THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

HIGH COURT CIVIL SUIT NO. 209 OF 2008

PIONEER CONSTRUCTION LTD::::::::::::::::::::::::::::::::::PLAINTIFF

VERSUS

BRITISH AMERICAN TOBBACCO (U) LTD::::::::::::::::::DEFENDANT

AND

INFRASTRUCTURE PROJECTS LTD::::::::::::::::::::::::THIRD PARTY

BEFORE HON.LADY JUSTICE HELLEN OBURA

JUDGMENT

The plaintiff's claim against the defendant in this matter is for the recovery of an aggregate liquidated sum of Shs. 560,394,373/= being allegedly the outstanding value of work done together with accrued interests thereon, plus costs of the suit. The plaintiff's claim arose allegedly from certified payments for work done but the defendant defaulted in paying.

In its written statement of defence (WSD), the defendant denied the claim and put the plaintiff to strict proof thereof. It is contended that the plaintiff breached the contract in some material aspects by failure to complete the works within the agreed period and the work was substandard or of poor quality. Further, that the plaintiff handed over the said substandard work at the Arua site on 28th February 2008 about 80 weeks after the agreed date of practical completion which was16 June 2006. The defendant therefore counterclaimed from the plaintiff the sums of Shs. 320,000,000/= since according to it, the plaintiff breached the term of the contract which provided that if it fails to complete the works by the date of practical completion stated in the appendix to the contract, then the defendant shall pay or allow the defendant a sum calculated at a rate of 2,000,000/= per calendar week or part thereof as liquidated damages for the period for which the works shall

remain incomplete and the defendant may deduct such sum from any monies due or to become due to the plaintiff.

The defendant also contended that should it be found liable then the same should be indemnified by the 3rd party as it has been negligent in doing its work.

The 3rd party however contended that the defendant is not entitled to be indemnified by it against any claims or at all because as the supervising consultant, the 3rd party executed its duty diligently and rightly issued the two practical completion certificates in respect of the Hoima and Arua works.

The agreed facts are that in or about March 2006 the defendant engaged the plaintiff to carry out building and construction works on its central purchasing facilities in the districts of Arua and Hoima. The parties agreed that the plaintiff would take possession of the sites on 21st March 2006 and complete work on 16th June 2006. The defendant employed M/S Infrastructure Projects Limited (the 3rd party) as project architect and quantity surveyor. The written terms governing the employer-contractor relationship between the plaintiff and the defendant are embodied in the building contracts executed by them on 6th September 2006 (Exhibits P1 (i) & P1 (ii)).

By the said contract the defendant was entitled to liquidated damages calculated at the rate Shs. 2,000,000/= per calendar week for the period during which the works would remain incomplete and would deduct such sum from any monies due or to become due to the plaintiff under the contract. The 3rd party certified payments in favour of the plaintiff and issued certificates of practical completion in respect of the works as follows: for the Hoima project on 18th August 2006; and for the Arua project on 22nd August 2006. There are unpaid architect's certificates in favour of the plaintiff issued by the 3rd party. The Project Managers by letter dated 19th May 2007 after a meeting with the plaintiff and the defendant forwarded a list of incomplete works and required the plaintiff to make good.

The following issues were agreed upon;

1. Whether there was breach of contract, if so by whom?

2. Whether the defendant is indebted to the plaintiff in the sums claimed.

3. Whether the defendant is entitled to the sums claimed in the counter- claim.

4. Whether the defendant is entitled to indemnity/contribution from the third party.

5. Remedies available, if any.

At the closure of hearing of evidence written submissions were filed by the respective counsel for the parties and this judgment is based on them.

Issue 1: Whether there was breach and if so by whom.

It was submitted for the plaintiff on this issue that the contract between the parties were breached by the defendant when it failed to pay the sums certified as due and owing in the certificates presented, especially Exhibits P8, P10, P12, P14 and P16. It was therefore submitted that the sum total of the said invoices is Shs.439,343,150/= plus interest for late payments which was calculated at Shs.121,051,223/=. He submitted that the earliest of the series of the breaches in relation to the contracts occurred on 17th November 2006 which was the due date for payment.

Counsel for the plaintiff submitted that the evidence of PW1 was unchallenged in that he was not cross examined. He submitted that where a party refuses or neglects to cross examine a witness, he or she is taken to have accepted the witness's account. Counsel referred court to a number of authorities on this principle to wit: ***B.Malik's Practical Hints on Cross Examination 5th Edition at page 72;Phipson on Evidence, 10th Edition at paragraph 1542;Aiyar and Aiyar's: The Principles and Precedents of the art of Cross Examination 10th Edition at page 1747; Brown v Dunn(1893) 6 R.(H.L), cited in Stanley Schiff's Evidence in the Litigation Process at Pages 213 to 216, Per Lord Harschell at page 70*** and concluded that court should find in favour of the plaintiff on this issue.

Conversely, it was submitted by counsel for the defendant that the rule that failure to cross examine a witness is deemed an admission of what the witness stated does not apply where there has been clear prior notice of an intention to impeach the credibility of the relevant testimony. Counsel sought to rely on an article by ***John Bellhouse and Poupak Anjomshoa of White and Case LLP, London***; entitled ***'The Implications of a Failure to Cross-Examine in International Arbitration,***

June 2008'and also among others, on the authority of ***Uganda Breweries Ltd v Uganda Railways Corporation SCCA 6 OF 2001*** where Oder JSC (RIP) observed that failure by the appellant to cross-examine a witness on the matter does not necessarily mean that it accepted the figures.

On issue one, counsel for the defendant submitted that court should hold the plaintiff in breach of the contract because it failed to complete the works within the time agreed in the contract and also provided very substandard or poor quality work.

It was counsel's submission that PW1 in his evidence at paragraph 10 admitted that they never completed the work. Further, that DW1 and DW2 testified that the work was poorly executed with several defects that the plaintiff was supposed to make good as was confirmed by TPW in cross examination as per Exhibit TP1(ii) and (iii), but the plaintiff did not. DW2 testified that they made several complaints to the plaintiff but he never made good the defects and he took several pictures of the same. Counsel for the defendant submitted that according to the evidence of DW2, it is clear that even if the certificate of practical completion was issued, there were significant defects that needed to be addressed but was not and in 2008 when the defendant realised that the snags were not going to be rectified by the plaintiff, it was forced to hire Roko Construction to complete the work.

Counsel further submitted that the plaintiff's argument that the certificate of practical completion, having been issued signified that the work was completed should not be accepted by court because as per clause 30(8) of the contracts (Exhibits P1 (i) and P1 (ii)) the certificate is not in itself a conclusive evidence that the work was done satisfactorily except the final certificate which was never issued by the 3rd party.

Moreover, according to counsel the 3rd party did not act fairly, independently and impartially in issuing the certificates of practical completion as is required of him since TPW stated in cross examination that he never inspected the premises but was merely told by the plaintiff then he issued the certificates based on the said information. Counsel referred to the authority of ***Beaufort Developments Ltd v Gilbert Ashni Ltd and Another [1998] All ER 778 at 786*** and ***Sutcliffe v Thackrah [1974] AC 727 at 759***.

Counsel for the 3rd party associated himself with the submissions of the plaintiff's counsel on this issue.

Before I determine the 1st issue, I will first of all consider the arguments of both counsel as regards the choice of counsel for the defendant not to cross examine PW1. I have carefully read all the authorities relied upon by both counsel and it is my view that failure to cross examine PW1 does not in any way prevent this court from evaluating the evidence on record and coming to a just and fair decision. In any event, none of the authorities relied upon by the plaintiff's counsel suggest that court is bound to accept the evidence of a witness that was never subjected to cross examination as gospel truth. The observation by Oder JSC (RIP) in ***Uganda Breweries Ltd v Uganda Railways Corporation SCCA 6 OF 2001*** is also very instructive. I will now proceed to evaluate the evidence on record.

I have reviewed both the oral and documentary evidence on the 1st issue as well as considered the submissions of counsel on the same and the authorities relied upon. I have also studied the photographs of the alleged shoddy works by the plaintiff company.

I agree with the definition of breach stated by counsel for the defendant in his submission when he relied on the authority of ***Ronald Kasibante v Shell Uganda Limited HCCS No.542 of 2006 [2008] ULR 690;*** in that case, court referred to the definition of breach in **the Oxford Law dictionary 5th edition** and stated thus; *"breach of contract is breaking of the obligation which a contract imposes which confers a right for action for damages on the injured party."*

Each of the parties is accusing the other of breaching the contract. The plaintiff alleges breach in terms of non payment of the outstanding certificates of payment while the defendant alleges breach in terms of failure to comply with the set completion time and providing substandard or poor quality work. I prefer to deal with the alleged breach of the plaintiff before I delve into the issue of the alleged breach of the defendant by non payments.

It was agreed by the parties under clause 15 (1) of Exhibits P1 (i) and P1 (ii) that:-

> ***"When in the opinion of the Architect 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 purposes of this contract to have taken place on the day named in such certificate."

It is an agreed fact based on Exhibits P1 and P2 that the plaintiff took possession of the sites on 21st March 2006 and was to complete construction by 16 June 2006. It is also an agreed fact that the certificate of practical completion for the Hoima project was issued on 18th August 2006 and the one for Arua project was issued on 22nd August 2006. In effect, there was a delay of about two months. No evidence was led to show that the defendant ever complained about that delay or even sought to invoke clause 22 of the contract which gave it instant remedy of claiming liquidated damages if the plaintiff failed to complete the works by the date for practical completion. All that the defendant needed to do was have the Architect (3rd party) certify in writing that in his opinion work ought reasonably to have been completed then the plaintiff would pay or allow to the defendant a sum at the rate stated in the appendix. The defendant chose not to invoke that provision and took possession of the premises and occupied it after the certificate of practical completion was issued. It only complained about the snags/defects that the plaintiff needed to rectify.

Can this court now overlook the above conduct of the defendant and hold that the contract was breached by the plaintiff when it failed to complete the work as agreed. I would say no. It is the view of this court that the plaintiff waived its right to complain about delay in completing the work.

Black's Law Dictionary 8th Ed at page 1611 defines waiver as*; "the voluntary relinquishment or abandonment express or implied of a legal; right or advantage"*.

It states further that ; *"an implied waiver may arise where a person has pursued a course of conduct as to evidence an intention to waive a right or where his conduct was inconsistent with any other intention than to waive it"*.

In **Agri-Industrial Management Agency Ltd v. Kayonza Growers Tea Factory Ltd & Anor HCCS NO. 819 of 2004**; Kiryabwire, J while considering the issue of waiver stated that;

> ***""'waiver' in contract is most commonly used to describe the process whereby one party unequivocally, but without consideration grants a concession or forbearance to the other party by not insisting upon the precise mode of performance provided for in the contract, whether before or after any breach of a term waived."***

The effect of waiver is that a party cannot later seek a remedy for breach that was waived. **Kiryabwire, J** stated in **Three Way Shipping Services (Group) Ltd v China Chongaing International Construction Corporation HCCS 538 of 2005** that;

> ***"What is waived therefore is the right to rely on the term waived for purposes of enforcing his remedy for the breach made."***

To my mind, the doctrine of estoppel by election which is defined by **Black's Law Dictionary, 8th Edition at page 590** as; "*the intentional exercise of a choice between inconsistent alternatives that bars the person making the choice from the benefits of the one not selected*" would apply.

The defendant having waived its right to insist that the works be completed within the agreed period is now estopped from raising the issue at this stage. In the premises, I find that there was no breach of contract by the plaitiff in so far as completion time is concerned.

Turning to the issue of breach as relates to the standard or quality of work, I have considered the principles that govern building contracts generally but more specifically where there is provision for practical completion. To that end, it is stated in ***Hudson's Building and Engineering Contracts 11th Edition by I.N. Duncan Wallace Vol. 1 Sweet & Maxwell at page 474*** that:

> ***"In addition to this principle express or implied obligation to complete, formal English-style contracts may make express reference to "substantial completion" or "practical completion" These expressions are rarely precisely defined, but are often used in formal contracts to denote the start of maintenance or "defects liability period" and to secure the release to the contractor of the 1st portion of any "retainage" (United States) or "retention moneys"***

(United Kingdom). In general what is contemplated by these expressions is a state of apparent completion free of known defects which will enable the owner to enter into occupation and make use of the project, with the result that they will usually bring any possible liability of the contractor for liquidated damages for delay to an end. The scheme of of this type of contract thus contemplates the commencement of a period when the owner enters into occupation but at the end of which any known omissions or defects will be made good by the contractor."

It is further stated at page 492 that:-

"....Since the maintenance provisions contemplate that there may be defects needing to be put right during the maintenance period, and the liquidated damages provisions contemplate that the owner's damage due to delay in completion has come to an end, it seems clear that completion for purposes of this instalment means a sufficient degree of completion to permit occupation and use of the work by the owner and the departure of the contractor from the site, but not a complete and perfect discharge of every last contractual liability of the contractor with regard to quality or finish of the work.....So, too, it has been said (the holding of ***Viscount Dilhorne in Westminister Corp. v. Jarvis [1970] 1 W.L.R. 637)***:

'It follows that a practical completion certificate can be issued when, owing to latent defects, the works do not fulfil the contract requirements, and that under the contracts works can be completed despite the presence of such defects. Completion under the contract is not postponed until defects which became apparent only after the work had been finished have been remedied.'"

The authors then concluded thus:

"*These definitions are of importance in showing that the subsequent discovery of defects, however serious, will not affect practical completion and its express purposes under most contracts of bringing the liquidated damages liability to an end and starting the*

maintenance period running. In many building contracts, therefore, it is this practical or substantial completion which is in fact that contemplated by the express or implied obligation to carry out and complete the work. There is usually no further physical obligation of the contractor, save only the conditional and usually rigorous circumscribed duty to return and remedy those defects which qualify under the maintenance clause."

I have quoted the above passages at length because it is my view that it fairly describes the type of contract the parties in the instant case entered into and the principle that applies to it. It is therefore very instructive to this court in interpreting the terms of the contract vis-a-vis what took place. My understanding of the principle is that once a certificate of practical completion is issued, the liquidated damages liability comes to an end and the defects liability period starts. At that stage work is considered completed save for the requirement of the contractor to rectify the defects that are identified during that period. It is only when the defects are rectified that the contractor would be entitled to the retention moneys which in my view would be the only issue at stake at this stage as opposed to allegation of breach of contract.

The defects are usually contemplated and that is why there is provision for rectification of the same under the contract and therefore it cannot be said that the presence of defects per se amount to breach of contract. In the instant case, defects liability is provided for under clause 15 (2), (3) & (4). Under clause 15 (2), the period is stated in the appendix to the contract to be six months.

The defects were identified in accordance with clause 15 of the contract and brought to the attention of the plaintiff by the 3rd party for its action. This is confirmed by Exhibit TP1. I have carefully studied the list of snags which were exhibited by the defendant as D2 (ii) & D2 (iii). The 3rd party also exhibited the same as TP 1 (i) & TP 1 (ii). Whereas the list appears so long, I have noted that they were minor replacements, repairs and clean ups that the plaintiff was required to do. In my view they are not so substantial defects that went to the core of the contract so as to amount to breach. They are the ordinary defects that are contemplated under the contract during the defects liability period.

In any case, the above principle suggests that during the defect liability period the contract is already completed subject to rectification of defects that are identified. It therefore follows that a contract which has been practically completed cannot be breached. It is my considered view that failure to rectify the defects only gives the employer the right to refuse to release the retention moneys and not to sue for breach of contract.

For the above reasons, I find and hold that the defects that were identified and brought to the attention of the plaintiff did not amount to breach of the contracts. On the whole, it is my finding that the plaintiff did not breach the contract in the two aspects alleged by the defendant.

I now turn to consider the alleged breach of contract by the defendant failing to pay for work that was certified. I have studied all the certificates in respect of which payments are said to be outstanding. I wish to observe that there was an earlier Phase I of the works which had a separate contract. TPW testified to this when he stated in cross examination that Exhibits P7, P8, P15 and P16 all relate to the outstanding payments in Phase I. The contracts in dispute are in respect of Phase II of the works and so any outstanding payments under Phase I cannot be claimed in this suit unless the contracts under that phase were pleaded. For that reason, I would ignore those certificates because they were irregularly included in the plaintiff's claim.

That now leaves me with three certificates namely; P10 titled Final Certificate (Arua Phase II); P12 titled Final Certificate (Arua Phase II Extra Works) and P 14 titled Penultimate Certificate (Hoima Phase II). The covering letters for Exhibits P10 and P12 which were marked Exhibits P9 and P11 respectively are dated 16th April 2007 implying that the certificates were issued about the same time. The covering letter for Exhibit P14 marked Exhibit P13 is dated 19th October 2006 also implying that the certificate was issued about the same time. I will make my findings on these certificates after referring to the relevant provisions of the contract on the issue of certificates and payments.

Clause 30 (1) (a) provides:

> ***"Upon written application by the Contractor, at intervals not less than 4 weeks, the Architect shall issue within 28 days a certificate***

stating the amount due to the Contractor from the Employer, and the Contractor shall, on presenting any such certificate to the employer be entitled to payment thereof within 28 days from the presentation, Interim valuations shall be made whenever the Architect considers them to be necessary for the purposes of ascertaining the amount stated as due in an Interim Certificate."

Clause 30 (1) (b) provides for interest on the unpaid amount and clause 30 (2) provides that the amount stated as due in an Interim Certificate shall be the total value of works properly executed and the value of the materials and goods required for use in the works or have either been delivered to or adjacent to the works or have with the Architects approval been stored elsewhere in safe custody by the contractor or his agent.

Cause 30 (3) provides for retention of the percentage of the total value of the work, materials and goods referred to in sub-clause 2 which is named in the appendix as Percentage of Certified Value Retained. Under the appendix Percentage of Certified Value Retained is 10% and Limit of Retention Fund is 5%.

In relation to payment of retention money, clause 16 (f) (i) of the contracts provides for payment of one molety of the amount retained under clause 30 (3) to the contractor within fourteen days from the date on which the employer shall have taken possession of the relevant part of the premises. Clause 16 (f) (ii) provides that on the expiration of the defects liability period or on the issue of the Certificate of Completion of Making Good Defects in respect of the relevant part, whichever is the later, the contractor shall be paid from the sums retained under clause 30 (3) the other molety of the amount referred to in clause 16 (f) (i) and the amount named in the appendix to the Conditions as Limit retention shall be reduced by the amount of such molety.

If the Architect was strictly following the terms of the contracts he should have issued the certificate in accordance with the above provisions. I have looked at the five certificates that were issued in respect of the contracts in dispute. An Interim Certificate No. 1 for the Hoima Works was issued on 24th May 2006 for a sum of Shs. 133,705,864/= inclusive of 18% Value Added Tax (VAT). The amount retained as per the certificate was Shs. 12,590,000/= representing 10% of the sub-

total of the value of work executed, value of materials on site and variation of price. On the same day an Interim Certificate for Arua Works was issued for a sum of Shs. 206,505,395/= inclusive of 18% Value Added Tax (VAT). The amount retained was Shs. 19,444,952/= representing 10% of the sub-total of the value of work executed, value of materials on site and variation of price. It appears the two Interim Certificates were paid so they are not part of this claim.

The next certificate was issued on 19th October 2006 (Exhibit P14) for a sum of Shs. 130,129,261/= inclusive of preliminaries, value of work executed and 50% of the money that was retained in the Interim Certificate No. 1 for Hoima Works. The only money that would have remained under that contract after the payment of that certificate was 50% of the retention money which I believe was to be paid after the defects were made good and a final certificate issued.

I find that Exhibit P14 was properly issued in accordance with the terms of the contract and should have been paid by the defendant. I have carefully evaluated the defendant's evidence on this matter and failed to find any satisfactory reason why this certificate was not paid. In fact counsel for the defendant at page 10 in paragraph 4 of his submission conceded that the plaintiff is entitled to that payment. I would therefore hold the defendant in breach of the contract by failing to pay the certificate and I so find.

The next certificates to be issued are Exhibits P10 (for Shs. 190,295,654/=) and P12 (for Shs. 107,522,296/=) that were issued on the same day and described as Final Certificate for Arua Works and Arua Extra Works respectively. It was the testimony of TPW that Exhibit P10 is not a Final Certificate although he issued it as such. He pointed out that he did not issue the Final Certificate for both contracts because he had not yet carried out inspection to confirm that the defects had been rectified as communicated by the plaintiff. TPW stated that he is still expecting to issue a final certificate for the retention money after he has been called upon by the defendant to carry out the final inspection.

I have found a lot of difficulty in synchronising the evidence of TPW in respect to Exhibits P10 and P12 as stated above. If at all he did not issue a Final Certificate then what is the defendant doing with those documents that purport to be Final Certificates whereas the alleged author is saying they are not. Final Certificates are

normally issued after the defects are rectified and inspection done by the consultant (Architect) to verify that all the works has been done to his/her satisfaction.

I would have expected the Architect to issue a similar certificate like Exhibit P14 at this stage for the Arua Works. I am also wondering what payment would be certified as due in the Final Certificate that TPW is still expecting to issue. This is because the retention money that is normally certified as due in the Final Certificate was fully released in Exhibit P10 when the defects had not yet been made good.

TPW himself testified in cross examination that by 19th May 2007, the defects he had communicated on 23rd August 2006 for both Hoima and Arua had not yet been made good. This is confirmed by the different correspondences including Exhibit D7 dated 2nd July 2007 by which the Architect referred to a meeting held that morning and reminded the plaintiff about what was agreed namely; that the lists of incomplete items in Arua and Hoima dated 19th May 2007 should be attended to in its entirety and all leakages, down pipe works and replacement of dented sheets in Arua should be completed by Sunday 8th July 2007; the other works on the lists should be completed by 25th July 2007 and payments shall be released after completion of all the works.

Exhibit P19 is another correspondence dated 19th November 2007 which confirms that the defects were not yet fully made good by the time Exhibit P 10 was written on 16th April 2007. By Exhibit P19 the plaintiff informed the Architect (3rd party) that the snags were now fully attended to and requested for an inspection to be arranged.

From Exhibit P20 dated 19th May 2008, it appears a joint inspection was done at the Arua works on 7th December 2007 and Hoima on 11th December 2007 and more snags were noted which by that letter the 3rd party was notifying the defendant that they had been attended to and requesting for payments to be processed.

Upon analysing the evidence as above, this court only comes to the conclusion that Exhibit P10 was irregularly issued by the 3rd party before the defects were made good. The 3rd party's justification for the delay in making good the defects by the plaintiff way beyond the defects liability period was the alleged failure of the

defendant to pay the plaintiff. One wonders what should have been the basis of that payment. Is it the so called Final Certificate which this court has found to have been irregularly issued? I find that that certificate was outside what was contemplated under the contract and so the defendant was justified in not effecting the payments. In a nutshell, failure by the defendant to pay Exhibit P10 does not amount to a breach.

I will now look at Exhibit P12 as the last item on this issue. It is a Final Certificate for Arua (Extra Works). I have made recourse to clause 15 (3) of the contract which allows for adjustment of the contract sum. It provides for extra works during the defect liability period in the follow terms;

> ***"...the Architect may... issue instructions requiring any defect, shrinkage or other fault which shall appear within the defect liability period ....to be made good, and the Contractor shall within a reasonable time after receipt of such instructions comply with the same and (unless the Architect shall otherwise instruct, in which case the contract sum shall be adjusted accordingly) 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."***

No evidence was led to show how the costs of extra works were incurred. The so called Final Certificate was merely issued without any justification why it should be paid. I want to believe that if at all the extra works was in relation to the defects then the provisions of clause 15 (3) quoted above had to be complied with. Adjustment of price in my view would not just be a matter between the Architect and the Contractor but should have the concurrence of the Employer who would ultimately pay. In any event, there is a proviso under that clause which this court can only verify compliance with upon hearing evidence on when and how the costs of extra works was incurred. I am unable to do so without that evidence. I therefore find that the defendant was justified in not paying that certificate because there was no basis for it.

I have also considered the argument of the defendant that the certificates and the invoices were never delivered to them. Contrary to the arguments of counsel for

the defendant, I find that the documents were actually delivered according to the delivery book (Exhibit P21). I do not agree that PW2 as a person who delivered the letter needed to know the numbers and dates of the invoices. In any case, even she knew them at the time of delivery it would be human to forget due to the passage of time. The only fault I find with those certificates is that they were irregularly issued and the defendant was right in not paying the plaintiff based on them.

In conclusion of the first issue, I find that what would have been breach of the contract by the plaintiff was waived by the defendant's conduct and cannot be claimed in this suit due to the operation of the doctrine of estoppels. I also find that the defendant did not breach the contract by failing to pay for the works certified in Exhibits P10 and P12. The only breach by the defendant is in relation to non payment of Exhibit P14.

Issue 2: Whether the defendant is indebted to the plaintiff in the sums claimed.

It was submitted for the plaintiff on this issue that the defendant is indebted to the plaintiff in the sums claimed as evidence of the total indebtedness was never challenged, nor was evidence led to rebut PW1's claims. Furthermore, that DWI testified that no payments had been made by the defendant in respect to Exhibit P8, P10, P12, P14, and P16. Counsel for the plaintiff implored this court to find that the defendant is indebted to the plaintiff in the amount of Ushs. 560,394,373/= which includes interests.

On the other hand, it was submitted for the defendant that since the evidence on record shows that the work was not done in accordance with the contract the plaintiff should not be entitled to the sums claimed or at all. It was submitted that according to the testimony of TPW, he issued the certificate of practical completion with a list of unfinished works but also certified that the plaintiff was entitled to payments as set out in Exhibits P10 and P14 and this according to counsel for the defendant was wrongfully issued as the work was not done in accordance with the terms of the contract.

It was argued that TPW had not measured or supervised the work prior to issuing the certificates as he admitted in cross-examination and further that when the buildings were handed over to the defendant in February 2008, some areas had not

yet been completed. Counsel submitted that it was not wrong for the defendant to have used the premises in a makeshift manner owing to the need to buy tobacco and the same could not be visited on the defendant as having jeopardised the work since it is trite law that a party can even mitigate the loss and court should look at the same acts of the defendant as such. Counsel referred to the authority of ***British Westinghouse v Underground Electronic Railways (1912) AC 673*** for this principle.

It was submitted that the plaintiff cannot rely merely on the certificate which was issued by the 3rd party without inspecting the work to demand for payment without proving that they had satisfactorily carried out the work to be entitled to payment. Counsel argued that there is overwhelming evidence to show that the 3rd party wrongfully issued the certificates of practical completion, moreover according to counsel it is clear from the contracts that the certificates of practical completion is not in themselves conclusive evidence that any works, materials or goods to which it relates are in accordance with the contract.

Counsel also submitted that it is trite law that where a party has only performed part of his obligation under an entire contract, he can normally recover nothing and the main exception according to counsel being that of the doctrine of substantial performance where a failure to perform only an unimportant part of the plaintiff's obligation does not prevent his claim for agreed price, subject to counter-claim for damages which will go in diminution of the price. He buttressed this argument with a passage from ***Chitty on Contract, 25th Edition, Vol 1. Para 1401 and 1402.*** Counsel concluded that the plaintiff's claim should be rejected as the same was not specifically pleaded and has not been proved as required by the law.

Counsel for the 3rd party associated himself with the submission of the plaintiff's counsel on this issue.

I have taken into account my findings on issue one and wish to state that the plaintiff is entitled to the full amount in Exhibit P14 plus interest at Commercial Banking lending rate from the date it became due, that is, 28 days from the date it was issued as per clause 30 (1) (b) of the contract. That interest would run up to the date of filing the suit (13th August 2008). I have calculated it and I found a period of 20 months. Applying the interest rate of 22% that was prevailing at the time for

the 20 months would give a total of Shs. 176,975,795/= as being due and owing under that certificate as at the time of filing the suit.

As regards the plaintiff's entitlement to payment of Exhibit P10 which I have already found to have been irregularly issued, I have taken into account the fact that the plaintiff had already completed performance of the contract subject to the defects that were to be made good. Since the defendant has retained that benefit from the plaintiff's works common law principle of unjust enrichment requires it to compensate the plaintiff.

Unjust enrichment is defined by ***Black's Law Dictionary 7th Edition*** as "*a benefit obtained from another, not intended as a gift and not legally justifiable for which the beneficiary must make restitution or recompense.*"

In the celebrated decision of ***Lord Wright*** in ***Fibrosa Spolka v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32 at 61,*** it was stated that:-

> ***"…it is clear that any civilized system of law is bound to provide remedies for… unjust benefit… Such remedies in English law are generically different from remedies in contract or in tort and are now recognized to fall within a third category of common law which has been called quasi – contract or restitution…"***

That principle has been applied in a number of cases in our jurisdiction. See: ***Stanbic Bank (U) Ltd v Sino Africa Health Ltd HCCS No. 137 of 2004; Alfa Insurance Consultants Ltd v Empire Insurance Group Supreme Court Civil Appeal No. 9 of 1994*** and ***Busoga Growers Co-operative Union Ltd v Non-Performing Assets Recovery Trust HCCS No. 240 of 2004*** among others.

Following that principle, I find that the plaintiff is entitled to the amount in that certificate less the Shs. 19,444,952/= retained in Interim Certificate No. 1 for Arua Works (Exhibit P6) which should have been released after the defects were made good and verified. The total sum would then be Shs. 170,850,702/= which I find and hold that the plaintiff is entitled to.

On Exhibit P12, due to my finding that there was no justification for the extra works I would find that the plaintiff is not entitled to it. The overall finding of this

court on issue 2 is that the plaintiff is entitled to the sum of Shs. 176,975,795/= as per Exhibit P14 (inclusive of interest) plus Shs. 170,850,702/= being the sum stated in Exhibit P10 less the retention money. I have not awarded the contractual interest on this amount because of my finding that the defendant was justified in not paying it as the certificate was erroneously issued. In the result, I find and hold that the plaintiff's total entitlement is Shs. 348,826,497/= and not the Shs. 560,394,373/=claimed in the plaint.

Issue 3: Whether the defendant is entitled to the sums claimed in the counterclaim.

It was submitted for the plaintiff/counter-defendant on this issue that the counterclaimant's claim is unjustifiable and unsustainable because the alleged period of delay was never certified by the Architect (the 3rd party). Counsel submitted that under clause 22 of the contract, it is only the Architect who can certify in writing that the works have been unnecessarily delayed and as a result the Contractor should pay liquidated damages to the Employer. It was argued that TPW clearly stated in his evidence that he never authored a letter stating that the works had been delayed by the contractor. It is therefore submitted for the plaintiff that the counterclaimant's claim that the plaintiff breached the contracts between the parties by its failure to complete works on the counterclaimant's central buying facilities in Arua and Hoima is unfounded and court should find as such.

It was submitted for the defendant/counterclaimant that as per the contract, it is entitled to liquidated damages from the plaintiff due to the breach of the plaintiff of not completing the work in time more over doing shoddy work. It was submitted that it was an agreed term of the contract that if the work was not done within the stipulated time, then the defendant would be entitled to compensation at a rate of Shs.2million per every calendar week or part thereof when the breach occurs. It was submitted that the plaintiff handed over the site at Hoima and Arua on 28/02/2008, 80 days after the due date and should pay the amount of Shs. 320,000,000/= as was stated in the appendix of the Contracts. This court was urged not to believe the submission of the plaintiff that the delay was not certified by the 3rd party as the final completion certificates which would have indicated the same were not issued.

Counsel for the 3rd party associated himself with the submission of the plaintiff on this issue.

I have already made a finding under issue 1 which has a direct bearing on this issue to the effect that the defendant waived its right to claim liquidated damages and is now estopped from raising the same. I wish in addition to observe that the provision for liquidated damages as per clause 22 of the contract was in respect of failure by the contractor to complete the works by the date for practical completion. That means the claim could only be made for the period between the agreed date of practical completion and when the certificate of practical completion was actually issued. In that case, the defendant would have only claimed liquidated damages for a period of 9 weeks and four days under the Arua Contract and 15 weeks and 5 days under the Hoima Contract. This was not done and this court has already held that the defendant waived its right to do so.

I note that under clause 16 (e) there was an attempt by the parties to provide for some payment in lieu of liquidated damages during the defects liability period based on some formula which I believe could have been best calculated by the Architect who understands the language. In the absence of that calculation which should have been instigated by the defendant, I am unable to conclude that the defendant was entitled to any payment in lieu of liquidated damages during the six months defects liability period.

For the above reasons, I find that the defendant is not entitled to the sums claimed in the counterclaim as there is no basis for it.

Issue 4: Whether the defendant is entitled to indemnity/contribution from the third party.

It was submitted for the plaintiff on this issue that a 3rd party will be held liable where the defendant claims or shows that the 3rd party can indemnify or contribute to the claim made against the defendant. Counsel for the defendant submitted that Order 1 Rule 18 of the CPR provides that the liability of the 3rd party needs to be established as between the defendant and the 3rd party.

It was submitted for the defendant that since a 3rd party notice was issued, any award to the plaintiff should be paid by the 3rd party since it has been negligent and unprofessional in carrying out its duties.

On the other hand, it was submitted for the 3rd party that works was done within what an ordinary consultant would do and it should not be penalised as it did what was reasonably possible and gave advise with due care.

I have considered the above submissions as well as the oral and documentary evidence on record and has come to a conclusion that the 3rd party largely did the work well save for the lapses especially as relates to the manner in which the certificates were issued and the failure to do the final inspection. Otherwise the defects that were identified and listed were promptly forwarded to the plaintiff to make good. There is also evidence that a representative of the the 3rd party attended joint meetings and participated in the joint inspections that were done up to December 2007.

While I fault the 3rd party for erroneously issuing the two certificates (Exhibit P10 and P12) and failing to carry out the final inspection with a view of verifying what was communicated by the plaintiff in Exhibit P19 and issuing the Final Certificate, I do not think those faults are responsible for giving rise to the plaintiff's claim as to warrant ordering the 3rd party to indemnify the defendant. The plaintiff carried out works for the defendant who retained the benefit and must solely bear the responsibility of paying for the works.

In the premises, I find and hold that the defendant is not entitled to indemnity or any contribution from the 3rd party.

Issue 5: Remedies available, if any.

In view of the findings on all the above issues, judgment is entered for the plaintiff against the defendant in the following terms:

1. The defendant shall pay the plaintiff a total sum of Shs. 348,826,497/= being its outstanding entitlement.
2. Interest is awarded on (1) above at the rate of 22% per annum from the date of filing the suit till payment in full.

3. The plaintiff is awarded costs of the suit.
4. Costs are not awarded to the 3rd party because it could have done better as the consultant/supervisor and some of the issues between the plaintiff and the defendant could have been avoided.

I so order.

Dated this 31st day of May 2013.

Hellen Obura

JUDGE

Judgment delivered in chambers at 4.00 pm in the presence of Ms. Diana Nabwiso who was holding brief for Mr. Paul Rutisya for the plaintiff, Mr. Kiryowa Kiwanuka for the defendant and Mr. James Muwawu for the 3rd party.

JUDGE

31/05/13