[2011] JMCA Civ 26

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 32/2006

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA

BETWEEN	**GLOBAL DEVELOPMENT CORPORATION LTD**	**APPELLANT**
AND	**BEVERLY M^{C}NAUGHTON**	**RESPONDENT**
AND	**KEITH LUMSDEN**	**3RD PARTY/ RESPONDENT**
AND	**LOUIS DOUET**	**4TH PARTY/ RESPONDENT**
AND	**CONSTRUCTION DEVELOPERS ASSOCIATES LTD**	**5TH PARTY/ RESPONDENT**

Christopher Dunkley and Miss Daicia Welds instructed by Phillipson Partners for the appellant

Maurice Frankson instructed by Gaynair & Fraser for the respondent

Keith Brooks for the 4th party/respondent

Miss Hilary Phillips, QC and Miss Sherise Gayle instructed by Grant, Stewart, Phillips & Co for the 5th party/respondent

24, 25 June; 6, 14 July 2009 and 29 July 2011

PANTON P

[1] I agree with the excellent reasoning and conclusion of my learned sister, Harris JA, and there is nothing that I can usefully add.

HARRIS JA

[2] This is an appeal by Global Development Corporation from the judgment of Reid J delivered on 30 March 2006 in favour of the respondent ("McNaughton"), the fifth party/respondent and the fourth party/respondent against the appellant and in favour of the fifth party/respondent against the fourth party/respondent.

The background

[3] In or about March 1987 McNaughton entered into a written agreement with the appellant to purchase a shop, situate at the upper level part of a development complex, then under construction, known as Princeville Commercial Centre (PCC) situate at 95-97 Constant Spring Road in the parish of Saint Andrew.

[4] On completion of the building in March 1989, the appellant's managing director Donald Glanville invited McNaughton to take possession of her shop. She declined, pointing to extensive cracks in one of the walls. The appellant deferred the date of possession in order to remedy the defects. The repairs were carried

out. Relying on an assurance that the defects had been remedied, McNaughton went into possession on 18 July 1989, only to discover, at a later date that cracks in the wall had reappeared. By January 1990, water had begun seeping into the shop through the roof of the building.

[5] McNaughton stated that she was advised by the appellant that the defects about which she complained related to an "expansion joint". Thereafter, she vacated the shop for the necessary work to be undertaken but no such work was done. She related that the necessary repairs were not carried out for the reason that there was a disagreement between the appellant and the third party/respondent ("the architect") as to who was responsible for the costs of the repairs.

[6] Dissatisfied with the situation, McNaughton, on 16 September 1992, commenced an action against the appellant claiming damages for breach of contract or alternatively, for negligence in respect of the construction of the building. In her statement of claim filed on 17 September 1992, paragraphs (3) to (10) of the claim read:

> "3. The agreed selling price of the property was $247,500.00 which the Plaintiff has paid together with the one-half ($_{1/2}$) costs of transfer.
>
> 4. It was an express term of the contract that: -
>
> "The purchaser shall be deemed to take possession of the shop on the fourteenth day after notice by the Vendor that:-

(i) The shop is completed; and

(ii) A certificate of Title for the shop under the Registration (Strata Titles) Act has been issued by the Registrar of Titles.

which notice the Defendant gave on or about the 22nd day of March 1989.

5. On the day of March, 1989 the Plaintiff attempted to take possession of the property and the Plaintiff notified the Defendant architect Mr Keith Lumsden and its Attorneys-at-Law that she could not take possession of the property as one of the walls thereof was extensively cracked, and that the building was defective.

6. The Defendant deferred the date of possession in order to remedy the said defects, as a consequence whereof the Plaintiff did not get possession of the said shop until 18th July, 1989.

7. By reason of the foregoing the Defendant unlawfully and wrong-fully charged the Plaintiff an escalation fee of $30,000.00 which the Plaintiff paid, the repayment of which sum the Plaintiff claims with interest.

8. It was an express and/or implied condition of the agreement between the Plaintiff and the Defendant that the shop would be built in a workmanlike manner and the Defendant warranted that the building would have been fit for its purposes.

9. Further and/or in the alternative the Plaintiff will say that the Defendant, its servants, and/or agents were negligent in the construction of the said shop.

PARTICULARS OF NEGLIGENCE

(a) Failing to provide a proper foundation for the building and to prevent subsidence.

(b) Failing to construct walls which were suitable for the purpose for which they were intended.

(c) Failing to erect a roof that was watertight.

(d) Failing to construct walls and eaves beams and cantilevers which remained intact and did not crumble.

(e) Failing to provide any or any adequate support for concrete beam.

(f) Failing to utilize and apply accepted and tested techniques of construction.

(g) Construction walls which separated from the building.

NOTE: The Plaintiff will at the Trial rely on the doctrine of RES IPSA LOQUITUR.

10. By reason of the Defendant's negligence the Plaintiff has been unable to continue to utilize the shop as a ladies clothing boutique, has been forced to give up occupancy of the building and to utilize it for any purpose. As a consequence whereof the Plaintiff has sustained loss and damage.

PARTICULARS OF SPECIAL DAMAGE	$
(i) Loss of income from business for a period of two weeks in August and one week in September, 1991 when shop was closed at request of Defendant and its agent to effect repairs at $5,000.00 per week	15,000.00
(ii) Loss of income from the business from/May 1992 and continuing @/8th $5,000.00 per week (x 15 weeks)	75,000.00

(iii)	Cost of Engineers Report	
(iv)	Amount paid by Plaintiff for escalation fees wrongly claimed by Defendant	30,000.00
(v)	Maintenance fees paid during above period @ $591.00 per month from October, 1989	20,094.00
(vi)	Air Fresheners purchased	589.00
(vii)	3 Buckets purchased	260.00
(viii)	3 Mops @ $35.00 each	105.00
(ix)	Estimated costs of replacing internal partition	2,000.00
(x)	Clothes damaged by water (2 Suits @ 2,500.00 each) (4 pairs Jeans $700.00 each)	7,800.00
(xi)	Replacing broken glass shelf	1,000.00
(xiii)	Business closed 1991 34 days (in addition to Item 1) $51,850.00	
	1992 $67,300.00	119,150.00
	TOTAL	$295,998.00"

[7] The appellant filed an amended defence denying liability. Paragraphs (2) to (4) and (7) state:

> "2 As to paragraph 5 of the Statement of Claim, the Defendant does not admit that any notice was given by the plaintiff as is alleged and denies that the walls were extensively cracked or that the building was defective.

3. Further the Defendant will say that Clause 13 of the Agreement for sale required all notices to be given in writing and this was not done and that the walls were not cracked but were in fact two separate walls placed closely together and further it was the cladding on the wall that appeared unattractive due to the negligence of the contractors. By reason of Clause 14(iii) of the said Agreement for Sale, the Certificate of Practical Completion is conclusive evidence that the shops were properly built and completed in accordance with the Agreement for Sale. In the premises, the Plaintiff is not entitled to recover damages as alleged for breach of contract or negligence.

4. Save and except that the Plaintiff took possession of the shop on the 18th day of July 1989 paragraph 6 of the Statement of Claim is not admitted.

7. It is denied that the Defendant its servant and/or agent were negligent in the construction of the said Shop as alleged in paragraph 9 of the Statement of Claim or at all and the Particulars of Negligence therein contained are denied. The Defendant will say that any negligence in the construction of the said Shop were due to negligence of the contractor and/or Architect and/or Engineer whom the Defendant employed as independent contractors to construct the said Shop."

[8] On the 15 June 1994, the appellant sought and obtained leave of the court to join Keith Lumsden ("the architect"), Louis Douet ("the engineer") and, Construction Developers Associates Limited ("the contractor") as third parties to the suit, claiming from each of them a contribution or an indemnity. Paragraphs (3) to (6) of its statement of claim against the engineer and the contractor were couched in the following terms:

"(3) By virtue of a contract in writing dated the 14th day of May, 1988 between the Defendant and CONSTRUCTION DEVELOPERS ASSOCIATES LIMITED as contractors, CONSTRUCTION DEVELOPERS ASSOCIATES LIMITED agreed to erect a shopping and commercial complex known as "Princeville Commercial Centre" at No. 95-97 Constant Spring Road in the parish of Saint Andrew.

(4) The Defendant appointed KEITH LUMSDEN as Architect and LOUIS DOUET as Structural Engineer for reward as Independent Contractors to prepare plans, drawings, specifications, Bills of Quantities etc., for the erection and the supervision of construction of the said Princeville Commercial Centre.

(5) It was an expressed and/or implied term and condition of the agreement between the Defendant and CONSTRUCTION DEVELOPERS ASSOCIATES LIMITED, KEITH LUMSDEN and LOUIS DOUET that the aforesaid shopping and commercial complex would be built in a workmanlike manner in accordance with the drawings, plans and specifications and it was warranted that the building would be fit for its purposes.

(6) If there is a defect in the design, foundation and/or construction of any building at the aforesaid shopping and commercial complex then same was caused by the negligence and/or a Breach of Contract by CONSTRUCTION DEVELOPERS ASSOCIATES LIMITED, KEITH LUMSDEN and LOUIS DOUET, jointly and severally."

"AND the Defendant claims:

(a) A declaration that the Defendant is entitled to a contribution and/or to be indemnified by the Third, Fourth and Fifth Parties against liability in respect of the Plaintiff's claim.

(b) Damages for any sum that may be awarded to the Plaintiff whether by way of

damages, interest and/or cost, together with the Defendant's cost of defending this Action."

[9] The engineer filed a defence to the appellant's claim as well as a claim against the contractor. In paragraphs (3) to (9) of the defence he avers as follows:

"3. SAVE that he admits that he, in his professional capacity as a specialist STRUCTURAL ENGINEER, prepared certain plans, drawings and specifications in respect of the construction of a building at No. 95-97 Constant Spring Road in the Parish of St. Andrew, the FOURTH PARTY makes no admission as to paragraphs 4 & 5 of the DEFENDANT'S STATEMENT OF CLAIM.

5. As to paragraph 6 of the DEFENDANT'S STATEMENT OF CLAIM, the FOURTH PARTY will deny that there was any defect in the design or foundation of the said building at the Princeville Commercial Centre, but will aver that there was a defect in the CONSTRUCTION of the expansion joint throughout the said building and adjacent to the Eastern End of the PLAINTIFF'S said shop. The FOURTH PARTY will deny that the said defect was solely caused or contributed to by his negligence, whether jointly of severally.

6. The said defect was caused solely or contributed to by the Negligence of the FIFTH PARTY:

Particulars of Negligence:

a - Failing and/or neglecting to observe and/or regard the instructions of the FOURTH PARTY as to the construction and manner of treatment of the said expansion joint:

b - Departing from the intentions and/or instructions of the FOURTH PARTY as to the details of construction of the said expansion joint:

c - Rendering or causing the said expansion joint to be rendered:

d - Creating a restriction of movement at the said expansion joint by the said rendering:

e - Failing to seal the said expansion joint properly or at all, or otherwise to ensure that the said expansion joint was watertight.

7. The FOURTH PARTY will refer to and rely on the said plans, drawings, and specifications prepared in respect of the said building for their true terms and effect at the hearing of this matter.

8. In the premises, the FOURTH PARTY denies that he is liable to the DEFENDANT in respect of the alleged or any indemnity, or for damages for breach of contract and costs, as alleged or at all.

9. Save as is hereinbefore expressly admitted, the FOURTH PARTY denies each and every allegation contained in the DEFENDANT'S STATEMENT OF CLAIM as though the same were set out and traversed seriatim."

[10] The averments in the claim against the contractor are as follows:

"10. The Fourth Party repeats the allegations set out above in Paras. 1 to 9 inclusive AND CLAIMS AGAINST THE FIFTH PARTY FOR

A – GENERAL DAMAGES FOR NEGLIGENCE:

B – AN INDEMNITY and/or CONTRIBUTION from the FIFTH PARTY against ALL LIABILITIES or any SUMS (inclusive of any damages, interest, and/or costs) that may be awarded to the PLAINTIFF, or to ANY PARTY HEREIN, AGAINST

THE FOURTH PARTY in respect of ANY CLAIM in this SUIT or MATTER."

[11] The contractor filed an amended defence to the appellant's statement of claim, a reply to the engineer's claim, and a claim against the architect, averring in paragraphs (3) to (17) as follows:

> "3 Save and except that the Fifth Party admits that Keith Lumsden was appointed as Architect by virtue of the Articles of Agreement executed between the Defendant and the Fifth Party dated the 14th day of May, 1988, and pursuant to the joint Consultative Committee Conditions of Contract, paragraph 4 of the Statement of Claim is not admitted.
>
> 4. With regard to paragraph 5 of the Statement of Claim the Fifth Party admits that it was an express or implied term and condition of the Articles of Agreement and JCC conditions of Contract between the Defendant, the Fifth Party and the Third Party that the shopping and commercial complex would be built in a workman-like manner in accordance with the drawings, plans and specifications and it was warranted that the building would be fit for its purposes.
>
> 5. As regards paragraph 6 of the Statement of Claim of the Defendant the Fifth Party denies that it was in any way negligent in the construction of the said building and/or that it was in breach of contract.
>
> 6. The Fifth Party further avers that pursuant to the Articles of Agreement dated the 14th day of May, 1988 signed between the Defendant and the Fifth Party which agreement incorporated the JCC Conditions of Contract, the Fifth Party constructed the said building as per the instructions, plans, designs and drawings of the Architect the Third Party, Keith Lumsden.

The Fifth Party will at the trial of this action rely on the said contract for its full terms and legal effect.

7. The Fifth Party further avers that under the JCC Conditions of Contract the Contractor is obliged to forthwith comply with all instructions issued to it by the Architect. The Fifth Party at no time entered into any contract with the Fourth Party.

8. The Fifth Party avers that the Third Party, the Architect in this project on the 11th January, 1990 issued a letter to the Fifth Party informing the said Fifth Party that the building works were completed to his satisfaction. The Fifth Party will at the trial of this action rely on the said letter of practical completion dated the 11th day of January, 1990 for its full terms and legal effect.

9. Further in keeping with the Architects position, the Quantity Surveyors, Berkeley and Spence appointed by virtue of the abovementioned Articles of Agreement, by way of letter dated the 8th day of February, 1990 recommended the final release of retention, signifying that all defects had been corrected to their satisfaction. Further this recommendation was acted on by issuing of Certificate No. 11 dated the 8th day of February, 1990 which certificate evidences the release of the retention sum which release signified that all obligations under the contract were satisfied at that time. The Fifth Party will at the trial of this action rely on the said letter and certificate for their full terms and legal effect.

10. The Fifth Party denies that it was liable to the Defendant in respect of the alleged or any (sic) idemnity (sic) or for damages for breach of contract and or negligence and costs as alleged or at all.

11. Save as is hereinbefore expressly admitted, the Fifth Party denies each and every allegation contained in the Defendant's Statement of Claim as though the same were herein set out and traversed seriatim.

REPLY TO FOURTH PARTY'S CLAIM AGAINST FIFTH PARTY

12. The Fifth Party repeats paragraphs 1 – 11 of the Defence herein.

13. As regards paragraph 5 of the Fourth Party's Defence the Fifth Party denies that there was any defect in the construction of the expansion joint throughout the said building and adjacent to the eastern end of the PLAINTIFF'S said shop. The Fifth Party avers that there was no negligence in the design drawings which showed no detail for the installation of a standard metal flashing at the expansion point (sic) to prevent leakage.

14. The Fifth Party denies paragraph 6 of the Fourth Party's Defence. As regards the Particulars of Negligence the Fifth Party states

    (a) The Fifth Parth (sic) complied fully with all the instructions of the Architect which included all designs and drawings including the Engineers drawings.

    (b) The Fifth Party admits there was rendering of the expansion joint but denies that this rendering in any way affects the structural integrity of the building and denies that there was any negligence on the part of the Fifth Party in this regard. Further it was a requirement of the said contract that all walls of the building were to be rendered.

(c) The Fifth Party denies that rendering at the expansion joint created a restriction of movement.

(d) The Fifth Party avers that there was no requirement in the said plans and drawing for sealing of the said expansion joint, further the said construction was done strictly according to the drawings.

15. The Fifth Party denies that the Fourth Party is entitled to damages for negligence against the Fifth Party. Further the Fifth Party avers that there is no contract between the Fourth and Fifth Party and the Fifth Party owes no duty to the Fourth Party under contract or at all.

16. The Fifth Party denies that the Fourth Party is entitled to any indemnity, and or contribution from the Fifth Party or for damages in respect of any claim in this suit or matter or for costs as alleged or at all.

CLAIM AGAINST THE THIRD PARTY BY THE FIFTH PARTY

17. The Fifth Party repeats paragraph 1-16 inclusive herein.

AND THE FIFTH PARTY CLAIMS:

1. An indemnity and/or a contribution from the Third and Fourth Parties against all liabilities or any sum (inclusive of any damages, interest and/or costs) that may be awarded to the Plaintiff or to any party herein against the Fifth Party in respect of any claim in this suit or matter."

[12] The architect entered an appearance to the appellant's action but took no further part in the proceedings.

[13] Mr Glanville testified that in 1989 he met with the purchasers of units at the PCC when McNaughton informed him of the cracks. He, accompanied by the architect and the appellant's attorney at law, went with McNaughton to view the cracks. He observed hairline cracks on the vertical walls which he promised to repair and made good his promise. He discussed the matter with the architect, following which, the contractor remedied the defects. He went on to state that he had no further discussion with McNaughton about the cracks.

[14] It was also his evidence that Mr Lumsden was employed as architect, Mr Douet as the structural engineer and Berkeley & Spence as quantity surveyors on the project. Construction Developers Associates Ltd was engaged to carry out the construction of the building. He further asserted that the appellant had a written contract with the architect and the contractor but he did not recall it having any with the engineer.

[15] Dr Wayne Reid, a structural and civil engineer, gave evidence on McNaughton's behalf. His evidence was that his examination of the structural drawings disclosed that no provision was made for an expansion joint but provision was made for continuity between the beam, slab and column, at the shop.

[16] He opined that the damage done was as a result of faulty design and construction and that the faulty design would be within the knowledge of the

architect and the structural engineer. He pointed out that only the walls beside the expansion joint should have been rendered and not the expansion joint itself.

[17] Mr Alfrico Adams, structural engineer, was commissioned by McNaughton to make a report on the matter. He visited the site and saw the structural drawings which had provision for an expansion joint but it did not extend to the non structural finish, namely, the rendering of the joint with cement and sand. He stated that he did not see the requisite treatment of the expansion joint and saw a significant crack on the wall as well as vertical cracks from the roof. The location of these cracks was significant. He saw evidence of water penetrating from the roof, due to rupture caused by inadequate water proofing in several places along the expansion joint. He revealed that he saw repairs being carried out at the expansion joint. He said rendering across the joint did not meet the acceptable standard of the building industry and this should be a matter within the knowledge of the contractor and also of the architect and the engineer supervising the project.

[18] He asserted that during the currency of a building project, an architect operates as an agent for the employer and it is the duty of the contractor to submit interim certificates for the architect's approval for payment. The architect, being responsible for inspecting the works prior to approval, should only confirm approval if the works are satisfactorily done. If the works are found to be unsatisfactory, the architect is obliged to reject it and request that it be

corrected. Interim certificates are issued up until the time when a final certificate of practical completion is issued. When such a certificate has been issued, it signifies that the architect is satisfied that the building has been completed for the purpose for which it has been designed.

[19] He further related that in January 1990 the architect issued a final certificate of practical completion indicating that the building had been completed to his satisfaction subject to minor defects which were not specified. All defects are required to be remedied prior to the issuing of the final certificate.

[20] Mr Leonard Bailey, structural engineer of Conrad Douglas & Associates, giving evidence for the appellant, stated that he visited the site and saw cracks along "what appeared [to him] to be a point running across the building". He noticed cement mortar which had broken away, was on the ground and on close examination this appeared to be from a joint. On his inspection of the entire building, he said that he did not find any difference in alignment in the beams in the building. He spoke with Mr Douet who provided him with negative of a blue print of the structural drawings. He checked the structural frame and was satisfied that the structure was adequately designed and that the design of expansion joint was adequate.

[21] Mr Louis Douet, a structural engineer testified that he prepared 12 drawings for the building and prepared details of the expansion joint. An expansion joint he said, was a function which permits the building to "behave

under its contraction and expansion". An expansion joint was necessary due to the overall configuration of the building. He stated that while the building was in progress he visited the site on several occasions and gave instructions regarding the construction. He said a site instruction was given to the contractor that the expansion joint should be placed at grid 15 as shown in drawing 8.

[22] Mr Roy Williams, civil engineer, testified that in 1988 he entered into an agreement with the appellant to erect the commercial shopping centre. He stated that the contractor took instructions from the architect. He further declared that the agreement, the drawings, the specifications and bill of quantities were prepared by the architect. Instructions were received from the architect with which he, the contractor must conform, and cannot deviate from them without the architect's written instructions. The instructions of the architect were carried out, he stated. The contractor, he asserted, was never requested to return to the site after 8 February 1990 as some minor defects were rectified on that date.

[23] The learned trial judge set out the factual background, after which, he addressed the issue as to whether the appellant was entitled to a contribution or to be indemnified by all or any of the third party respondents. In so doing, he dealt, in considerable detail, with the issue of indemnity or contribution to the appellant from the engineer and/or contractor and likewise to the engineer from the contractor. He embarked on a close and careful examination of the building contract between the appellant and the contractor in an effort to determine

whether or not the contractor was in breach of its obligations under the said contract and found that the contractor was not liable to indemnify the appellant for the defects in the building. He then considered the issue as to liability between the appellant and McNaughton taking into account certain clauses of the contract between them as well as the testimonies of each party and ascribed liability to the appellant for the problems of which McNaughton complained.

[24] He ordered that:

> "1. Judgment be entered for the 5th Party against the 4th Party and the Defendant each to pay ¼ of costs to be taxed and/or agreed;
>
> 2. Judgment to be entered for the 4th Party against the Defendant with costs to be agreed or taxed;
>
> 3. Judgment be entered for the Claimant against the Defendant in the sum of $237,986.60 with interest at the rate of 20% from 1st July, 1989 to the 30th March, 2006 and cost to be agreed or taxed as against the Defendant;
>
> 4. 5th Party may have certificate for Queen's Counsel and Junior Counsel;
>
> 5. General Damages in the sum of One Hundred Thousand Dollars ($100,000.00) with interest at 20% per annum from 1st July 1989 to 30th March 2006."

[25] The engineer did not appeal the judgment of the court in favour of the contractor against him. The appellant filed seven grounds of appeal. They are as follows:

> "1. The Learned Trial Judge erred in that the Third Party failed to:

(a) make regularly or timely inspections of the construction at issue;

(b) exercise sufficient supervision of the construction at issue;

(c) to observe defects or faults in the said construction, or to supervise or instruct the fifth party to remedy the said defects;

(d) approving the said construction and thereafter issuing final certificate where he knew or ought to have been aware of the said faults.

2. The Learned Trial Judge erred in failing to find that the Fourth Party failed to adequately design or detail the said construction (including the foundation) or to prepare drawings or bills of quantities and ought therefore to have been accountable to the Defendant or to such Third Parties as would foreseeably have been affected by any negligent act or omission on his part.

3. The Learned Trial Judge erred in not finding that the Fifth Party failed to carry out the construction at issue in accordance with the approved plans drawing or specifications or to comply with the instructions of the Third and Fourth Parties.

4. The Learned Trial Judge erred in failing to find, as a matter of law that as the developer of the construction at issue, the Defendant was entitled to rely on the professional acts and the duty of care owed to it by the Third, Fourth and Fifth Parties in defence of an action brought by an injured Third Party (now Claimant) affected by any acts or omissions of those Parties if found to be negligent.

5. The Learned Trial Judge erred in failing to properly apply the principle of indemnity or at all.

6. The Learned Trial Judge erred in not finding that as a matter of law the Defendant ought to have been able to rely on its contract of May 14, 1988 between itself and the Fifth Party.

7. The Learned Judge erred in not finding that the Defendants (sic) was entitled to rely on its agreement for sale with the Claimant and in particular failed to properly interpret or at all *Clause 13* of the said agreement as a defence to the claim."

[26] Before giving consideration to the issues arising in these grounds, specific reference must be made to the first ground which relates to the architect, who, as stated earlier, notwithstanding the fact that he was served with the appellant's claim, entered an appearance but filed no defence. No steps were taken by the appellant to enter a default judgment against this party and consequentially, to seek a decision at trial as to the extent of a contribution by him or his indeminification of the appellant. In this court, certain submissions written and oral had been advanced by Mr Dunkley for the appellant, in respect of the architect. However, the requisite procedural regime had not been followed in the court below, to obtain a judgment against him. As a consequence, this court cannot entertain those submissions. It follows therefore that this ground is clearly misconceived.

[27] The issues arising on the remaining grounds are:

(a) Whether there is evidence to show that there was a breach of the contract between the appellant and the respondent by the appellant. If it is found that liability ought to be ascribed to the appellant, then the following questions arise.

(b) Whether the engineer had failed to adequately design the works causing the defects in the expansion joint as the drawings prepared by the engineer were inadequate.

(c) Whether the engineer owes a duty of care to the appellant.

(d) Whether there was failure on the part of the contractor to comply with its obligations under the contract with the appellant, resulting in the defect in the expansion joint.

(e) Whether the contractor failed to follow the instructions of the engineer and the drawings and specifications.

(f) Whether the contractor owes a duty of care to the appellant.

(g) Whether a contractual relationship exists between the contractor and engineer, arising out of the contract between the contractor and the appellant.

[28] We will now address the first issue which relates to the contract between the appellant and the respondent. The learned trial judge, having examined the testimony of the appellant and that of McNaughton as well as the relevant provisions of the agreement between them, and in particular clauses 13 and 14 thereof, found that the specific defect, namely, the crack in the wall at the PCC was brought to the attention of the appellant and that the final certificate did not address this complaint. He found that it was the appellant's responsibility to have been aware of the root cause of the defect and not McNaughton's. He concluded that the appellant's covenant at clause 14 of the agreement remained unsatisfied.

[29] On one hand, Mr Dunkley submitted that, the learned trial judge having found the appellant negligent ought also to have ascribed liability to

McNaughton. It was further contended by him that it was incumbent upon the learned trial judge to have considered McNaughton's failure in giving written notice of her complaint concerning the defects within the time permitted under her agreement with the appellant. In those circumstances, he argued, it is open to this court to find that the appellant is entitled to rely on McNaughton's breach in its defence to her claim.

[30] On the other hand, counsel for the respondent McNaughton, Mr Frankson, submitted that the conduct of the appellant, amounted to a waiver of the right to insist upon the provisions contained in clause 13 of the agreement for sale and accordingly it cannot now complain that McNaughton did not comply with clause 13 of the contract. The fact is, he argued, that when McNaughton was first offered possession, she refused so to do because of cracks in the walls which she pointed out to the appellant and which the appellant viewed and undertook repairs and again offered possession. She entered into possession after which, the cracks reappeared and she complained to the appellant that the cracks in the wall had reappeared and later water began seeping into the shop. The appellant, having advised her that the problem was with an expansion joint, agreed to remedy the defects, he submitted. This being so, the appellant, he argued, had consented to dispensing with the requisite notice. In support of this proposition, counsel referred us to, among other cases, ***Selwyn v Garfit*** (1888) 38 Ch. D. 273, C.A.

[31] Miss Phillips, on the other hand, submitted that the problems experienced at the location of the joint on grid line 15 at the PCC was as a result of faulty structural engineering design of the joint by the architect and/or the engineer and thus it is the responsibility of those parties who were the agents of the appellant; the appellant being equally liable. She further submitted that the appellant cannot rely on the contract with the contractor to avoid liability to McNaughton.

[32] It is now necessary to outline certain clauses of the agreement between McNaughton and the appellant which are relevant for the purpose of this appeal. Clause 4 of the contract states:

> "The purchaser shall be deemed to take possession of the shop on the fourteenth day after notice by the Vendor that:
>
> (i) the Shop is completed as to which a Certificate of Practical Completion by the Vendor's Architect or Quantity Surveyor shall be final; and
>
> (ii) …"

Clause 12 (1) reads:

> "The Vendor hereby covenants with the Purchaser that there will be erected on the land on the date of delivery of possession the commercial complex of which the Shop …, the driveway parking area and commercial amenities of the type, size, … and construction shown and set out … the plans and specifications deposited in the Office of the Vendor all of which the Purchaser hereby acknowledge that he has seen and perused PROVIDED THAT the Vendor with the approval of the Vendor's Architect or

> Quantity Surveyor may make minor alterations and variations not affecting the size, strength and soundness of construction of the complex or substitute alternative building materials of similar quality if they are not available in Jamaica or only available at a substantially increased price and no such alteration and variation shall vitiate this Agreement."

[33] Clause 13 provides as follows:

> "Any structural defects in walls, roofs, floors or foundations which shall appear or arise within six (6) calendar months of the date of issue of the Certificate mentioned in Clause 14 (iii) hereof and of which written notice shall have been given by the Purchaser within such period and which (notwithstanding the issue of the said Certificate) shall be due to materials and workmanship not in accordance with Clause 12 (i) hereof, shall within a reasonable time after receipt of the written notice on that behalf be made good by the Vendor and unless the Quantity Surveyor or Architect mentioned in Clause 14 (iii) hereof otherwise directs at its own costs PROVIDED HOWEVER that on the Vendor obtaining a new Quantity Surveyor's or Architect's Certificate certifying that the defects complained of have been made good as aforesaid such Certificate shall be final and binding on the parties hereto and all liability of the Vendor in respect of the construction of the Shop shall cease after the expiration of the said six (6) calendar months."

[34] Clause 14 (iii) reads:

> "Upon the Vendor obtaining certificates of practical completion of all Shops in the Complex and the attendant communal amenities issued by the Architect or Quantity Surveyor, the Vendor shall be deemed for the purposes of this Agreement fully and faithfully to have performed and satisfied the covenant in Clause 12 (i) hereof and subject to Clause 13 hereof all

> liability of the Vendor in respect of the construction of the Complex whether express or implied shall thenceforth cease and determine."

[35] Clause 14 (vi) reads:

> "Any notice required to be given or served upon either of the parties hereto shall be deemed to be sufficiently given to and effectually served upon the Purchaser if addressed to him at his address hereinbefore mentioned or his last known address in Jamaica and posted by prepaid registered post at any Post Office and upon the Vendor if addressed to the Vendor at its address aforementioned and posted by prepaid registered post at any Post Office in Jamaica. A notice shall be deemed to be served seventy two (72) hours after the time of posting."

[36] McNaughton's claim was founded on a breach of her contract with the appellant, or alternatively in negligence. The appellant entered into an agreement with McNaughton to sell her the shop while it was under construction. She was advised that the shop was ready for possession but refused to take possession due to cracks in the walls. Mr Glanville having assured her that he would carry out the requisite repairs, she entered into possession in July 1989. In or about October or November of the same year, the cracks reappeared. She again informed Mr Glanville about them at which time he told her that the defects were due to the expansion joint and promised to carry out the necessary repairs. There was cogent as well as overwhelming evidence that the problems experienced by McNaughton originated from a defective expansion joint and the

cracks appearing on the building were due to the expansion joint being improperly rendered or cladded with cement mortar.

[37] The appellant acknowledged that a final certificate of practical completion was issued by the architect. In light of clauses 12(1) and 14(iii) of the contract, upon delivery of the shop, McNaughton would have been led to believe that, save and except for minor alterations, it was fit for the purpose for which it was purchased. It transpired that was not to be so. There can be little doubt that the property could have been utilized for the purpose for which it was intended. The appellant would have been aware of this and was clearly in breach of clause 14.

[38] Although there was sufficient evidence to show that the appellant was in breach of clause 14, a further question is whether McNaughton's failure to give written notice of the defects to the appellant, in accordance with clause 13 of the agreement for sale, was fatal to her claim. This, in our opinion, is the real issue. As can be readily observed, clause 13 of the agreement for sale expressly specifies that any defects arising within six months subsequent to the date of issue of the final certificate of the quantity surveyor or the architect must be communicated to the appellant in writing. A written notice from McNaughton concerning the defects was not submitted within the prescribed period but would her failure to issue the requisite notice preclude her from succeeding on her claim?

[39] The answer lies in whether the conduct of the appellant, after receiving the reports of the defects, would amount to a waiver. Mr Frankson referred us to Halsbury's Laws of England (3rd Edition) Volume 14 in which the learned authors in treating with the question of waiver at page 637 state that:

> "Waiver is the abandonment of a right, and is either express or implied from conduct. A person who is entitled to the benefit of a stipulation in a contract or of a statutory provision may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted upon it is sufficient consideration. Where the waiver is not express, it may be implied from conduct which is inconsistent with the continuance of the right…"

[40] In the case of **Selwyn v Garfit** at page 284, Bowen LJ in dealing with the effect of a waiver said, "waiver is consent to dispense with the notice". It cannot be denied that the appellant had a right to written notice from McNaughton. The question however, is whether the appellant had impliedly, by its conduct, waived its right to the notice. McNaughton orally notified the appellant of the defects. Mr Glanville inspected the property and promised to carry out the repairs. Relying on the promise McNaughton went into occupation of the shop. The defects manifested themselves yet on another occasion. The appellant again promised to rectify them. McNaughton would have been induced by the appellant's conduct and would have a right to believe that it would dispense with a written notice and therefore would not have enforced its right to the notice. We are in agreement with Mr Frankson that the appellant is deemed

to have waived its right to a written notice as required by clause 13 of the agreement for sale. Clearly, the appellant cannot now assert that McNaughton cannot pursue her claim because she had failed to comply with the said covenant. The learned trial judge was without doubt correct in ascribing liability to the appellant.

[41] We will now turn our attention to the remaining issues relating to the engineer and the contractor. The learned trial judge examined clauses 1, 2, 3, 6, 15, 30(7) and 30(8) of the building contract and analyzed the evidence. Thereafter, he said:

> "At the fulcrum of these proceedings is the efficacy of an expansion-joint of the building revealing cracks, which caused seepage of water into the Claimant's [McNaughton's] shop. The PCC is a reinforced concrete-frame building of length approximately 320 feet and elevated two storeys, progressively to three, varying in width of 52 feet at the eastern end to approximately 110 feet at the western end . The transverse concrete frame occurs at 16 feet on centre in two bays.
>
> Because of the length of the PCC it was necessary to provide an expansion-joint in the vicinity of Gridline 15, adjacent to the eastern end at shops Nos 11 and 50 and at a corresponding location vis-a-vis two other shops in the northern bay. The expansion joint would traverse the building vertically through roof and floor, engaging slab and column down to foundation. Its purpose was to allow for differential movement of the building caused by ambient temperature changes."

[42] He went on to make reference to a report from Conrad Douglas and Associates Ltd which was obtained by Mr Glanville. The report identified cracks

in the roof, slab soffits, the floor, slab and the walls at the front and rear of the shops. The report states that the cracks which appeared at the expansion joint were clearly due to the rendering or cladding with cement mortar across the expansion joint.

[43] The learned trial judge then proceeded to address the testimony of the engineer, Mr Douet, with respect to the issue of the expansion joint, observing that Mr Douet strongly defended the integrity of the structural drawings which he had supplied to the architect. He went on to say that Mr Douet conceded that "but for the rendering over, there had been compliance by the contractor with the drawings". Against this background, the learned trial judge concluded that:

> "Whatever the merits, all told, the final Certification (sic) of Practical Completion of the Architect, unchallenged through the vehicle of Article 30(8), supra, puts paid to any suggestion of redress to the Defendant enuring in Contract."

[44] We will now make reference to such clauses in the building contract as are relevant to the appeal. They are clauses 1, 2, 3, 6, 15, 18(2), 30(7) and 30 (8). Clause 1(1) places an obligation on the contractor to carry out the work shown upon the contract drawings and in the contract bills in accordance with the directions and reasonable satisfaction of the architect. It reads:

> "1 (1) The Contractor shall upon and subject to these Conditions carry out and complete the Works shown upon the Contract Drawings and described by or referred to in the Contract Bills and in these Conditions in every respect in accordance with the

directions and to the reasonable satisfaction of the Architect."

[45] Clause 2 mandates the contractor to comply with the architect's instructions and imposes sanctions for non-compliance.

[46] Clause 3 speaks to the significance of the contract drawings. It states:

"3 (1) The Contract Drawings and the Contract Bills shall remain in the custody of the Architect or of the Quantity Surveyor so as to be available at al (sic) reasonable times for the inspection of the Employer or of the Contractor.

(2) Immediately after the execution of this Contract the Architect, without charge to the Contractor, shall furnish him (unless he shall have been previously furnished) with -

(a) one copy certified on behalf of the Employer of the Articles of Agreement and of these Conditions,

(b) two copies of the Contract Drawings, and

(c) two copies of the unpriced Bills of Quantities and (if requested by the Contractor) one copy of the Contract Bills.

(3) As soon as is possible after the execution of this Contract the Architect without charge to the Contractor, shall furnish him (unless he shall have been previously furnished) with two copies of the specification, descriptive schedules or other like document necessary for use in carrying out the Works. Provided that nothing contained in the said specification, descriptive schedules or other documents shall impose any obligation beyond those imposed by the Contract documents, namely, by the Contract Drawings, the Contract Bills, the Articles of Agreement and these Conditions.

(4) …"

[47] Clause 6 prohibits any departure from the prescribed standard of workmanship and materials without the prior agreement of the architect. It reads:

> "(1) All materials, goods and workmanship shall so far as procurable be of the respective kinds and standards described in the Contract Bills. No substitution of materials or goods or alteration in the standards of workmanship to be used in the Works shall be made without the prior written agreement of the Architect.
>
> (2) The Contractor shall upon the request of the Architect furnish him with vouchers to prove that the materials and goods comply with sub-clause (1) of the Condition.
>
> (3) The Architect may issue instructions requiring the Contractor to open up for inspection any work covered up or to arrange or carry out any test of any materials or goods (whether or not already incorporated in the Works) or of any executed work, and the cost of such opening up or testing (to-gether with the cost of making good in consequence thereof) shall be added to the Contract Sum unless provided for in the Contract Bill or unless the inspection or test shows that the work, materials or goods are not in accordance with the Contract.
>
> (4) The Architect may issue instructions in regard to the removal from the site of any work, materials or goods which are not in accordance with this Contract.
>
> (5) The Architect may (but not unreasonably or vexatiously) issue instructions requiring the dismissal from the Works of any persons employed thereon."

[48] Clause 15(1) and (2) empowers the architect to issue a certificate of practical completion when he considers that the works are satisfactorily completed to be utilized for the purpose for which they were designed. It provides as follows:

> "15 (1) Unless the parties shall have otherwise agreed, Practical Completion shall be when in the opinion of the Architect the works shall be completed sufficiently to enable the Employer to utilize the Works for the purpose for which they were designed.
>
> (2) 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 the purposes of this Contract to have taken place on the day named in such certificate."

[49] Clause 18(2) states:

> "1 …
>
> 2. Except for such loss or damage as is at the risk of the Employer under clause 20(B) or clause 20(c) of these Conditions (if applicable) the Contractor shall be liable for, and shall indemnify the Employer against, any expense, liability, loss, claim or proceedings in respect of any injury or damage whatsoever to any property real or personal in so far as such injury or damage arises out of or in the course of or by reason of the carrying out of the Works, and provided always that the same is due to any negligence, omission or default of the Contractor, his servants or agents or of any sub-contractor, his servants or agents."

[50] Clause 30(7) authorizes the architect to issue a final certificate of completion. It states:

> "Upon completion of making good [by the Contractor] defects under clause 15 of these conditions or from receipt by the Architect of the documents referred to in paragraph (a) of sub-clause (6) of this Condition, whichever is the latest, the Architect shall issue the Final Certificate. The Final Certificate shall state:
>
> (a) The sum of the amount paid to the Contractor under Interim Certificate and the amount named in the said appendix as Limit of Retention Fund, and
>
> (b) The Contract Sum adjusted as necessary in accordance with the terms of these Conditions, and the difference (if any) between the two sums shall be expressed in the said certificate as a balance due to the Contractor from the Employer or to the Employer from the Contractor and the said balance shall be honoured within the period stated in the appendix from the presentation of the Certificate. Interest shall be paid on overdue amounts at the rate stated in the appendix."

[51] Clause 30(8) makes the issuing of the final certificate conclusive evidence in any proceedings originating from the contract. The clause reads:

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

> or fraudulent concealment relating to the Works, or any part thereof, or to any matter dealt with in the said certificate."

[52] It is common ground that a certificate of practical completion was issued by the architect on 8 February 1990. This certificate comprised specifications and calculations compiled to authorize the disbursement of sums from the Retention Fund.

[53] We will now address the issues so far as they affect the engineer. The learned trial judge made no findings of fact or law as to the liability or otherwise of the engineer to indemnify the appellant. It appears to us that the judge's failure to consider the engineer's liability to indemnify the appellant is based on his view that the appellant is barred from bringing any action by virtue of clause 30(8) of the building contract. But, importantly, the engineer was never a party to that contract. That contract was between the appellant and the contractor. However, the architect and the engineer were employed by the appellant and a separate contractual relationship would have arisen between the architect, the engineer and the appellant. The engineer prepared the relevant drawings for the construction of the building and the architect, pursuant to clause 30(7), issued a certificate of final completion. In his defence, the engineer pleaded, in answer to the appellant's claim, that the negligence was caused or contributed by the contractor. The question which now arises is whether negligence can be ascribed to the engineer in designing the building.

[54] The learned trial judge, Mr Dunkley argued, in dealing with indemnity, did not state whether negligence was found. He contended that the learned trial judge focused on clauses 30(6), 30(7), 30(8) and 30(9) of the building contract, which he misconstrued, since, the certificate of practical completion is not conclusive as the certificate stands as a matter of fact and not a matter of law. The question, he submitted, is whether the certificate acts as a shield to negligence due to the acts and omissions of the engineer and the contractor.

[55] It was further contended by him that the learned trial judge erred in failing to find that the engineer failed to adequately design or detail the said construction or to prepare drawings or bills of quantities. The engineer, he argued, ought to have been made accountable to the appellant or to such third parties as would have been affected by any negligent act or omission on his part. He argued that the engineer's drawings failed, not only to provide for an expansion joint depicted at Detail A, to be placed on Gridline #15, but the drawings also failed to provide for the expansion joint in the vertical walls. He contended that the engineer is a professional and where professional persons are employed in providing services based on his skill and expertise, a duty of care is implicit in such a relationship. In these circumstances the failure to exercise due skill and care, he argued, will render the engineer liable in an action in tort for professional negligence.

[56] The failure in the drawings along with the engineer's failure to accurately detail the dimensions of the joint were, he argued, cumulatively fundamental errors and defects in the design. There was, he contended, expert evidence at the trial that the engineer's drawings were defective and did not properly provide for an expansion joint. In those circumstances, he submitted, the learned trial judge erred in failing to find that the engineer had breached his contract and that he clearly owed a duty of care to the appellant for the provision and design of drawings for an expansion joint suitable for the PCC. The appellant relied on his professional skill and expertise, and was exposed to liability due to his negligence, for which he ought to be indemnified, he argued. In support of these submissions, counsel referred us to, among other cases, ***Greaves & Co. v Baynham Meikle & Partners*** [1975] 1 WLR 1095.

[57] Mr Brooks, counsel for the engineer, submitted that there was no failure on the part of the engineer to adequately detail or design the construction, (including the foundation) or to prepare drawings or bills of quantities. In any case, he submitted, Mr Douet, as an engineer does not prepare "bills of quantities", that being the job of quantity surveyors. He further argued that if there was any such failure, it did not cause or contribute to the problems complained of by McNaughton, nor to the loss that gave rise to the claim.

[58] He further argued that it was established that one of the drawings was 'incomplete', as, on the face of it, the drawing did not show precisely where the

expansion joint was to be placed but in so far as there was any 'incompleteness' in any of the drawings, he argued, the evidence is that the professional team of the architect and the engineer were always available to give assistance by way of clarifying instructions. In the circumstances, he submitted, this court should disregard any attempt to suggest that there was any 'inadequacy' in the said plans and drawings that led to the problems complained of by McNaughton.

[59] It is perfectly true that the learned trial judge did not make a finding on the issue as to the appellant's claim against the engineer for negligence or breach of contract. But curiously, he ascribed liability to the appellant by finding in favour of the engineer. There is a line of cases which shows this court's reluctance to interfere with the finding of fact of a trial judge merely because it is of the view that if it had tried the case it would have come to a different view on the facts from that of the trial judge - see ***Watt v Thomas*** [1947] A.C. 484; ***Industrial Chemical Company (Jamaica) Limited v Ellis*** (1986) 35 WIR 303 and ***Union Bank of Jamaica Ltd v Dalton Yap*** (2002) 60 WIR 342. However, the court will, in an appropriate case, intervene where it is satisfied that the judge acted on a wrong principle of law or misapprehended the evidence or failed to take into account relevant matters - ***Davies v Powell Duffryn Associated Collieries Ltd*** [1942] AC 601; ***Hadmor Productions v Hamilton*** [1982] 1 All ER 1042.

[60] In our view, we find merit in Mr Dunkley's submissions that there is sufficient evidence to support the appellant's contention that the engineer failed to exercise reasonable care and skill in providing and designing the relevant drawings. In circumstances in which a professional person is employed to carry out work which is within his expertise, the law, by implication imposes a duty on him to employ reasonable care in the course of his employment. Significantly, such duty is imposed upon all professional persons who are required to perform services. In **Greaves & Co v Baynham Meikle & Partners**, at page 1101 Lord Denning M.R had this to say:

> "…It seems to me that in the ordinary employment of a professional man, whether it is a medical man, a lawyer, or an accountant, an architect or an engineer, his duty is to use reasonable skill and care in the course of his employment. The extent of this duty was described by McNair J. in *Bolam v. Friern Hospital Management Committee* [1957] 1 W.L.R. 582, 586, approved by the Privy Council in *Chin Keow v. Government of Malaysia* [1967] 1 W.L.R. 813, 816:
>
> "… where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."

[61] There is evidence that the structural drawing did not indicate where the expansion joint was to be placed on the gridline 15. At least two of the expert witnesses testified that the failure to provide for the expansion in the vertical walls caused or contributed to the restriction at the expansion joint and the subsequent cracking and spalling. The engineer admitted in cross examination that he was retained by the appellant for his experience and that the appellant placed reliance on him in approving the drawings. Any defects arising from the error of the engineer would have been within his knowledge as a professional and experienced engineer. The appellant relied on his expertise. He therefore was expected to have deployed the requisite skill and care in executing his duty in preparation of the drawings. He clearly failed to carry out his task diligently as would have been expected of him as a professional.

[62] The engineer having not performed his duty in the manner in which he is expected, some liability must be ascribed to him. In our view, the learned trial judge erred in that he failed to expressly find that the engineer did not take reasonable care in observing his obligations to the appellant and was thus liable. Accordingly, the engineer ought to indemnify the appellant against McNaughton's claim.

[63] We now move to the issues as they affect the contractor. Mr Dunkley submitted that the learned trial judge misconstrued clause 30(8) of the contract as the contractor was not only in breach of its contractual obligations thereunder

but also of its duty of care owed to the appellant in tort. He argued that the contractor constructed the building according to the directions given to it by the architect and relied on the certificate of practical completion and the final certificate issued by him [the architect] to absolve itself totally from liability. By accepting this defence, the learned trial judge fell into error, he argued.

[64] The evidence, he further argued, is that there was a contract between the appellant and the contractor and that there was no dispute between these parties that it was an expressed or implied term in the JCC Conditions of Contract that the PCC would be built in a workmanlike manner as per the contract documents and that the contractor warranted that the building would be fit for its purpose. Counsel also submitted that the contractor, in its evidence, did not deny that problems existed at shop #50 and that the evidence was that the contractor constructed an expansion joint without providing for it in the vertical walls which was subsequently rendered over.

[65] He also submitted that the experts who spoke to the defects in the construction, all, save for one, have stated clearly and unequivocally that an expansion joint is never to be rendered over, and it was this rendering over that had caused and/or contributed to the cracking and spalling at the joint. As a consequence, he argued, the contractor was liable for breach of its warranty to construct a plaza fit for the purposes for which it was required and as such, the

appellant was entitled to be indemnified in respect of any liability, costs and expenses to McNaughton flowing from such breach.

[66] In the alternative, Mr Dunkley prayed in aid, the provisions of clause 18(2) of the contract, which, he contended, would make the contractor liable to indemnify the appellant against any expense, liability, loss, claim or proceedings in respect of any damage to any property.

[67] In dealing with the issue as to the indemnification of the appellant, by the contractor, the learned trial judge found "guidance" and "support" in the advice of the Judicial Committee of the Privy Council in ***Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd & Others*** [1985] 2 All ER 947, cited by Miss Phillips, QC where Lord Scarman in giving the opinion of the Board said at page 957:

> "Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship…
>
> [It is correct] in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis …
>
> [nor do] their Lordships accept that the parties' mutual obligations in tort can be any greater than those to be found expressly or by necessary implication in their contract."

[68] The learned trial judge accepted a submission of Miss Phillips, relying on the case of ***Tai Hing Cotton Ltd v. Liu Chong Bank Ltd,*** that "once the

parties to a contract have fixed their rights, duties and obligations in contract, no duty can exist in excess of the contractual duty". He then concluded that:

> "By virtue of the architect's Certificate of Practical Completion, CDA [the contractor] must be deemed to have satisfied and discharged all its contractual obligations, hence there is no basis for compensation in tort or indemnity accruing to the Defendant as claimed, for problems at the Princeville Commercial Centre."

[69] Mr Dunkley, in contending that the learned trial judge was wrong in relying on the ***Tai Hing*** case, directed our attention to the later case of ***Henderson and Others v Merrett Syndicates Ltd and Others*** [1994] 3 All ER 506; [1995] 2 AC 145. He submitted that the issue as to whether a contractual duty and a duty in tort may exist concurrently was finally decided by the House of Lords in ***Henderson***, where Lord Goff, after a full analysis of the English and Commonwealth authorities, rejected the view that the existence of a contractual duty excluded any parallel duty in tort between the same parties. In his conclusion at pages 194-195, his Lordship states:

> "… the common law is not antipathetic to concurrent liability, and that there is no sound basis for a rule which automatically restricts the claimant to either a tortious or a contractual remedy. The result may be untidy; but, given that the tortious duty is imposed by the general law, and the contractual duty is attributable to the will of the parties, I do not find it objectionable that the claimant may be entitled to take advantage of the remedy which is most advantageous to him, subject only to ascertaining whether the tortious duty is so inconsistent with the applicable contract that, in accordance with the ordinary principle, the parties must be taken to have

> agreed that the tortious remedy is to be limited or excluded."

[70] In that case it was held on appeal:

> "that a duty of care was owed … in tort … and that the existence of such a duty of care was not excluded by virtue of the relevant contractual regime … and that the Names were free to pursue their remedy either in contract or in tort."

[71] Mr Dunkley also brought to our attention the case of ***Rowlands v Collow*** [1992] 1 NZLR 178, in which Thomas J found an engineer concurrently liable in contract and tort for the design of a driveway. Thomas J stated:

> "There is no doubt that the decisions and literature are overwhelmingly in favour of concurrent liability. I venture to suggest that this preponderance of support for concurrent liability reflects the merits of the competing arguments. The issue is now virtually incontestable; a person who has performed professional services may be held liable concurrently in contract and in negligence unless the terms of the contract preclude the tortious liability."

[72] He also referred us to Jackson & Powell on Professional Negligence 4th edition where at page 42 the learned authors stated that:

> "…the parties to a contract could, subject to statutory restrictions…, agree to exclude the tortious duties which they owe one another. But this would have to be agreed expressly and in clear terms. Such an exclusion could not be inferred from silence or from the mere fact that the contract rendered the tortious duties of little importance*."*

[73] Miss Phillips argued that on the evidence, it has been shown that no liability can be ascribed to the contractor, as, the contractor was instructed to construct a joint on grid line at the PCC and evidently it was constructed in accordance with these instructions and it had complied with all its obligation under the contract. The architect's certificate of practical completion having been issued in accordance with the contract documents, demonstrates that the building could be used for its intended purpose**,** she contended. Therefore, she argued, the contractor had discharged its obligations under and pursuant to the conditions of contract.

[74] It was also her submission, that the unchallenged evidence of Mr Williams is that if any work done on the project was not in accordance with the contract documents or in compliance with the instructions of the architect, the architect would instruct the contractor to rectify the same and if there was a failure to rectify the works to accord with the contract documents and/or the architect's instructions, the contractor could be met with sanctions pursuant to clauses 2 and/or 25 of the contract. Similarly, she submitted, the architect could refuse to certify a valuation for payment until there was rectification of the building works.

[75] It was her further submission that based on the wording of clause 30(8), the issuance of the final certificate by the architect and the receipt of the same by the contractor completely and totally exonerates it from liability in "any proceedings" relating to the construction of the PCC. She contended that it is

clear from the wording of the clause that the final certificate, once issued by the architect, is decisive of all issues between the contractor and the appellant arising out of the contract. She also submitted that the authorities clearly establish that where a developer and a contractor specify in their contract that the final certificate issued by the architect is to be conclusive evidence in all proceedings arising out of the contract, for the reason that the works have been satisfactorily performed, the court is obliged to find for the contractor in any proceedings brought by the developer with regard to any matter concerning or arising out of the works undertaken by the contractor. She referred us to ***Kaye Ltd v Hosier & Dickinson Ltd*** [1972] 1 WLR 146.

[76] Miss Phillips acknowledged that although a final certificate may be decisive in a party bringing proceedings, this, however, does not oust the jurisdiction of the court to entertain proceedings arising out of a final certificate. In support of this, she referred us to Halsbury's Laws of England, 4th Edition, Volume 4, paragraphs 1197 & 1209 and ***Beauford Developments (NI) Ltd v Gilbert - Ash (NI) Ltd & Others*** [1998] 2 All ER 778; [118] UKHL 19.

[77] It is perfectly true, as submitted by Mr Dunkley, that the mere existence of a contract between parties will not exclude tortious liability. Contractual and tortious liability may co-exist as shown in the ***Henderson*** case and ***Rowlands v Collow.*** It is also clear, that although an arbitration clause, conferring the right of adjudication on arbitrators in an agreement between contracting parties,

exists, this, in itself, does not bar the court from considering any issue arising on the contract**.** In ***Beauford*** the court held that where a contract expressly confers upon arbitrators the right to rectify a contract, this does not mean that the court is implicitly deprived of the power to rectify the contract.

[78] In Halsbury's Laws of England, 4th Edition, Volume 4, paragraph 1209 the learned authors in dealing with the effect of a final certificate states:

> "Except in cases where there is an arbitration clause entitling an arbitrator to review the decisions of the architect as to the amount due or as to whether the works are in accordance with the contract, or where the architect is disqualified from certifying or where the certificate may otherwise be dispensed with the final certificate will be conclusive. Thus, where a final certificate states an amount as due to the contractor which includes sums in respect of additional work which is not ordered in writing, the employer cannot resist payment in respect of the extra work. Even where the arbitrator is given power to review certificates in general, the final certificate may be expressly rendered conclusive in some respects."

[79] A final certificate may be binding, and, depending on the terms of the contract, may also be conclusive, otherwise than where there is fraud. Despite this, the binding effect of a final certificate may, subject to the express terms of the contract, be open to review by the court. Whether a final certificate is conclusive is a question of the construction of the particular terms of the contract. In ***Kaye Ltd v Hosier & Dickinson Ltd*** clause 35 of a building contract made provision for disputes to be referred to arbitration. Under clause 37 it was provided that unless arbitration had been requested within specified

times before and after the architect's final certificate is issued, the certificate "shall be conclusive evidence arising out of this contract (whether by arbitration under clause 35 or of these conditions or otherwise) that the works have been properly carried out …" It was held, by a majority, that the words "conclusive evidence in any proceedings arising out of this contract" extended to proceedings previously commenced and were not restricted to proceedings begun subsequent to the date of the final certificate and that a final certificate of an architect was conclusive evidence as to the satisfactory performance of the work which had been carried out and effectively barred an employer from maintaining a claim that the works were defective.

[80] The drawings and specification clause 30(5)(c) speak to the architect issuing a final certificate for the release of the retained fund. On 11 January, 1990, the certificate of practical completion was issued. Clause 30(8) makes the contractual relationship between the appellant and the contractor conclusive unless a request has been made for the appointment of an arbitrator. No request for arbitral proceedings was made. The certificate of practical completion issued under clause 15 clearly demonstrates that the architect had certified that the works had been satisfactorily completed. Significantly, there is no evidence that the contractor deviated from the drawings and specifications for the building or that he altered or modified the directions or instructions of the architect, which obviously would make him liable not only in contract but also in tort.

[81] We agree with Miss Phillips that the case of ***Henderson*** on which the appellant relied, does not enlarge the contractual responsibilities of the parties. Indeed, it recognizes that if the tortious remedies are so inconsistent with the applicable contract then the tortious remedies could be taken to be limited and or excluded by the contract. We are in agreement with Miss Phillips that the learned trial judge having properly found that the relationship between the appellant and the contractor was circumscribed by the contract, the learned trial judge properly found as a matter of both law and fact that the appellant could not extend any liability found against it in favour of McNaughton to the contractor.

[82] We now turn to the question as to whether or not clause 30(8) exonerates the contractor from liability in tort. Having considered the submissions made by counsel for the appellant and the contractor, it seems clear to us that the law on this issue was settled when their Lordships, in the case of ***Henderson,*** rejected the view that the existence of a contractual duty excluded any parallel duty in tort between the same parties.

[83] The next question then is whether in light of clause 18(2), the contractor owed the appellant a duty of care in tort. Miss Phillips argued that the problems experienced at the location of the joint on grid line 15 at the PCC are as a result of faulty structural engineering design of the expansion joint by the architect and/or the engineer and therefore it is the responsibility of those parties and, as

those parties were the agents of the appellant, the appellant is equally liable. Mr Douet, the structural engineer on the project, among other witnesses, gave evidence at the trial that the contractor had "substantially" complied with his structural drawings and that the only deviation that was seen at the PCC related to the rendering across the joint.

[84] Mr Williams testified that no instructions were received from the architect or anyone throughout the currency of the project to demolish or rectify any part of the building works nor was any request for payment in accordance with a valuation for payment refused by the architect on the basis of the failure by the contractor to construct the works in accordance with the contract documents and/or the architect instructions.

[85] In our judgment, clause 18(2) which provides for the contractor indemnifying the appellant against damage to any real or personal property arising out of or in the course of its work due to negligence, or omission on its part, does not assist the appellant. There was overwhelming evidence from various experts that the root of the problem was as a result of the defective expansion joint caused by the failure of the architect and the engineer to properly supervise the work. The obligation of the contractor by virtue of clause 1 of the building contract was to execute the work in accordance with the drawings and directions of the architect and to his satisfaction.

[86] Clause 3(3) imposes no other obligation on the contractor after the issuance of the certificate of practical completion. The condition laid down in that clause shows that once the architect is satisfied that the works have been satisfactorily done and issues his certificate, this would exclude the contractor from all liabilities touching the work. Mr Williams said that corrections to which his attention was directed, were carried out on 8 February 1990. Since then, there has been no request to remedy any further defect. Clearly, the final certificate once issued rendered all obligations on the part of the contractor redundant.

[87] The evidence is that the contractor followed the instructions and directions of the architect and the engineer. If the contractor desired to deviate from the instructions it was obliged to submit a request in writing. There is nothing to show that the contractor sought by a written request permission to diverge from the instructions to render the expansion joint in the manner in which it had been done and that either the architect or the engineer rejected the request. The evidence indicates otherwise. It was the duty and responsibility of the architect and the engineer in their supervisory role to have ensured that the works had been correctly carried out. No liability in negligence ought to be assigned to the contractor.

[88] Mr Dunkley submitted that the engineer's claim against the contractor is an expanded defence and not an action as he brought it in the event of a finding

against him. This submission is without merit. The rendering across of the expansion joint was done by the contractor, on the instruction of the engineer and/or the architect. The learned trial judge correctly found the engineer liable to the contractor. This is clearly based on his acceptance of the contractor's evidence that it was carrying out the instructions of the engineer.

Conclusion

[89] The appellant is doubtlessly liable to McNaughton. We are of the view that the contractor did not owe a duty of care to the appellant. However, the engineer owed a duty of care to the appellant and is liable to indemnify it.

[90] The appeal against McNaughton and the contractor is dismissed. The appeal is allowed against the engineer. The appellant is entitled to be indemnified by the engineer. The appellant should pay the costs of McNaughton and the contractor in this court and in the court below. The engineer should pay the costs of the appellant in this court and in the court below.

DUKHARAN JA

[91] I too agree with the reasoning and conclusion of Harris JA.

PANTON P

ORDER

It is ordered as follows:

1. The appeal against the respondent Beverly McNaughton is dismissed with costs against the appellant both here and in the court below to be agreed or taxed;

2. The appeal against the 5th party/respondent Construction Developers Associates Ltd. is dismissed with costs against the appellant both here and in the court below to be agreed or taxed;

3. The appeal against the 4th party/respondent Louis Douet is allowed with costs to the appellant to be agreed or taxed;

4. The appellant is to be indemnified by the 4th party/respondent Louis Douet; and

5. The 4th party/respondent Louis Douet is to pay the costs of the appellant both here and in the court below.