meet your expectations and must say that the offers were very keen and interesting."

It seems that the advice of the quantity surveyors that the final decision be made in consultation with the Architect was construed by Bernard to mean that his company could unilaterally select the contractor and then inform the architect of the selection. But this action had its rebound as I shall hereafter explain.

Contractor a stranger to Mr. Bernard?

Mr. Feanny in the course of his evidence made it clear that he was no stranger to Mr. Bernard. He had known Mr. Bernard for more than two years up to September 1976 and had done the following jobs for him at his request:

(a) Lands belonging to Mr. Bernard at Spanish Town were sub-divided and a road was built thereon;

(b) A retaining wall at Stony Hill was made;

(c) A factory along Hagley Park Road was started but was not completed owing to the inability of Mr. Bernard to finance the continuation of the construction. This work started in the latter part of January 1973 and the cost of construction was about $19,000.

With regard to previous dealings between Mr. Bernard and Mr. Feanny, a suggestion in the cross-examination of Mr. Feanny seems to have confirmed this fact. Dr. Edwards was the cross-examiner.

Q: "I suggest that in the Hagley Park Road project, you did not get pay because of delay, defective work and absence of certificate from the Quantity Surveyor?

A: No Sir, there was delay owing to no money. There was no defective work and there was a certificate from the Q.S."

If Mr. Bernard had knowledge that Mr. Feanny was not competent to put up a $19,000 factory, how was it that he as Managing Director of his company could have advised that the contracting company of Mr. Feanny be the contractors of putting up a complex to cost $216,000? Was prudence being thrown overboard? Did he pass on his own knowledge of the competence of Mr. Feanny to his professional advisers? What was stated by Mr. Feanny and was not challenged is that arising out of the Hagley Park project, a suit is pending between his company and that of Mr. Bernard.

Performance bond waived

Under the building contract the contractor is required to take out the necessary insurance and bonds against certain losses incurred during the course of the construction. This is a well known practice. And although at site meetings, the Architect repeatedly brought up the question and reminded Mr. Feanny of his obligation, on the 4th October, 1973, Mr. Bernard, on behalf of his company, waived the requirement of any bond on the part of Mr. Feanny. At four consecutive site meetings beginning on April 14, 1973, the matter had been brought up. And at site meeting number 4, Mr. Feanny was

released. But by May 12, it was clear that the contractor was not performing satisfactorily. By September 5, the situation was worse. There had been a ten week work stoppage to which I shall refer in due course. When the site meeting was held on September 5, the engineer (Mr. Richards), was of the view -

> "that acceptable building standards and the contract documents were not being complied with by Mr. Feanny."

A long list of defects - about eleven in number - was referred to. And yet in this situation, the Managing Director of the employer was prepared to release Mr. Feanny from any obligation by way of insurance or a bond whereby any defect, default or loss occasioned during the remainder of the construction could have been satisfied without much difficulty.

Having outlined certain features of the case, I shall now attempt to examine in more detail what I regard as the essential elements in this strongly fought action.

Background outlined

In 1971, Mr. Bernard acquired a lot at 2, Hermitage Dam Road, St. Andrew. The lot was acquired for the purpose of developing a housing project. A company called Casilla Development Limited was formed to promote the housing project. The shareholders and directors comprised of Mr. Bernard, his wife and two sons. The company was incorporated on August 3, 1972.

Mr. Bernard consulted Mr. Massop, told him of his plans and sought his advice as to the appropriateness of the scheme in relation to the locality. A visit was paid to Hermitage Dam Road when Mr. Bernard pointed out to Mr. Massop, the lot of land. Having inspected the place, the architect (Mr. Massop) advised that for the purpose contemplated, the place was suitable.

Drawings prepared

In a letter dated July 30, 1972 the terms of the engagement of Mr. Massop as architect are set out clearly. The letter of appointment is signed by Mr. George W. Bernard as employer and by Mr. Harold V. Massop as architect.

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When Mr. Bernard first consulted Mr. Massop, the venue of the discussion was at the home of Mr. Massop. There is a paragraph in the letter of July 30, 1972 which, although it appears to be silent, speaks eloquently on a point in which there has been some dispute. The paragraph states as follows:

> "The Architect agrees and undertakes to perform the services of Architect in connection with said proposal in accordance with said conditions of engagement and scale of professional charges."

The letter is written at a time when there was no dispute. There was no motive for any lie to be told therein. On the contrary there was a congenial atmosphere for mutuality, truth, frankness and understanding. A reference to some book or publication is implied in the use of the words:

> "in accordance with said conditions of engagement and scale of professional charges."

Mr. Massop told the court - but Mr. Bernard denied it - that in the discussion, he showed Mr. Bernard a copy of the publication:

> "Conditions of Engagement
> and
> Scale of professional charges"

which guides the architect in Jamaica. The Jamaican Society of Architects published the "conditions" in 1960. There was a revision in 1964 and in 1973. I find without any hesitation that this aspect of the evidence as mentioned by Mr. Massop and hinted in the letter of July 30, is true and correct. By the same party of reasoning, I find that on the date of the letter of engagement which was only about three days from the incorporation of the company, Mr. Massop was well aware that Casilla Development Company was formed and that incorporation was near at hand. This bit of evidence was given by Mr. Bernard . He said that in the discussion with Mr. Massop at his home, he outlined this fact.

The final paragraph of the letter of July 30, 1972, states as follows:

> "The client should complement the Architectural Professional Services by commissioning an approved Structural Engineer and Quantity Surveyor, whose fees will be in excess of this commission."

Acting on the advice aforesaid, the employer appointed the second defendant as quantity surveyors by letter dated the 31st August, 1972. The firm of quantity surveyors [illegible]

1972. On December 15, 1972, the third defendant accepted the appointment as engineer for the project. The nature of the professional services which the engineer offered included the following:

(a) Preliminary studies and recommendations;

(b) Structural design;

(c) Structural drawings for construction;

(d) General structural supervision.

The architect in due course prepared the drawings and the quantity surveyors submitted the bills of quantities and costs. The financing of the project was to be done by the First National City Bank. The drawings and the estimate of costs as prepared by the quantity surveyors were deposited with the bank.

Tenders invited

On the advice of the architect, the employer invited tenders for the construction of the project. According to Mr. Bernard, it was agreed that the following should be observed.

(1) The architect to recommend two persons;

(2) The quantity surveyor, two persons;

(3) The employer, two persons;

and a final selection to be made from the six applicants. In his evidence in chief, Mr. Bernard said this:

(1) "I consulted with the architect and then I made a selection."

(2) "Mr. Massop did not inform me that Mr. Feanny was a road contractor and not a building contractor."

(3) Q: "What was your experience of Mr. Feanny before the selection of his company as contractor?

A: Only the building of a road in Spanish Town on a lot of land which was sub-divided."

I have already commented on a part of the evidence of Mr. Feanny. A suggestion put to him in cross-examination suggested that Mr. Feanny had done construction on a factory building at Hagley Park Road belonging to Mr. Bernard and the work was found to be unsatisfactory. I find, therefore, that the evidence of Mr. Bernard in (2) and (3) is unacceptable. He tried to mislead the court. The correct picture was outlined by Mr. Massop in a letter dated January 15, 1974 and addressed to the employer. This correspondence is at page 113 of the agreed bundle. Paragraph two of the

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pondence is at enclosure 113 of the agreed bundle. Paragraph two of the letter reads:

> "Please be reminded that Mr. Feanny was recommended by you and your company. On investigation we found no evidence of Mr. Feanny being a Building Contractor. I informed you of my findings and you expressed your confidence in Mr. Feanny and instructed B. L. Goldson & Partners to select Hadlinston Construction Company Ltd. as contractors. You further stated that Mr. Feanny had done satisfactory construction for you."

Doubts as to Feanny's ability

It was during the cross-examination of Mr. Massop on the 25th February, 1980, that he disclosed his state of mind concerning the competence of Mr. Feanny. Dr. Barnett was cross-examining:

> "I had my doubts when the works started as to the contractor's ability to perform the construction under the contract."

Q: "Did you adopt any special measures to safeguard against any poor performance by the contractor?

A: Yes Sir.

Q: What measures did you adopt?

A: I informed the owners of all my observations."

And in answer to the court, this is what the witness said:

> "I had my doubts from the first day I heard his name. I never heard of him before and I told Mr. Bernard. My practice is and was to investigate the background of a contractor. We kept lists of contractors and graded them into categories A,B & C. A & B are the best. When I heard the name of the contractor, I checked our lists and that name did not appear. That was sufficient to doubt the ability. In addition to checking the list, I telephoned others in the business and inquired into the competency and ability of the contractor."

I accept this bit of evidence from the architect. It shows his interest and alertness. But one is not surprised that the name of Mr. Feanny or that of his company did not appear on any list of approved contractors kept by Mr. Massop. Mr. Feanny told the court that the Hermitage Apartment complex was the first assignment of that nature he was going to undertake. It was in the interest of the employer also that in a venture of that kind, the Managing Director should have conducted his own discreet inquiries as to the ability, integrity and experience of the contractor to handle a construction of the kind contemplated and to convey his information to the technical and professional advisers whom he had

appointed. But as it turned out, he concealed valuable information from his architect concerning the Hagley Park Road project and summarily rejected the doubt expressed by the architect as to the contractor's competence. Mr. Bernard was courting disaster by his conduct and contributed to the fiasco which turned out in the end.

But the question as to the liability, if any, on the part of the contractor and the technical advisers will still fall for determination.

Work on the site began

The site was formally handed over to Mr. Feanny on April 14, 1973. What is referred to as an "orientation meeting" was held at the site. Minutes of the site meetings were taken by the architect (Mr. Massop) and subsequently distributed to all the interested parties. As stated in the minutes at enclosure 42 of the bundle:

(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."

The minutes show that six persons were present at the meeting including Mssrs. Bernard, Feanny, Tulloch (Quantity Surveyor), Massop and Richards.

Certain points clarified

At this meeting, the following were made very clear:

(1) Mr. Feanny was instructed to obtain the necessary insurances and bonds as stated in the contract and to hand over all receipts and documents in relation thereto to Mr. Bernard.

(2) Mr. Feanny was instructed to get in touch with the quantity surveyor whenever a request for payment was made.

(3) That payment would only be made on a certificate of recommendation by the quantity surveyor and approved by the architect.

(4) The co-operation of Mr. Bernard was strongly requested:

"so as not to cause any delay of this project."

The next site meeting was fixed for Saturday May 12, 1973. A certificate dated May 9, 1973 and under the signature of the Quantity Surveyors and the Architect was granted to Mr. Feanny for work done up to the date of

the valuation. On its face, the certificate shows the following:

Valuation Certificate No. 1

Starting Date	Completion Date	Contract Sum	Work Done	Certified
9.4.73	8.1.74	$216,000	$8,521	$9,994.50

The value of the materials on site is added to the estimated value of the work done. From the total, there is a retention of 10% in accordance with the contract. But all did not go well during the construction which lasted for about one month. This is reflected in the minutes of site meeting No. 2. As was arranged, the meeting was held on May 12. The engineer (Mr. Richards) and the architect (Mr. Massop) were present. Mssrs. Bernard and Feanny sent agents to represent them. At the meeting, the Architect and theEngineer pointed out separately a list of directions to Mr. Feanny. In my view, what was observed amounted to a sweeping suggestion that the construction was not being pursued according to the contract drawings and that what had been seen by the technical men left much to be desired. Notwithstanding the numerous faults which were noted, the certificate of the Quantity Surveyor and the Architect was issued three days prior to the meeting.

In his evidence on the 25th February last, Mr. Massop said this in answer to the court:

> "My job would not cover my going on the site other than on a site meeting day. It would not cover my going on any other day to observe the progress of the work."

As I have already pointed out neither the second nor the third defendant gave evidence at the trial. Whether or not they support the stand of Mr. Massop is not clear. But assuming that the architect did not visit the site even for the purpose of having a glance on what was happening - the question would arise as to the basis for his concluding that in respect of valuation certificate No. 1 the estimated value of the "contract work" completed is or was correctly stated in the document signed by him and the Quantity Surveyor. Is the inference to be drawn - that whatever was pointed out at a site meeting by the architect, was what he observed on a site meeting inspection before the meeting was held? And if yes, may this inference still be drawn despite the evidence of Mr. Feanny in answer to the court on the first day of the trial?

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"Mr. Massop was very keen; could not get away with anything; even on Sundays he would be on the job."

Financial trouble appeared

At the first site meeting held on April 14, 1973, Mr. Bernard disclosed that on April 13, (the day before) all documents required by the Bank had been deposited. As I have already indicated, it was the First National City Bank which was going to finance the construction of the complex. Without the bank's backing as soon as a claim is made, Mr. Bernard would have been in trouble. And according to Mr. Feanny, the "trouble" began from the start. There was a delay in the satisfaction of the first certificate calling for the payment of nearly $9,995. There was a work force of nearly 40-50 men when the first payment became due. But there was delay in payment. As a result, the construction work on the site was closed down for about ten weeks. Work re-started in September. An indication of what was happening may be reflected as shown hereunder:

Site Meetings

No.	Date held	Remarks
1.	14. 4.73	Orientation meeting.
2.	12. 5.73	Defects in construction observed and pointed out to contractor.
3.	5. 9.73	Resumption after 10 weeks suspension. Contractor reminded that contract documents should be complied with.
4.	4.10.73	Mr. Feanny's bond is waived. Work continues to be unsatisfactory.
5.	1.11.73	All the parties are unanimous that the construction work is unsatisfactory.
6.	6.12.73	Progress report of contractor not yet ready. Slow progress; lack of co-ordination detected.
7.	10. 1.74	Slow progress. List of defects pointed out.
8.	9. 2.74	Meeting summoned for discussion concerning the handing over of unfinished project by contractor. A long list of defects to be corrected at the expense of the contractor.

The approved certificates issued to the contractor for payments, are as listed below:

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No.	Date Certified	Estimated value of work to date	Sum payable
1.	9. 5.73	$ 8,521	$ 9,994.50
2.	10. 7.73	$10,728	$ 1,910.70
3.	9.10.73	$18,846	$ 8,971.20
4.	12.12.73	$44,727	$32,578.60
5.	19. 3.74	$69,813.55	$43,302.75

Mr. Feanny said that with regard to certificate No. 3 above, he did not get any payment until about October 23. And with regard to certificate No. 4, it was on December 31, that his bank received part payment of $18,858,60. A balance of nearly$14,000 was withheld. Certificate No. 5 was prepared pursuant to the mutual termination agreement which became effective on February 7, 1974.

Escalation in cost

By the time certificate No. 4 above was issued, the final cost of construction had moved from $216,000 to $229,562. The completion date still showed January 8, 1974. Owing to a chain of circumstances Mr. Feanny was unable to complete the construction by that date.

Extension requested

On the 16th January, 1974, the contractor applied for an extension of time. He gave the following as his reasons:

(1) Shortage of cement;

(2) Shortage of blocks;

(3) Shortage of bagasse board;

(4) Shortage of steel;

(5) Flood rains caused by "Gilda" in October;

(6) Variation to construct retaining wall;

A paragraph of the letter states:

> "In addition to the above, it has been constantly pointed out by us that the non-payment; partial or late payment by the employer of certificates properly certified by the Architects is causing serious financial hardships on this company and has therefore seriously delayed the progress of the work."
> (see enclosure 124 of agreed document).

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Previous extension to March 24, 1974

An examination of the minutes of site meeting 7 held on January 10, 1974 shows that the contract completion date was varied and that March 24 was the new date. But on January 10, the Architect pointed out that the buildings were only about 30% completed. The progress schedule of Mr. Feanny showed a completion date of June 1974.

There was a strong opposition to the request of Mr. Feanny. At the meeting, the Architect warned Mr. Feanny that the revised contract completion date was March 24,1974 and in the event of any further delay "the delay and extension of time clause" (clause 18 of the contract) would be resorted to by the employer. Under the clause, it is the Architect who is to decide whether an application for extension should be entertained and if yes - to what extent.

Probably it was the state of the atmosphere at the site meeting on January 10, why Mr. Feanny formally applied for an extension on January 16. The letter was addressed to the Architect but a copy was sent to the employer. The employer may have envisaged the move of Mr. Feanny. By letter dated January 12, 1974, Mr. Bernard wrote the Architect and directed the latter to inform Mr. Feanny in writing that:

> "We are not prepared to extend to any further date than the 31st March, 1974. Therefore, the progress chart given to us by H. L. Feanny of Hadlinston Construction Co. Ltd., scheduled to be completed June, 1974 is totally rejected. Time being the essence of contract."

Mr. Massop the Architect, obediently complied with the direction. The boss of the show had laid down his terms. Who is to question him? This meek submission of Mr. Massop - without his own independent judgment being brought into play, slighted two fundamental points:

(1) Under clause 18 of the contract, it is the Architect, and not the employer, who is to decide whether or not, having regard to all the circumstances, an extension should be granted and how long.

(2) Up to January 10, the construction had only been 30% completed and the work of the contractor had been faulty in several particulars. To say then that the remaining 70% should be completed within 60 days of that date, was

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a proposition which was not only impossible but manifestly absurd. The contractor was being invited to work a miracle. And the law does not expect such a feat from any contractor.

Factors relied on are fair

It is difficult to follow the logic that on the part of the contractor, "time is the essence of the contract", but on the part of the employer, it is not. What is clear - and I so find - is that Mr. Bernard did not have the ready cash available to satisfy the contractor as each payment certificate was issued. He had to depend on the cautious approach of a lending bank. A contractor who depends on a ready cash flow in order to keep him moving, is bound to run into difficulties where there is delay in payment. An angry and hungry work force will not listen to any other argument other than one where cash for work done is forthcoming without any delay.

The court will take judicial notice that since the latter part of 1972 and certainly from about the first quarter of 1973, certain building materials of the kind mentioned in the letter of January 16, 1974 were not readily available. The economic situation which had set in, caused the start of an acute shortage of certain materials. Judicial notice will also be taken that on or about October 17, 1973, a depression which was located in the north-east Caribbean, spawned tropical storm "Gilda". The depression dumped the heaviest rain fall throughout Jamaica within ten years. (See Daily Gleaner of October 18, 1973). The "Gilda rains" could be regarded as -

"exceptionally inclement weather",

one of the elements mentioned in clause 18 of the contract which the Architect had to consider but failed to do so when dealing with the application for an extention. The close down of the construction for ten weeks during the early stages as a result of delay in honouring the first payment certificate was another factor. It seems that these facts unfortunately escaped the attention of Mr. Bernard and Mr. Massop.

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Construction works final account

The mutual termination agreement was signed in the presence of the Architect and the Quantity Surveyor. What has been referred to as a "final account" was prepared by the Quantity Surveyor. The sum retained to cover "current defects" in the construction is put at $3,000. What was due to the contractor is stated as $43,838 and this was to be paid as follows:

(a) To be paid within 14 days $27,054.65

(b) To be paid within 30 days $16,783.77

Buildings blown down

On Sunday April 28, 1974, there was a heavy breeze. Mr. Bernard inspected the site on May 3 and found that:

(1) One of the upstairs interior bathroom walls of the Town Houses was on the ground with the steel and electrical conduits.

(2) The high wall of the 3 bedroom cottage was blown down. Defective construction was seen.

(3) It was also observed that most of the walls constructed after a cut off date was agreed upon were not filled or poured.

A letter dated May 6 was sent to the contractor and to the Architect. But the stance of Mr. Massop was peculiar. He told Mr. Bernard that he was not going to see the damage done by the breeze. Mr. Bernard had spoken to Mr. Massop orally. Having noted the reaction, Mr. Bernard wrote the letter to him. Another letter dated June 5 was sent to the Architect. It is enclosure 182 of the bundle. And it puts in writing the substance of a telephone conversation which Mr. Bernard had with Mr. Massop on June 4. I got the impression that Mr. Massop was tired of the whole thing and "was not prepared to waste anymore time in going up there." Whether Mr. Massop as architect was able to brush aside the complaint of the Managing Director of the employer so easily, will be examined in due course.

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Firm of Consulting Engineers called in

Mssrs. Mattis Demain Beckford & Associates Ltd., consulting engineers were retained by the employer to visit the site and report on the construction work done. Following the usual practice, the architect (Mr. Massop) was advised of the assignment. A letter dated June 7, was sent to the Architect by the consulting engineers.

On the 6th June, a report was prepared concerning the construction of the retaining wall. It is this work for which a claim of $26,435.50 has been made by the contractor.

On the 25th June, a report was prepared by Mr. Oswald Mattis, a chartered engineer and a member of the Jamaica Institute of Engineers. Mr. Mattis has been in practice since 1959. In the witness box he was cautious but firm. It was clear that he had mastered his instructions and had read carefully all the copies of the relevant documents given to him by Mr. Bernard. He took about 36 photographs of the houses that were built. Apart from this, Mr. Mattis caused cores to be taken from several of the areas of the construction. Thirty samples were taken for testing. I shall refer to the results shortly.

Some defects outlined

Mr. Mattis said that on visual inspection, defects were visible. Some will be outlined:

(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.

Tests were made on what was thought to be the better portions of the concrete. Critical points were tested.

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Q: "Give two examples of critical points?

A: Taking concrete from the top of the centre of a beam where it is highly stressed. All the load will eventually go back in the foundation. So that the foundation is another critical point."

A rough test was made on the spot. Mr. Mattis took a bit of steel and hit the beam. The beam started to crumble.

Core tests results

Provision is made under the contract for tests of the concrete to be made during construction. And where a test is made, the result should show a certain reading after the concrete had been poured after 28 days. The minimum resistance to crushing in pounds per square inch should be 3,000. The formula is generally shown as "3,000 psi".

There is a paragraph of the articles of agreement which states as follows:

> "All materials and workmanship shall comply with the British Standard Code of Practice for Reinforced Concrete (No. C.P. 114)."
> (See 2.08 (S.5) of the Agreement).

Certain Statistics

The core test produced the following:

(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 2418; 2185; 2056 and 1868.

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

Mr. Mattis told the court that the cores were about six months old when they were cut and tested. From the set formula which is used, a six month core produces a strength of 138% of the 28 day strength. The consequences is that the results above would have been much less at 28 days. This is a serious breach of the contractual arrangement and it goes to the

heart of the agreement. It is like building a house on sand. Disaster is bound to follow the event.

Evidence from a layman

It was Caribbean Boring and Diamond Drilling Ltd., which cut the cores. Mr. Mattis made marks at certain critical points in the buildings where the cores were to be taken. An employee of the company with about 14 to 15 years experience, operated the machine. He is Mr. Peter Grant an impressive and interesting witness who carries an interesting name. When he was cross-examined by Mr. Wright, he was asked about his academic background. His reply was:

> "I learnt the work over the years; there is no academic background which I have. It is based on experience."

The reply of the witness echoes the view of John Milton in "Il Penseroso":

> "Till old experience do attain
> To something like prophetic strain."

After he was re-examined the court asked the following questions:

> Q: "From your experience are you able to say by merely coring the wall or beam whether you are dealing with sound or good concrete as distinct from poor concrete?
>
> A: Yes your honour.
>
> Q: What kind of concrete your experience tells you that you were coring?
>
> A: There were about five or six borings that crumbled under the machine; what I got was just gravel and chunks of concrete. The rest came out for the purposes of testing and I do not wish to go any further."

The experimentalist was cautious; he did not directly answer the question but though he may have been silent, he had said enough.

An academician and expert speaks

A witness called by the employer was Mr. George Lechler, a graduate in Civil Engineering and a member of the Institute of Professional Engineers of Jamaica and of the State of Delaware (U.S.A.). Mr. Lechler has 28 years experience and has practised in Haiti, U. S. A. and Jamaica. He now lives in Trinidad.

Mr. Lechler was attached to Caribbean Boring and Diamond Drilling aforementioned when the cores were taken by Mr. Peter Grant. He examined the results and formed an opinion. The site was then visited by him while the cores were being taken and after they were taken. It was on June 4, 1979,

that Mr. Lechler gave evidence. But on the 17th May - about 17 days before - he took an additional set of samples for testing. Twelve cores were taken and tested. It was only possible to test nine of the samples. The other three had pieces of board and broken concrete block and were unsuitable for testing. The new borings were taken within a few feet of the old core location.

In the new test, the highest strength obtained was 2290 psi and the lowest was 730. In the original test, the highest was 2418 and the lowest 820. But the new borings were taken about six years after the concrete was poured. According to the expert's formula, strength is gained by age. But according to the new test, the "creature" suffers from debility as it gets older.

In answer to the court, Mr. Lechler who demonstrated in the witness box signs of assurance, knowledge and professional integrity had this to say:

> "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 in re-examination by Dr. Barnett, the witness was realistic as he could:

> "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."

A return to Mr. Mattis

The opinion of Mr. Mattis is that the whole construction should be condemned. His opinion is based on the lengthy and detailed report which he submitted as a result of his examination. He is further of the opinion that site meeting No. 8 (handing over of the project meeting held on February 9, 1974) referred only to minor defects. The major defects were untouched and nothing was done by the technical advisers to instruct the employer of the true state of affairs.

Mr. Mattis said that after he got the "core results", he consulted the City Engineer and a three hour inspection of the site was made by them.

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A copy of the drawings prepared by the Architect and a copy of the core results were given to the City Engineer. The City Engineer concurred in the conclusion arrived at by Mr. Mattis. The City Engineer was not called but I admitted the evidence of Mr. Mattis that the Engineer agreed with the opinion reflected in his report and which is a document in evidence.

I accept the evidence of Mr. Mattis and the conclusions at which he arrived. The substance of his conclusion is supported in a material particular by a layman, Mr. Peter Grant and in the techincal area by Mr. George Lechler.

Conclusion as to the wall

Mr. Mattis is also of the opinion that:

> "because of the poor standard and quality of work it is our opinion that it would be more economical to demolish and rebuild the wall in accordance with the Engineer's drawings."

And in his report touching the retaining wall, there is this eloquent paragraph:

> "The buildings adjacent to the Hermitage Dam Road are supported on soil which is retained by a retaining wall. Work should never be started on these buildings before the earth is retained as it poses great danger to both life and property."

Photograph 20 in evidence, supports the conclusion above. If the principle of "res ipsa loquitur" applies to a building contract, then photograph 20 - a spectacle which the court saw on November 9, 1978 - is proof of it.

Locus visited

The Court visited the locus in quo on November 9, 1978. All the interested parties were present. It was a shocking experience. In the first place, it was clear to me - and I believe that an ordinary intelligent man would agree - that the exact location was unsuitable for the purpose contemplated.

A vaulation report put in evidence speaks of the "commanding view of an ever-green re-entrant valley" and of the "panorama of the city..... and the Palisadoes peninsula in the distance." This sounds like a piece of Churchillian oratory. But the reality of the situation shows up by the spectacle of an ugly sight as in photograph 20 and a visit to the spot itself.

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Compressing so many houses on the spot as was seen would scare away tenants instead of alluring them to enjoy the panoramic view and the cool climate which is said awaited them.

It was injudicious to attempt anything like a construction in the area where photograph 20 depicts. 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. How this absurdity could have passed the inspection of the technical advisers at any stage for payment will remain a mystery to all practising architects, quantity surveyors and engineers who will muster sufficient courage to inspect the site. I entertain doubts whether any part of the building could be used as a storeroom, a view propounded by Mr. Lechler.

As to the wall, again an inspection will show that the effort was worthless. Almost every defect which Mr. Mattis outlined with clarity in his evidence and in his report is supported by a visual inspection.

What brought about this result?

At enclosure 200 of the documents, Mr. Mattis has given a general opinion as to the reasons which brought the state of affairs to which I have adverted. He listed three reasons as follows:

(a) Lack of proper construction programming;

(b) Deficiency of skilled labour on site and/or control of such labour;

(c) Lack of adequate site supervision.

But the site meetings also show clear evidence of what was taking place.

Example outlined - Site meeting No. 2

(1) Buildings to be set out in accordance with the contract documents in keeping with all levels and set backs.

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

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Site meeting 3

(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.

Site meeting 4

(6) Job lacked competent supervision and programming.

(7) There should be supervision and inspection of the work before the Engineer or the Architect was called for inspection.

Site meeting 5

(8) Performance of contractor roundly condemned.

(9) Poor supervision, poor construction of block work; improper sequencing.

(10) Warning that no more payments will be certified unless contractor complied with instructions given by the consultants and contract documents were followed.

(12) Improper sequencing of the job.

(13) Lack of co-ordination of the project.

When site meeting 7 was held on January 10, there was a general rehearsal of previous complaints, yet there was a discussion on what was called "Review of contractor's progress." If by this time there were these major defects, there were deviations from specifications; there were violations of the directions of the consultants employed by the employer, it was a contradiction in terms for one to discuss "progress report" or to review the contractor's progress.

How defence was conducted

(1) With regard to Hadlinston Construction Company Ltd., on the 6th November, 1978, Mr. Jones informed the court that the state of his instructions was such that he was unable to attend the proceedings on a day-to-day basis. For all purposes, therefore, as from the 6th November

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the contractor took no further part in the case. Subsequently on June 8, 1979, Mr. Feanny appeared in court and sought permission to appear for his company. But this was refused on the ground that in an action in the High Court in which a company is interested, a director, even if formally authorised by a resolution of the board, will not be allowed to represent the company's interest. (See Tritonia Ltd. v. Equality & Law Life Ass. So. /1943/ A.C. 584 (H.L.)

2. Each of the three defendants moved at the instance of their counsel to make a "no case" submission without being put to his election. The move failed. As a result, the first defendant gave evidence and called a witness. The second defendant played a game of wait-and-see. When his time came, as I have already indicated, he gave no evidence nor did he call any evidence. The third defendant elected to stand by his election. I have already adverted to the step taken.

Common ground argued

Mr. Wright with his usual display of clarity and emphasis, submitted that his client Mr. Massop dealt with Mr. Bernard in his private capacity and not as an agent or otherwise a director of the employer. He argued that there could have been no dealing with Mr. Bernard as "agent" prior to August 3, 1972 and that no evidence has been tendered on which a novation by conduct could be inferred on the part of the company and Mr. Massop after the incorporation of Casilla Development on August 3, 1972.

Mr. Macaulay in his contribution to the point was reasonably laconic and spirited. He argued that on the 15th December, 1972, when the engineer addressed a letter to Mr. Bernard conveying his acceptance:

> "to execute the structural engineering for the project,"

Mr. Bernard was acting in his private and personal capacity in his relations with the third defendant; that the third defendant was dealing with Mr. Bernard and not with the Managing Director or agent duly authorised of any company.

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Reasons for rejecting submission

I am of the opinion that the arguments of Mr. Wright and Mr. Macaulay touching the knowledge of their clients whether they were dealing with an agent of a company or with a private person in his private capacity, are highly technical and ingenious but unsound.

The vast amount of documents tendered in evidence and an application of common sense will show that the arguments are untenable. I shall state some of the reasons:

(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

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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. Architects, Surveyors and Engineers are regarded as gentlemen. And gentlemen do not rely on a mere delicacy when sued. Valuable time was consumed in arguing a point which experience and good sense should have whispered that it could not succeed. Mr. Daley should be complimented in his refusal to participate in the useless debate.

Posture of first defendant

My impression of the way the case of the three technical consultants was conducted, is that there is no challenge whatever in the contention that the contractor did not produce what he contracted to do; that numerous defects were detected during the construction period but that for some reason or the other, none of them is answerable in law for the damage sustained by Casilla Development Limited.

This now leads me to an examination of the contractural arrangement between the Architect and the employer. I have already referred to the letter of July 30, 1972 in which the Architect confirmed his agreement. The correspondence is at enclosures 3-7 of the agreed documents.

Main points in agreement

1. Design and preparation of sketch scheme to client's approval;
2. Providing the surveyors and structural engineer with all necessary information to allow them to perform their specialist work;
3. Directing and co-ordinating the architectural, engineering and surveying work;
4. Preparing with the help of a Quantity Surveyor and Structural Engineer, complete working drawings, schedules, specifications and Bills of Quantity to describe the whole project adequately for the purpose of placing the main contract by the approved method;
5. Preparation of working drawings sufficient to submit for statutory approval and inviting tenders.

The "Conditions of Engagement and Scale of Professional Charges" publication which I have already found was shown to Mr. Bernard when he

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discussed the proposed project with the Architect, has certain provisions to which I shall briefly refer.

Architect's services

A copy of the "Blue Book" containing the guidelines of the Royal Institute of British Architects was the publication which the Architect showed to Mr. Bernard. He gave Mr. Bernard a copy and invited him (Bernard) to calculate the fees payable for the services to be rendered. These are facts which I find. The book shows the different stages of the Architect's services. They are:

(1) Preliminary stage: This covers among others - taking instructions from the client regarding the project as a whole and acquainting the client with the conditions of engagement and scale of professional charges.

(2) Working Drawing stage: This stage covers the advice to the client and obtaining the form of contract to be used; preparing the necessary drawings and documents and undertaking the agreed procedure in relation to imported materials and goods. It also covers the direction and co-ordination of the architectural, engineering and surveying work.

(3) Construction stage: 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.

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(e) Checking contractors application for payment (with the assistance of a Quantity Surveyor if necessary).

(f) Certifying the final completion of the works.

The "Blue Book" has now been replaced by the "Gold Book". But under the Blue Book, it is clear that where a Surveyor and an Engineer are to be named to assist in the project, they must be nominated or approved by the Architect. And once appointed:

> "they shall be under the Architect's direction and control."

Having examined the "Conditions of Engagement" as outlined in the "Blue Book", I am of the opinion that the different stages mentioned are for the purposes of calculating the fees which the client is required to pay. The duty of the architect to his client has not been circumscribed by the conditions stated. 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. The conditions cannot vary, modify or circumvent the law of the land.

I shall give an example. Under the heading "A - Conditions of Engagement" in the Gold Book, paragraph 11(b) at p. 5 states as follows:

> "The liability of the Architect expires after 2 years from the date of completion of the relevant part of the works."

If the client should sue an architect in tort arising out of contract, he would be unable to defeat the claim by pleading a limitation bar of two years. By law, the client has six years to bring his action against the architect for the commission of a negligent act arising out of a contractural relationship. To attempt, therefore, to throw the Blue or Gold Book at the client showing a limitation of two years, would be otiose an endeavour as the experiment of King Canute.

The legal position is clearly stated in Emden and Gill's Building Contracts and Practice, 7th Edition at p.385:

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"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."

In his speech in Sutcliffe v. Thackrah /1974/ 2 W.L.R. 295 at p.320 B, Lord Salmon has put the point neatly:

"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 interest. That, indeed, is what he is paid to do."

What was to be paid

The employer was required to pay the architect at least $12,960. That is 6% of $216,000. Of this sum, the architect admitted receiving $9,000 and he has counter-claimed for $3,960.

Danger flag to watch

Mr. Massop in his evidence, told a story which I accept. But it is a story which demonstrates that the "red light" was on from the day he knew that Hadlinston Construction Company with Mr. Feanny as the head, was awarded the contract. This is the story: One Sunday he visited the house of Mr. Bernard. Mr. Bernard was informed by him that he could find no evidence to show that Mr. Feanny's company was a contractor or builder. Mr. Bernard advised that Mr. Feanny should be permitted to submit his tender. Up to this period, there were only six prospective contractors. Mr. Massop had investigated the background of all six and Hadlinston was the only one where evidence was lacking as to experience and competence in the construction field.

But there is more to come. And I shall quote portions of the evidence of Mr. Massop given on June 19,1979:

(1) "I had observed that Mr. Feanny was performing unsatisfactorily from site meeting No. 2" (Answer to the Court).

(2) "The approach of Mr. Feanny in settling down, gave me some concern. I did not see the batter boards - which is the first step in construction." (Ex-in-chief)

(3) "In no way was Mr. Feanny comparable with a foreman. A competent foreman is able to put up a building with the aid of drawings from the Engineer and the Architect. A competent foreman is able to read and follow a blue print." (Answer to the Court).

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Mr. Bernard made the task of Mr. Massop and of himself difficult and risky. As I have already mentioned, Mr. Bernard concealed from his own architect the fact that Mr. Feanny's company was the builder of a factory along Hagley Park Road and that Mr. Feanny's performance was unsatisfactory. To foist Mr. Feanny on a complex, therefore, was foolishness at its zenith. But with the knowledge, suspicion and observation of Mr. Feanny which Mr. Massop 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 advised a termination forthwith of the contract or to take action whereby supervision of the construction was more often and minute. To sit in an easy chair and hope for the best with an occasional protestation at a site meeting was not good enough. That was not in accordance with what Lord Salmon said in Sutcliffe's case to which I have referred or was his conduct in harmony with the view of Brett, J (as he then was) in Turner v. Goulden /1873/ L.R. 9 C.P. 57, 60-61:

> "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."

The casual approach of Mr. Massop 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. Is this an example of:

> "giving periodical supervision and inspection as may be necessary to ensure that the works are being executed in general accordance with the contract?"

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Construction of retaining wall

Mr. Massop told the Court that he did not assume any responsibility at any stage during the building of the wall. What he pointed out at site meetings concerning the wall and what he wrote about it, was gratuitous. No fee was promised to him nor did he seek any for what was done. The design of the wall was not done by him. I shall quote his evidence on June 18:

"Architects do not design retaining walls.
Engineers design retaining walls."

I accept the evidence of Mr. Massop on this aspect of the matter. He accepted no responsibility with regard to the building of the retaining wall. It follows, therefore, that he is not liable for the faulty work which the contractor performed on the retaining wall.

Quantity Surveyor's position

The first defendant called as a witness, Mr. Herbert Robinson, a fluent, impressive and authoritative witness. Mr. Robinson is a graduate of Montreal University, Canada and was a former President of the Jamaica Society of Architects. He has had about 23 years practice and has done several post graduate courses. I shall summarise certain areas of his evidence, as far as I was able to understand him.

(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.

I have taken some time to examine in detail the vast amount of evidence tendered in evidence at the hearing. Before I turn to another angle of the case, I must return to a piece of evidence of the architect given on June 18 while he was being examined in chief:

Q: "Why were engineering services necessary for the construction?

A: A project of this size would need structural engineer input to ensure that the buildings when built would stand up and be able to cope with the loads and usage."

Following this the court intervened.

Q: "As you have explained it, would the engineer himself know that that would be his function on the project?

A: Yes my Lord. These are set out in the engineer's conditions of engagement - the basic requirements."

Summary - findings

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 conctractor 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

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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 knowledgable 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.

I shall run the risk of being repetitious. But I shall attempt a brief summary at this point. The very nature of the undertaking dictates that where a project calls for employment of an architect, surveyor and an engineer, team work, unison and collaboration among them should be demonstrated. In such a situation, the builder or contractor comes under proper control. If the project produces a useless result - an end which defeats the purpose of the owner - then it must mean that someone at least must have been negligent. Finger pointing will not necessarily trace the root cause of the failure. An examination of the facts and circumstances touching the design, execution, administration and superintendence of the works will be a safer guide.

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 [illegible] which they

were required to show had been put in abeyance.

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.

Apportionment of damages

Where a plaintiff claims damages in negligence, it is open to the Court to hold that he contributed to the negligence causing the loss if the facts warrant such a finding. And this may be done even if contributory negligence is not pleaded by the defendant. If it were not for the fact that Mr. Bernard had placed his company fully within the hands of professional men, I would have been inclined to hold that he, as Managing Director and as the duly authorised agent, contributed to the loss which the company as employer has sustained. And the apportionment of his contribution may be

stated as follows:

Particulars

(1) Failure to advise the Architect at the time when the tenders were being considered, that Hadlinston Construction Company had done work, i.e. building a factory at Hagley Park Road for himself Mr. Bernard.

(2) Failure to inform the Architect that the performance of Mr. Feanny was regarded as unsatisfactory.

(3) Concealing a material particular from the Architect, thus depriving the said Architect a full opportunity of examining and reporting on the construction work executed by the Contractor before the advice was tendered as to the suitability of the contending prospective contractors.

As at present considered, but for the men he was dealing with, I would have been inclined to hold that Mr. Bernard contributed 25% to the debacle of which he complains. But the incompetence and shortcomings of Mr. Feanny were made very clear to the professional men at the opening of the innings. It was apparent to all of them what kind of ball, if any, he was in a position to handle. A lay client should not be answerable for the folly of his professional consultant.

Difficulty in assessment

A difficulty I have encountered in this case, is how the assessment of damages should be approached and ascertained. I shall give two examples of what I mean by using the word "difficulty".

1. The employer has maintained that he entered into an agreement with the contractor (apart from the main contract) for the construction of a retaining wall. For services rendered in this regard, the contractor has claimed the sum of $26,435.50. (See enclosure 149A). Neither in the pleadings nor in evidence has the employer dealt specifically with this item. Evidence was produced to show that the retaining wall was not built in accordance with the drawings and specifications and that it has encroached on the public road. The third defendant has counter-claimed for services rendered in respect of this construction. The pleading in the reply and defence to this item is with respect, somewhat evasive. It begins

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by saying:

> "Further and in the alternative there was no agreement between the plaintiff and the defendant in respect of an additional wall."

However, in the report of Mr. Mattis, (at enclosures 196-201) a rough estimate of demolishing and re-instating the wall is put at $15,440.

This must be regarded as an item of special damage. It does not form part of the main contract. Is the Court able to include this sum of special damage in a judgment on the state of the pleadings? If special damage must be claimed and proved, the answer must be in the negative.

2. The other difficulty is the state of the arrangement made between the Bank and the employer with regard to the financing of the Hermitage Court Development. It was during the careful and searching cross-examination of Mr. Bernard by Mr. Henriques that light was thrown on this vital area touching damages. Several documents were tendered in evidence on this point.

Certain particulars outlined

1. A construction loan and term loan of $175,000 was to be made by the First National City Bank provided that the "sponsors provide their own funds of $91,000 prior to any advance by the Bank."
2. Present estimates then indicated that the cost of site clearance and construction would cost (including items like professional fees, bank charges etc.) about $266,000.
3. Construction alone was set to cost $216,000 but by the time Valuation Certificate dated March 19, 1974 was prepared, the "estimated final cost" was put at $309,000.
4. The Bank's loan of $175,000 (if the whole had been granted) was to be "rolled over" into a 7 year mortgage on a ten year amortization secured by a first mortgage on the property upon completion of the construction period which was put at April 30, 1974.
5. The Bank's commitment to lend was to expire on June 22, 1973 "unless extended or terminated at an earlier date by mutual consent."

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6. The repayment was to be made from the lease rental of the complex at the rate of $2,360.75 monthly based on a 10½% interest (commencing on April 30, 1974 the latest). There were to be 83 monthly payments with one final payment of $74,232.

Certain points in cross-examination

During cross-examination by Mr. Henriques, Mr. Bernard admitted the following:

(a) The only sum which the Bank loaned in pursuance of the agreement was $12,672.92. That was in December 1973 and it was to pay part of Certificate No. 4 which recommended a payment of $32,578.60. No other sum was loaned under the agreement.

(b) When certificate No. 5 dated 19.3.74 which called for payment of $43,302.75 was issued, it was sent to the Bank. But payment was refused by the Bank. As a result, Mr. Bernard wrote a letter dated April 25, 1974 to the Manager. Part of the letter reads thus:

> "We would take this medium of informing you that because of your refusal to honour this certificate, a great deal of embarrassment, moral and financial strain has been experienced by all concerned apart from yourselves.
>
> Considering the urgency of this matter, your immediate reply would be greatly appreciated."

(c) If the sponsors had to supply the sum of $91,000 to the Company interest would have been charged at the then rate of 10-14%.

(d) The escalated contract price of $309,000 meant that the Directors would have had to find another $93,000. And at interest at the lowest rate of 10%, this would mean interest of $9,300 yearly payable on the capital to be raised.

(e) No provision was made towards the payment of principal with regard to the $91,000 to be advanced by the sponsors. Presumably this would also apply to the extra $93,000. which would have been required.

(f) In order to assist in the -

> "start-up expenses of Hermitage Dam Road project being undertaken by Casilla Development Ltd."

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the Bank had previously loaned Mr. George W. Bernard, the sum of $30,000. This was on the security of a first mortgage on 7 lots of land. Interest was charged at 11%. The principal with interest was repayable on demand but not later than June 30, 1974.

(g) The valuator's report showed that the net rental of the premises would be about $19,000 yearly. But Mr. Bernard put it at $26,000.

Summary of charges to be paid

Mr. Bernard admitted that the sum of $41,069 annually was payable as interest on the Bank loan of $175,000 (if it had been made) and on the sum of $91,000 to be advanced by the sponsors. But at least an additional $9,300 annually would have been required to service the additional $93,000 required to complete the project. This would make at least a total of $50,369 annually. To this must be added the interest of $3,300 yearly on the first loan of $30,000. Exhibit 18 shows that up to March 13, 1975, interest alone amounting to $5,183.23 was due and owing. The principal was still outstanding along with other fees.

Escalation of contract sum

With the escalation of the contract sum from $216,000 to the massive figure of $309,000, there would have been an increase of the professional fees to the three consultants. They charged a fee depending on the movement of the estimated final cost of the construction.

Even if the estimate of Mr. Bernard is to be accepted that he would have reaped the net sum of $26,000 yearly as rental, there would have been a shortfall of at least $24,000 yearly as interest to service the loans to the company. And matters like taxes, rates, upkeep, Director's charges, and administrative expenses have not been accounted for.

A question put to Mr. Bernard by Mr. Henriques in the final stages of the cross-examination was as follows:

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Q: "I suggest that as of February - March, 1974, the company was not in a position to continue the financing of the project?

A: I do not agree."

It is clear that Casilla Development Limited which was formed with a share capital of $200 was not in any financial position to back the construction of this ambitious project without the help of some source. And the source was the First National City Bank which was not prepared to make advances on a promised loan unless certain conditions were satisfied. One condition was that the sponsors should first provide the sum of $91,000. A letter from the First National City Bank dated April 23, 1974 (exhibit 17) shows that an advance of $30,000 was made to the company. But the particulars of "disbursement" shows five payments of certain sums between August 20, 1973 and December 28, 1973. And payments were made towards certificates 1, 2, 3 and 4.

From the very start, therefore, the company (employer) was in trouble. And this explains why on the presentation of the first certificate, Mr. Feanny had to close down operation as a result of delay in honouring the certificate.

Every form of delay on a construction project pushes up the cost. Everybody knows that since around the period when the construction started there has been a massive increase in building materials and labour in Jamaica with every passing quarter. And added to this, is the shortage of materials. An example of the rapid increase is shown in the building contract itself. When it was signed on April 9, 1973, the "contract sum" was put at $216,000. By March 1974, this sum was pushed to the figure of $309,000. And the longer the delay, the more the sum would have escalated.

I am not satisfied that the employer was in any financial position to complete the development as envisaged. This means that I am not satisfied that any loss by way of prospective rental has been established. On the contrary, the evidence shows a situation that even assuming that the construction was completed between March to June 1974, the projected net intake of $26,000 yearly as rent had to be set against not less than $50,000 yearly in loan and servicing alone. A viable proposition has not

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been established. A well intentioned but misguided bubble would have presented itself to the Company within a very short time.

What is recoverable

The employer has satisfied me that up to a point, the contractor and all three consultants must pay compensation for the loss suffered. I shall try to estimate what this is and against whom. The following items were paid for. The evidence in support, I accept.

(1)	To the Architect	- $ 9,000.00
(2)	To the Surveyors	- $ 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.	- $[illegible],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

Up to this point this makes a total of $[illegible],025.59. To this must be added the following: (Retaining Wall)

(a)	Demolition and salvage of retaining wall	$3,240
(b)	Make good to roadway	$ 500
(c)	Boundary survey	$ 100
		$3,840

The demolition costs for the buildings have been put at $25,000 by the consulting engineers. The employer is not entitled to the sum claimed for water rates nor for Bank charges and interest in respect of loan financing to June 30, 1974. He would have had to pay water rates for his premises whatever was the result of the contract. In respect of the Bank Loan, he had promised as sponsor to provide a certain sum as a condition precedent to his getting a loan. At no time was the promise to first find the sum of $91,000 before the Bank granted any advance satisfied.

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Where there has been a breach of contract, the court will award the successful plaintiff damages in accordance with the principles laid down in the case of Hadley v. Baxendale /1854/, 9 Ex. C.H. 341. Put simply, the principles are as follows:

(1) The aggrieved party will be awarded damages against any loss likely to arise in the usual course of things.

(2) The loss that was, or might reasonably be supposed to have been in the contemplation of the parties, is also recoverable.

(3) Where the immediate cause of the loss is not the breach of contract but the conduct of the plaintiff himself, the damage is too remote and is not recoverable.

Reinstatement costs?

With regard to the retaining wall, the employer did not pay anything to the contractor for the construction. What was due under that particular agreement for the work done, was withheld. The employer will, therefore, receive the sum of $3,840 only as arrived above under the head of "retaining wall." And under this head I can find no evidence to condemn the engineer.

In respect of the construction of the complex, I have already found that the employer would not have been in any position to bring its dream to a state of fruition. The question of re-instatement does not, therefore, arise. What was lost was the actual cash paid to the contractor, the cost of demolition and clearance and certain other expenses to which I have referred.

This case shows that as between the employer and the consultants, the nature of the contract for services was divisible and not entire. There were at least three stages in respect of which each of them was required to do something. And under the practice of their profession, each stage is to be paid for in accordance with a certain scale of fees. I, therefore, hold as I have already indicated, that in arriving at the final sum, each consultant must be given credit for sums paid for services immediately prior to the start of construction.

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Construction assessment

The Court is under a duty to apportion fault where a successful plaintiff is found to have contributed to his loss. There is no duty to apportion fault as between joint defendants. And where the contribution of one of the defendants is to be assessed in a percentage less than say 10%, the Court will not enter into any mathematical exercise to provide an answer. But in my view, the contribution of each of the four characters in the play, i.e. the contractor and the three consultants, is much greater than 10%. However, I shall not attempt to apportion the blame.

The result

1. In the claim between the contractor and the employer, there will be judgment for the defendant on both the claim and counter-claim. And on the counter-claim there will be judgment in the sum of $4,315 together with his contribution towards the sum for the breach of the main contract.

(2) As between the employer and each of the three consultants there will be judgment for the plaintiff. Each of the counter-claims stands dismissed.

(3) With regard to the main contract there will be judgment for the plaintiff/employer against the contractor and each of the consultants (1st, 2nd and 3rd defendants) in the sum of $[redacted],750.59 but this sum is to be diminished by the total fees properly payable immediately prior to the start of construction and in the light of my comments earlier made.

(4) If there is no agreement as to what total should be credited, I direct that an assessment be made before a Judge.

(5) The employer is entitled to costs in the action brought by Hadlinston (contractor) and in the action against the consultants. As far as the costs in the action brought by the contractor are concerned they must be limited to the point where the order of consolidation was made. Thereafter it is limited to such costs occasioned as a result of that action being tried with the main action.

Cost is to be taxed if not agreed.

Pcadings not adequate

I have observed that the pleadings of the employer did not cover some of the items of expenditure which I have found proved but which were not pleaded by way of amendment or otherwise. Similarly, that the contract of services between the employer and each of the consultants was divisible and not entire was not pleaded. By pleading in the alternative that the contract of services was divisible each of the consultants would be able to reap a benefit in the light of the judgment.

Amendment of pleadings

The Court has ample power under sections 259 and 270 of the Civil Procedure Code to entertain an application for an amendment, so as to determine the real issues in controversy between the parties. The judgment in the form above-outlined has been entered on the basis that an appropriate application for amendment has been made on a date prior to or not later than March 5, 1980, the last day of the hearing. The application must be in writing and lodged with the Registrar of the Supreme Court not later than ~~thirty~~ thirty-five days from date hereof. In default of so doing, the final judgment will have to be amended in the light of the state of the pleadings.

Counsel in action

This case lasted a very long time. All the counsel who were engaged in the proceedings acquitted themselves well but not to the point where I could hand out enconiums of the kind which Megaw, L.J. formulated in the recent case of Gandolfo v. Gandolfo /1980/ 2 W.L.R. 680 at p.688. I think I shall quote part of the learned judge's commendation:

> "It was a matter of some complexity, some intricacy; it was a matter which required to be explained to the Court, and both counsel have confined their submissions to within a period of half an hour each. They have put their arguments with complete lucidity, complete clarity, and have said with everything that is to be said on behalf of their respective parties. If all submissions to the court were of that quality, the task of the court would be infinitely easier."

But although counsel may not have been brief and pointed as in the case above, they distinguished themselves in a material particular during their final addresses. Mr. Wright, Dr. Barnett, Mr. Daley and Mr. Macaulay each cited scripture in support of a point which was being made. The Old and New Testament provided a quotation for each of the learned gentlemen.

Dr. Barnett and Mr. Daley were satisfied with the wisdom in Proverbs. Mr. Wright and Mr. Macaulay found more consolation in the New Testament. Citing scripture to the jury by counsel in a criminal case particularly where the going against his client was hard, was once a feature at the English Bar up to the first decade of the present century. And sometimes astonishing results were achieved particularly where eloquence accompanied the interpretation of the passage relied on.

In this matter, the scriptural citations were examined by me alongside certain well known principles of law on the background of the evidence. With the aid of a dose of common sense, I arrived at the result which I have outlined above. If in arriving at the end, I have shown any signs of tediousness, I apologise. No attempt was being made to compete with any of the counsel in the case.