

**Colman & Or v Laxmanbhai & Co. (Sey) (Pty)
(2001) SLR 206**

Phillippe BOULLE for the Plaintiffs
Kieran SHAH for the Defendant and Counter-Claimant

Judgment delivered on 12 October 2001 by:

PERERA J: This is an action in damages arising from an alleged breach of contract. On 2 November 1995, the parties entered into a Written agreement (exhibit P2) wherein the Defendant was contracted to carry out additions and alterations to a dwelling house for the Plaintiffs "as per materials supplied and to be supplied by the clients," for a contract price of R500,500. The works to be performed were specified in the bill of quantities prepared by Hubert Alton & Co Quantity Surveyor (exhibit P1).

The Plaintiffs aver that the Defendant failed to carry out the works as agreed and that consequently there were works that were incomplete and defective. The Plaintiffs therefore claim R23,860.25 in respect of incomplete work, and R163,278 as cost of rectifying defective works.

On 21 January 1997, the parties entered into a second agreement (exhibit P3). The object clause states that works contracted to be performed in the agreement dated 2nd November 1995 (exhibit P2) "have been suspended and the parties are in dispute," and hence the parties had agreed "to resolve their dispute without the need for formal arbitration in terms of Section 34 of the agreement." It was inter alia agreed that the Plaintiffs pay the Defendant R178,547.55 for works already completed, excluding the 5% retention fee, and that the Defendant shall "complete unfinished and extra works as described in annex one and two attached". This work was to be completed within one month, however failure to complete within time entailed a penalty sum of R.2000 per day payable to the Plaintiffs. The Plaintiffs therefore claim a further R668,000 on the penalty clause of the latter agreement on the basis that the Defendant had failed to carry out the unfinished works and to remedy the defects. The total claim is therefore R855,138.25.

The Defendant avers that works under the first agreement were suspended as the Plaintiffs withheld payments due. Upon signing the 2nd agreement (exhibit P3) a sum of R178,547.55 was paid to the Defendant "for works already completed". The Defendant therefore avers that the second agreement signed on 21 January 1997 superseded the earlier one. Under the second agreement, the Plaintiffs agreed to

- (1) Pay the Defendant R46,513 upon the completion of the unfinished and extra works.
- (2) Pay 50% of the retention money upon the issue of a practical completion certificate by the Architect.

The Defendant avers that the said practical completion certificate was certified by the Architect on 20 February 1997. They further aver that the Plaintiffs delayed in supplying some materials and also delayed payments as agreed. The Defendant therefore counterclaims a sum of R46,513, and the retention money as from 20 February 1997.

In answer to the defence and counterclaim, the Plaintiffs aver that the 2nd agreement did not entirely supersede the previous agreement as –

- (a) The unfinished works under the previous agreement remained subject to the said previous agreement and had to be completed in accordance therewith, and
- (b) The defective work made under the previous agreement and referred to in the plaint were not covered by the new agreement which only settled disputes so far arisen.

The Plaintiffs also aver that the sum of R46,513 was payable upon completion of the work, specified in the 2nd agreement as well as works remaining unfinished under the first agreement. They however admit that the Architect certified the practical completion of works on 20 February 1997, but aver that such certificate was only a partial certificate as it related only to uncompleted works under the 1st agreement and did not include the extra works agreed upon in the 2nd agreement. They also aver that the Defendant made no claim for work done under the 2nd agreement prior to making the counterclaim. The Plaintiffs further aver that no payments were made to the Defendant on the 2nd agreement as no payments were due to them and that there are still defective works which were not completed.

The Plaintiffs' claim is based on the report furnished by Ms Cecile Bastille, Quantity Surveyor, exhibited as P4, on an assessment made on site on 29 August 1997. Hence the alleged outstanding works and defective works set out in that report alone should be considered for purposes of the claim before Court. Miss Bastille states therein that although the practical completion was achieved on 20 February 1997 and the defects liability period ended on 20 August 1997, the newly built house is not complete and that there are still outstanding works to done. There are also defective works. She referred to the bills of quantities and the drawings and identified the following outstanding and defective works.

OUTSTANDING WORKS

1. Item 38-H, Rainwater shoes have not yet been installed.
2. Item 58-C&D, paving slab and channel have not been done for surface water drainage. Water is at present soaking under the house and this can cause damage to the foundation.

3. Extractor fan in the toilet of lower ground floor indicated on drawing No 95/011/23 was not done and therefore client have the fan installed by someone else.
4. The cooker hob to main kitchen is missing and therefore client had to install one himself.

DEFECTIVE WORKS

Balustrades

The 'X' design section of the balustrades to the veranda have been constructed of low quality timber and also the timber has also been affected by dry rot.

Guest quarters-lower ground floor

The wall cabinet to the kitchenette was faulty as the extractor fan did not fit into the wall cabinet.

No electrical wiring and connection was done for the extractor fan.

However these have now been rectified by the client.

The entrance is not done according to design as per annexe two.

Bathrooms

Wash hand basin to the entrance toilet has the corner broken Wash hand basin in the ground floor bathroom is broken and has been replaced by the clients, documents attached.

Ironmongery

Door furniture, item 43-k are rusted.

Painting Works

External structural painted wooden surfaces have been affected by mould. Emulsion water based paint has been used on the ceiling as per Penlac Co. Ltd report on document No 12.

Water Supply

Water supply to the kitchen sink is flowing at very low pressure.

Fixtures and Fittings

Timber used for kitchen cabinets and built-wardrobes are to be "Santol" local hardwood, Contractor's letter dated 12th June 1996. However they have been manufactured partly of plywood.

External Work

1. Timber to Japanese type Bridge has been affected by termite, as the bridge has been partly damaged.

2. The polyethylene pipes have been left above ground, as they should have been placed underground.

The First Plaintiff, Mrs Merali testified that consequent to the first agreement, the Defendant handed over possession of the house in 1997, when certain defects were observed. She stated that the aim of the second contract was "to complete all that had not been completed and to correct the defects". On being cross examined she stated that the rock foundation and walls were built by another contractor before work was contracted with the Defendant company. She further stated that when the house was handed over in March 1997, she noticed some termites in four wooden pillars at the main entrance of the house, and also on the wooden floor and a Japanese style bridge.

The Second Plaintiff Mr Merali also stated that the Defendant company was contracted to work on a partly built house. However a second agreement was entered into as certain works, in his opinion were not in accordance with the bill of quantities. He stated that the wood used was different, and that painting had been done in water based paint and not in oil based paint as specified, he also produced several photographs which depicted termite infestation of some of the wooden pillars, the ceiling made of pine wood and the Japanese style bridge. Explaining the reference to "unfinished and extra works" in clause 3 of the 2nd agreement (exhibit P3), he stated that "unfinished work" referred to works still due to be completed in accordance with the 1st agreement, and that works specified in the two annexures to the 2nd agreement were "extra works" not included in the previous agreement. The Second Plaintiff also produced the "certificate of practical completion of the works" issued by the Architects of the project "Berlouis Mondon design studio" on 24 February 1997 as exhibit P34.

As the reference to the contract date therein is 10 November 1995, he claimed that that certificate which certified that "practical completion of works was achieved on 20 February 1997", and that the stipulation that "the defect liability period will therefore end on 20 August 1997" related to works done in respect of the 1st agreement dated 2 November 1995. He further stated that no such practical completion certificate was received in respect of the 2nd agreement.

The Second Plaintiff admitted in cross examination that he supplied some timber from a Timber Dealer called "Island Timber" and also some other timber. As regards the "extra work" of the proposed modification to lower ground floor entrance, which was depicted in annex two of the 2nd agreement, the Second Plaintiff admitted that it was done by the Defendant, but not properly. As regards the item 'fixtures and fittings" in the list of defective works in exhibit P4, he testified that plywood was to be used only in the shelves of the kitchen cabinets and that the rest of the cabinets should have been of "santol" wood. He also testified that polythene pipes to carry surface water had been left above ground level, and that he got it rectified. In general, he corroborated all the defective and outstanding works identified in Ms Bastille's report.

Peter Mcgourt, Quantity Surveyor testifying on behalf of Ms Barker and Barton supported the report exhibited as P5. He stated that he inspected the site on 26 March

1998 on the basis of the defective and outstanding works identified in Ms Bastille's Report. As regards the decorative panel at the entrance to the lower ground floor entrance, he stated that there was a "slight" difference to what was in the drawing, in that whereas the panel had to be fixed close to the frame, it had been fixed slightly off the frame, leaving a gap in between. He opined that it was not something to be considered in relation to the contract, and that the contractor may have had a reason for doing so.

He further testified that the lever handles in most of the external doors had deteriorated due to oxidization. He also stated that he was not sure whether these items were in brass, as contracted or were replicas. He also stated that the Plaintiffs had intended the kitchen cabinets to be manufactured completely in hardwood and not partly of plywood.

Ms Bastille, on whose report the claim is based was unable to distinguish between client supplied items and contractor supplied items. Her report was based on the observations of the works as at 29 August 1997. As regards rainwater shoes, (item 38 H of the B.Q.), the Plaintiffs supplied them as it was an item to be supplied by them. The paving slab and channel (item 58 C and D of the BQ.) had not been constructed. Learned Counsel for the Defendant referred to Clause 3(iv) of the B.Q wherein it is stated that "the contractor is to order materials based upon the drawings and not on the bills of quantities". Ms Bastille was unable to satisfactorily explain the relationship of the BQ to the drawings upon which the contractor was obliged to perform the works. She was unable to explain how she included the item "extractor fan for toilet of the lower ground floor" as an outstanding work in her report, and also the cooker hob, which was a client supplied item, which the Second Plaintiff admitted was lost on site. Although the contractor who was in charge of the site would be liable, yet there is no evidence as to when such loss occurred.

As regards the balustrades, she stated that 50% were affected by termites, and opined that they may have been salvaged timber. As regards brass fittings she stated that the discolouration may be due to the closeness to the sea. However regarding the molding of painted wooden surfaces she stated that the effect of the sea would not have been a contributing factor so soon. As regards the kitchen cabinets she stated that she did not see the specifications as agreed upon by the parties. She also stated that about 50% of the wood used in the Japanese style bridge was affected by ter

Neville Rene, a painter testified that he repainted the whole ceiling, as it had been affected by fungus due to bad quality paint being used before. He used an oil based paint which was resistant to fungus. The painting took about six months as the paint mixture went out of stock. He was paid between R40,000 to R45,000 for the job. He however stated that he would have done it for even R15,000 as he was unemployed at that time he took samples of the previous paint used on the ceiling and gave them to the Plaintiffs.

Angelin Labiche, a maintenance contractor testified that he took samples of paint from the walls of the kitchen, the living room and the bedrooms. He produced the samples

together with a sample of oil based paint used subsequently. Dissolving them in separate glasses of water he demonstrated that the three samples he took were water based paints as they dissolved in water, while the oil based paint sample did not. On being cross examined he stated that the three samples of water based paints were taken on 9 February 2000.

Mr Hubert Alton, Quantity Surveyor testifying on behalf of the Defendant stated that he prepared the bills of quantities for the project. He testified that the rainwater shoes, gutters and down pipes were all client supplied items and hence the Contractor had to be paid only the labour costs. As regards the pre-cast concrete slab, he stated that it was just a "splash back for rain water" and that it had been done at the time of his visit. Regarding the form "channel" in the same item, he said that although it was in the BQ, it was not an item done on site and hence was omitted in the account, and that the contractor was not paid for it.

Testifying further, Mr Alton stated that the extractor fan and the cooker hob were not in the BQ. As regards the rainwater gutters, he stated that the contractor had not been paid. Further, in his testimony, he proceeded to make his comments on the other items in the report, and also on the pricing aspects therein.

Mr Alton further testified that a "snag" list is prepared after all works have been completed and before handing over. Those snags have to be remedied within 6 months thereafter. A second snag list is prepared at the end of 6 months. He further stated that if an item is not in the drawings, it would not be in the contract, and hence that item would either not have been done by the contractor or he would not have been paid for it. Explaining the term "outstanding works".

He stated thus –

It means, it is now sending work that the bill, the contract said it had to be done and it had not been done and he has paid for it, that is an outstanding work. But if he has not been paid, and the contract did not show that he is getting paid for it, it is not an "outstanding work" and you cannot expect him to ask him to pay for it now, to deduct and say, oh you have not done this, so, I have to ask you to pay me this money.

Mr Pramji, Director of the Defendant company testified that consequent to completing all unfinished and extra works, the Plaintiffs did not pay R46,513 as agreed in clause 4 of the second agreement, nor the 50% retention fee upon the issuing of the practical completion certificate. He stated that that certificate covered the outstanding work under the first contract and the extra works in the second contract. After that certificate was issued, a snag list was prepared by the Architect, and the works included therein were also completed. He testified that in the performance of the contract, the company experienced difficulties due to the clients making several changes and also not supplying items they were obliged to supply. He stated that the rainwater shoes were not supplied, that the paving slab and channel were not items in the drawings and that

the cooker hob was not a building material. As regards the built in cupboards, he stated that at a meeting with the clients and the Quantity Surveyor, the rates were reduced as plywood was to be used in some parts. He further said that the wall cabinets and the electrical connections were all done according to the drawings. As regards the design at the entrance, he stated that it was done according to the drawings, but the client wanted it repositioned. He further stated that the corner of the hand wash basin was broken when received, and that the door furniture (locks and handles) were imported from South Africa (exhibit D3) according to specifications. He denied that water based paint was used in the ceiling, and also denied liability for the timber used in the Japanese type bridge being affected by termites. He maintained that the clients supplied several items of timber in the course of construction.

Mr Pramjee further stated that in the construction business, a practical completion certificate is issued on completion of all works contracted, but still there could be a "snag list" to ensure that defects and other minor items would be attended to subsequently. In the present case, there are three snag lists produced as exhibits. Exhibit D6 dated 25 February 1997 by the Architect, exhibit D7 dated 27 February 1997 by the Second Plaintiff and exhibit P40 dated 11 March 1997. By letter dated 9 April 1997, Mr Pardiwalla, in his capacity as the Plaintiffs' lawyer at that time, listed 8 items as "not done", another 8 items as "uncompleted" and 4 items as defective.

Before the respective claims are considered I shall deal with the dispute as regards the two agreements and the practical completion "certificate issued by the Project Officer "Berlouis Mondon Design Studio". (exhibit P34). It is clear from the Agreement dated 21 January 1997 (exhibit P3) that the parties entered into that agreement to "resolve their dispute as regards the suspension of works that were agreed to be performed under the agreement dated 2 November 1995 (exhibit P2). The Defendant was paid R178,547.55 "for works already completed," excluding the retention fee of 5%. Hence in the 2nd agreement, the Defendant agreed to complete "unfinished and extra works described in annex one and two" of that agreement. Both "unfinished" and "extra works" were to begin on 15 January 1997 and satisfactorily completed on 15 February 1997. The Project Officer certified that practical completion of works was achieved on 20 February 1997. There are two disputes here. The Plaintiffs claim that that completion certificate related only to works under the 1st agreement as the Project Officer has specified the contract date as 10 November 1995. The Defendant submits that the 2nd agreement was signed on 21 January 1997 and hence the commencement date for both "unfinished" and "extra works" ought to be read as "21 January 1997" instead of 15th January 1997 and also that the completion date should similarly be the 21 February 1997. They therefore contend that all works were completed on 20 February 1997 as certified.

Mr Jesselin Mondon, the Architect and Project Officer testified that he was aware of both agreements and that he issued the practical completion certificate upon being satisfied that all works due to be performed on both contracts had been completed. He stated that all works, except those where materials were to be supplied by the client, were attended to by the Contractor. In terms of Article 1135 of the Civil Code:

agreements shall be binding not only in respect of what is expressed therein but also in respect of all the consequences which fairness, practice or the law imply into the obligation in accordance with its nature.

Although legally, obligations under a contract begin to flow only from the date of the agreement, yet as no amendment was made to Clause 3 of that agreement, it should be taken that the parties agreed that the work would be completed by 15 February 1997. The Contractor, in his correspondence with the Plaintiffs expressed their desire to complete all works by 15 February 1997 and not 21 February 1997. Clause 3 provided that the Contractor shall pay the employer R2000 per day "for the period during which the works shall so remain incomplete". The same clause provided that "the completion date shall be the date certified by the Architect in the practical completion certificate". Hence the delay was therefore 6 days.

Article 1229 of the Civil Code provides that –

A penal clause is the compensation for the damage which the creditor sustains as a result of the failure to perform the principal obligation.

He shall not demand both compensation for the principal obligation and the penalty unless the penalty has been stipulated for a simple delay in the performance.

A penal clause according to which the penalty is manifestly excessive may be reduced by the Court as provided by Article 1152 of this Code.

Mr Brian Orr, the Electrical Contractor testified that electrical fittings were not supplied by the employer and that hence the P.U.C. was unable to test the electrical system. As regards the tiles, the Defendant by letter dated 7 February 1997 informed the Second Plaintiff that "missing white tiles" had not been supplied to them. By letter dated 12 February 1997, the Defendants acknowledged receipt of those tiles at their yard at Providence, and stated that there was insufficient time to send them to Praslin.

By letter dated 11 February 1997 (exhibit P35c) the Defendants informed the Second Plaintiff:

We regret to mention that the missing materials needed to finish the works are still outstanding inspite of several reminders we have sent to you. As per the annexed agreement you were to supply to us all materials on time for us to complete the works by 15 February 1997. As the following materials have not been supplied to us up to this time, we cannot finish the works within the specified time.

1. Rain water gutters, downpipes and fittings.
2. 150 x 150 white wall tiles for lower ground floor toilet.

3. 150 x 150 wall tiles for ground floor kitchen and lower ground floor kitchen.
4. Light fittings
5. Toilet paper holders
6. Granite tops for kitchen

Because you have failed to supply the materials we cannot finish works associated with these materials. Apart from that we have finished all the works as agreed. We are therefore not liable if some of the works which are associated with the missing materials are not finished.

Yours faithfully
LAXAMBHAI & CO (SEY) (PTY) LTD

The 2nd agreement dated 21 January 1997 in the circumstances of this case was a supplementary contract for extra works and an agreement by the Defendant to discharge their obligations under the 1st agreement to complete unfinished work within a stipulated period. The penalty for any delay would become payable "subject to the timely supply of electrical fittings and tiles due from the employer". As is evidenced by the letter dated 11 February 1997 (exhibit P35 c) and the evidence of Mr Brian Orr, the Plaintiffs did not supply those items in time. Hence in terms of Article 1229 read with Article 1152, I would reduce the sum agreed to R500 per day and limit the period during which the works agreed upon remained incomplete up to the date certified by the Architect in the practical completion date as envisaged in Clause 3. Hence I award a sum of R.3000 under the penalty Clause.

Although the laws of Seychelles on building contracts are different from the laws of England, yet before considering the claims for incomplete and defective works, it is of interest to consider the comments made by Lord Diplock on Clauses of the RIBA building contracts in the case of *P & M Kaye Ltd v Hosier & Dickinson Ltd* [1972] 1 AER 121 At 138. He states that-

The primary obligation (of the contractor is) to carry out and complete the specified works in every respect of the reasonable satisfaction of the Architect (cl 1 (I)). The Contractor's obligation continues through two distinct consecutive periods. The first period, which I will call 'the construction period', starts when he is given possession of the site under cl 21 (I). It continues until he has completed the works to the satisfaction of the architect so far as the absence of any patent defects in materials or workmanship are concerned. It ends with the issue by the architect of a certificate of practical completion under cl 12 (I). This is the date of completion for the purpose of determining whether or not the contractor is in breach of his obligation to complete the works by the date so designated in the contract. The contractor then surrenders possession of the works to the employer, and the defects liability period starts. Where, as in the instant case the employer takes possession of a part of the works before

practical completion of the whole, the construction period for that part ends and the defects liability period for it begins.

The second period is the defects liability period. Its minimum duration is specified in the contract. If latent defects are discovered during this minimum period it is extended until the contractor has made them good and the architect has so certified. During this second period the contractor's obligation is to make to the satisfaction of the architect any latent defects that may become apparent. After the end of this second period the contractor is not liable to remedy any further defects; but the contract sum may be adjusted by reason of any defects which would not have been apparent on reasonable inspection or examination before the issue of the final certificate.

During the construction period it may, and generally will, occur that from time to time some part of the works done by the contractor does not initially conform with the terms of the contract either because it is not in accordance with the contract either because it is not in accordance with the contract drawings or the contract bills or because the quality of the workmanship or materials is below the standard required by cl 6(I). The contract places on the contractor the obligation to comply with any instructions of the architect to remedy any temporary discomformity with the requirements of the contract. If it is remedied no loss is sustained by the employer unless the time taken to remedy it results in practical completion being delayed beyond the date of completion designated in the contract.

(c) In this event the only loss caused is that the employer is kept out of the use of his building beyond the date on which it was agreed that it should be ready for use. For such delay liquidated damages at an agreed rate are payable under cl 22 of the contract."

According to the evidence, and the letter dated 27 March 1997 (in the bundle of correspondence marked P35), possession of the house was delivered to the Plaintiffs on 18 March 1997. Hence the "construction period" ended on that day. The snag lists are dated 25 February 1997 (D6) 27 February 1997 (D7) and 11 March 1997 (P40) respectively. The defects liability period stipulated in the practical completion certificate was 20 August 1997.

Clause 14(1) of the original contract provides that-

- (1) When in the opinion of the Project Officer the works are practically completed, he shall forthwith issue a certificate to that effect and practical completion of the works shall be deemed for all the purposes of this contract to have taken place on the day named in such certificate.

(3)

- (4) Notwithstanding sub-clause (2) of this condition, the Project Officer may whenever he considered it necessary to do so, issue instructions requiring any defect, shrinkage, or other fault which shall appear within the defect liability period named in the appendix to these conditions and which is due to materials or workmanship not in accordance with this contract to be made good, and the Contractor shall within a reasonable time after receipt of such instructions comply with the same entirely at his own cost provided that no such instructions shall be issued after delivery of a schedule of defects or after 14 days from the expiration of the said defects liability period".

This is a general Clause which binds both agreements. Hence works included in the "snag lists" could be performed within a reasonable time. Defective and outstanding works were identified by Ms Bastille for purposes of her report on 29th August 1997, nine days after the defect liability period specified in the practical completion certificate had ended. However as the correspondence discloses that the Defendant was intimated about some of those works and also as "snag lists" were served on them, I would proceed to consider the items set out in Ms Bastille's Report for purposes of determining the liability in the case.

Outstanding works

1. *Rainwater shoes*- There is overwhelming evidence that this was a client supplied item and that it was not provided by him despite several reminders. Under that item, the Defendant had only to be paid labour charges. Hence the item cost of R.480 + 25% thereon cannot be claimed from the Defendant.
2. *Pre-Cast Concrete Paving Slabs*
Mr McGourt in his report observed that the area adjacent to the entrance of the lower guest quarters had become waterlogged and hence recommended that concrete channels and paving slabs be installed in accordance with the contract documents. Mr Alton however testified that what was necessary was a "splash back for rainwater," which was done by the Contractor and that paving slabs were a client supplied item in the B.Q for which the Contractor would only receive labour costs. He further stated that the Contractor was not paid for it. The Second Plaintiff on being cross examined denied any knowledge as to where the paving slabs were supposed to be and as to whether they had already been fixed. In any event this item was not in the drawings and hence in terms of Clause 3(iv) of the B.Q, the Contractor was to order materials based on the drawings and not on the B.Q. Accordingly this item cannot be considered as an outstanding work.

3. **Form Channel**

The Second Plaintiff stated that he was not aware whether this item was in the Architects drawings. Mr Alton confirmed that although it was an item in the B.Q it was not done on site and hence the Contractor was not paid for it. In these circumstances, no claim can be made from the Contractor.

4. **Installation of extractor fan in the lower ground floor kitchen**

Mr Alton testified that it was not an item in the B.Q and that he did not know how that arose. Mr Pramji however stated that that item was in the Architect's drawings, but was later modified. As it was in the drawings, the Contractor would be liable to the expenses incurred by the employer to have it installed. Hence I would accept the evidence of Mr Alton that the sum of R.2800 claimed is reasonable.

5. **Missing Cooker Hob**

Admittedly, it was a client supplied item and that it was stolen on site. The Contractor would be liable if that loss occurred before the premises were handed over to the client. The premises were handed over on 18th March 1997. This item was reported to be missing in the snag list dated 11th March 1997 (P4) which has been signed by the Engineer of the Defendant company. Again on the basis of Mr Alton's rating, I award a sum of R. 1500.

6. **Rainwater Gutters**

There is documentary evidence that the rainwater gutters were purchased by the Plaintiffs from Bodco Ltd for R.4710.25 (*Receipt attached to Ms Bastille's Report*) this item is therefore allowed in full.

Hence the total amount payable by the Defendant under "outstanding works" would be R9010.25.

Defective works

1. **Replace all affected and low quality timber to veranda balustrades.**

Ms Bastille testified that about 50% of the balustrades were affected by termites. Michaud Pest Services Ltd, in their Report dated 26th May 1998 (P6) stated that "the main places which have been badly infested and affected with termite were the wooden bridge in front of the house and the floor and ceiling of the entrance to the kitchen. They identified A 20 x 20 beam and T & G ceiling and stated that the wood did not have any connection route from any other area. They further stated that it was generally difficult to determine the source of the termites.

They also stated that 4 vertical pillars supporting the infected beam were drilled, but no termite infesting was found. So also other beams

leading to the infested beam from inside the house and all interconnected structural timber were also examined, but no infestation was found. Hence it was concluded that the infested beam had "a route of infection within itself and most plausibly the infection was spread to the T & G ceiling which is a soft fine wood, while the infested beam was a hardwood timber which was badly affected.

The Second Plaintiff admitted in cross-examination that he supplied some timber from the Island Timber Co and also some other timber. However in his re-examination, he stated that he supplied only a beam 175 mm x 450 mm used for an internal beam. That was of Mahogany wood and it was free of termites up to date. Mr Pramji however testified that the Plaintiffs supplied the pine wood for the ceiling, and some other timber which he had in stock. Questioned as to the possible cause of termite infesting, he stated that it could have originated from the foundation which was built by the previous contractor. He also stated that ^{all} wood imported to Seychelles are treated and hence there was no possibility of there being termites at the time of supply.

On a consideration of the above evidence, there is no proof that the Contractor used low quality timber, or untreated timber. Although it is evident from the photographs exhibited that there was termite infesting, yet in circumstances where both the Contractor and the client, supplied wood and also the possibility that infestation may have originated from an untreated foundation for which the Defendant company was not responsible, on a balance of probabilities this Court cannot award damages against the Defendant under this item.

2. **Rectification of wall cabinet and installation of extractor fan to guest quarters on lower ground floor.**

The Defendant claimed that the wall cabinet was constructed according to the drawings. But the extractor fan supplied by the client necessitated a modification. As Ms. Bastille testified, the Contractor ought to have built the cabinet to fit the fan. Hence the Contractor would be liable for this item as a defective work. I would award a sum of R2000 on the basis of Mr Alton's rating.

3. **Replacing broken wash hand basins in the entrance toilet, and the ground floor bathroom (items 3 and 4)**

Mr Pramji testified that one basin was found to be broken when unpacked. The basins were supplied by the client. By letter dated 30th January 1997 (P35) (k), the Defendant informed the Plaintiffs about the damage to one basin and stated "the hand wash basin was supplied to us by you a very long time ago. It could have been broken during one of the various handling and rehandling procedures. Please organize for its replacement and no cost." The Defendant, in the same

letter discounted the possibility of fixing an "ordinary basin" temporarily due to the position of the outlet as constructed. Hence it is evident that the broken basin was not fitted. According to the supporting documents in Ms Bastille's report, only one wash hand basin was imported by Air Freight on 9th March 1997 at a cost of R4,717.25. There is no evidence of two basins being found. to be damaged. There is also no evidence as to who was responsible for the damage to the basin that was replaced. In the circumstances, the Defendant cannot be charged for items 3 and 4 of the defective work.

4. Replace pressure valve with a non return valve from reserve tank to kitchen sink supply.

Mr Pramji testified that water pressure was beyond the control of the Contractor. He stated that a non return valve does not control pressure, but only controls water flowing from the tank to the P.U.C. line. Hence he denied that it could be categorised as a defect. The snag list (P40) merely states "water pressure to be checked." Since water pressure depends on the P.U.C supply, the fixing of a non return valve to prevent water from flowing from the reserve tank to the P.U.C. line cannot ordinary be categorised as a defect attributable to the Contractor. However the Contractor should have anticipated this defect and made provision. Hence on the basis of Mr Alton's pricing I award a sum of R.600 for this item.

5. Replace Door Furniture.

Mr Alton testified that the term "door furniture" meant only the door handles. He claimed that they were imported from South Africa according to specifications. He produced a letter dated 26th March 1996 (in the bundle of correspondence marked (D3) whereby the order was made. He stated that the items received were of brass and that oxidization and colouring would be attributable to the effect of the sea close by. This item is specified in the B.Q. as item 43 k as follows

—

"Brass door furniture as B1004 comprising of lever furniture with Euro cylinder (as handles 12 nos. 900

Furniture P.O. Bar 1389, Cape Town 10,800.
8000 S.Africa)

The Contractor had priced this item at R.900 and hence 12 nos would be R10,800.

Mr Alton testified that he was not aware whether this item was replaced in full. Assuming they were replaced, he rated the item at R,300, per lever, so that 12 nos would be R3,600. It was submitted by the Plaintiff

that this item was not purchased from the supplier nominated in the B.Q, for purchasing door furniture but from the supplier who was nominated to supply only windows and doors. The Defendant has not explained why he purchased both items from the same supplier. Mr McGourt in his report confirmed that only the lever handles were affected and that to remedy the defect, the lacquer coating could be removed with a paint thinner and the fittings polished, and new lacquer applied. There is no evidence on record as to what was actually done as remedial work on this item. Ms. Bastille had identified it as a defective work and given the rating on the B.Q, adding a further unexplained amount. Hence in the absence of evidence, no award is made.

6. Repainting External Structural Wooden Surfaces and Ceiling

Ms Bastille's report on this item is based on the certificate issued by Penlac Ltd, confirming that according to the sample produced the paint used was emulsion paint with a water base. This was also confirmed by Barker and Baton in their report. That sample was taken from the ceiling. One Neville Rene testified that he repainted the whole ceiling with Acrylic paint and was paid R.40,000 - R.45,000 for the job. He stated that at that time he was unemployed, and hence he would have done it for even R.15,000. He also stated that the work took more than six months. In general he was not sure as to how much he was paid.

Mr Alton, in his testimony rated the re-painting on the ceiling at R.38,000 approximately.

This was on the basis that the total ceiling area was 540 sq meters. He priced the cleaning of the existing paint at R.20 per sq meter and repainting three coats of paint at R50 per sq meter.

Angelin Labiche, produced samples of scrapings taken from the ceiling after the Court hearing on 9th February 2000. By that time Neville Rene had already painted the entire ceiling with Acrylic paint. Be that as it may, whatever may have been the reason for the development of mould on the ceiling in such a short time, the painting work could be considered as defective. There is no evidence as to painting any other area apart from the ceiling. Accordingly I prefer to accept the rating of Mr Alton and award R.38,000 for this item.

7. Rectify quality of kitchen cabinet and built-in wardrobes from plywood to santol timber

The basic dispute under this item is whether the cabinet and wardrobes were to be built entirely in "santol" timber. According to the

Baker and Barton Report they had been constructed in plywood and faced in "santol". Reliance was placed heavily on a letter dated 12th June 1996 (in bundle of correspondence in P4). In that letter, the Contractor agreed to construct the wardrobes and kitchen cabinet in santol timber for a sum R.75,000. Mr Alton testified that he went through the quotation (exhibit D1) and reduced the amount. Thereafter the Second Plaintiff confirmed that plywood was to be used at the back of the cupboards and some shelves. He also said that the price agreed upon reflected such a construction.

However, the quotation (exhibit D1) is dated 8th May 1996. The letter dated 12th June 1996 refers to the discussions the parties had on 10th June 1996 regarding the quotation. Hence the Court accepts that his letter contained an unqualified acceptance to construct the wardrobes and kitchen cabinets in santol timber. According to the evidence, only the panels were constructed in santol. This is definitely a defective work. In the absence of a reliable pricing for the remedial work, taking into consideration the total pricing of R.75,000, I find that R. 16,000 claimed is reasonable.

8. **Replace damaged Japanese style bridge**

This item is described as item 57 c in the B.Q as follows-

"Timber Japans bridge size 1 metre high x 2.00 metres long x 1.00 metre wide constructed of treated wrot hardwood, comprising of arched based and supports, timber posts and lattice balustrades; allow for three coats of "xyladecer" stain on timber surface."

This item was priced at R.11,500 in the B.Q. Mr Alton testified that R.5500 quoted for replacing the whole bridge was reasonable. But according to Ms Bastille about 50% of the bridge was affected by termites. She was however unable to quantify the damage with reasonable accuracy. Mr Mondon, the Architect however stated that only about 1/3 of the main post was affected by termites. He further stated that to get the curved nature of the bridge, laminated timber (layers of timber glued together) had to be used. Mr Alton priced one post at R.200. In the absence of any other evidence of the damage, I award a sum of R300, which includes 25% for labour to remove, and 25% for replacing.

9. **Placing Polythene Pipes underground**

This item was not contested. Hence I award the sum of R. 100 claimed.

10. **Rectify entrance design as annex two**

Mr Pramjee testified that the design was constructed according to the

drawings. However according to the Barker and Barton report this had been constructed to a different detail than that indicated on the drawings, and consequently it had been fixed slightly off the main frame, leaving a gap between the panel and the underside of the timber rafters. Mr Mondon also admitted that the decorative panel, as constructed, was obstructed by a beam which was not envisaged in the drawing. Since this is a defective work, and as there is no other evidence as to the pricing I award the sum of R.6500 claimed.

Accordingly the total amount awarded to the Plaintiffs against the Defendant company is R75,510.25.

As regards the counterclaim which is based on clauses 4 and 5 of the second agreement dated 21 January 1997, the Plaintiffs aver that the practical completion certificate issued by the Architect related only to the unfinished work under the 1st agreement dated 2 November 1995. However in view of my finding that this certificate related to practical completion of both unfinished and extra works and also as the evidence revealed that the outstanding and defective works listed in the report of Ms Bastille have now been completed, there is no justification for the Plaintiffs to retain the sum of R46,513 and the 5% retention fee on the 1st agreement.

Accordingly the Defendants will be entitled to a sum of R46,513 plus R2325.65 being the 5% retention for extra work totalling R48,838.65 together with interest thereon from 20 February 1997 until payment in full. In addition, they will be entitled to 5% retention fee under the 1st agreement as computed also from 20 February 1997 with interest thereon, allowing for the unfinished work which were included in the 2nd agreement.

Judgment entered accordingly. As both parties have succeeded in their respective claims, no order is made as to costs.

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