IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2020

CORAM: BAFFOE-BONNIE, JSC (PRESIDING)
PWAMANG, JSC
MARFUL-SAU, JSC
DORDZIE (MRS), JSC
KOTEY, JSC

CIVIL APPEAL
NO. J4/31/2019

18TH MARCH, 2020

ENVIRONMENTAL DEVELOPMENT GROUP LIMITED ……. PLAINTIFF/RESPONDENT/ RESPONDENT

VRS

1. PROVIDENT INSURANCE CO. LTD. …. 1ST DEFENDANT/RESPONDENT/RESPONDENT

2. ATTORNEY GENERAL … 2ND DEFENDANT

3. GHANA EDUCATION TRUST FUND ….. 3RD DEFENDANT/APPELLANT/APPELLANT

JUDGMENT

PWAMANG, JSC:-

My Lords, this case comes before us as the final appellate court of the Republic. The case stems from an agreement made on 26th June, 2003 by which the plaintiff/respondent/respondent (the plaintiff) undertook to build two hostels at Tamale Polytechnic for the 3rd defendant/appellant/appellant (3rd defendant). The plaintiff is a building contractor and the 3rd defendant is an agency of the Government of Ghana in

charge of providing facilities for educational institutions among other functions. The agreement was comprehensive and spelt out the rights, duties and obligations of all the parties and stated what should happen in the event of, practically, all the known contingencies in construction projects. The agreement provided for a dispute resolution mechanism for industry experts to arbitrate any dispute that may arise. Despite all this, the parties ended up in court and the case has taken fifteen years to be brought to closure.

The facts of the case are largely documentary and its resolution ought to have consisted in applying the detailed provisions of the agreement to the facts and arriving at a decision which, in our opinion, should have taken far less judicial time than happened in this case. Also, if the alternative dispute resolution mechanism provided for in the agreement had been applied, the controversies regarding the technical aspects of the case would have been resolved by building industry experts so that any outstanding issues of pure law could then have been brought to the courts for determination. However, for reasons that do not concern us in this appeal, the court refused to grant an application for reference of the case for arbitration. But it ought to be stated, that from the record, a considerable amount of the time was used up by the parties to attempt settlement and for valuation of the works executed before the dispute arose.

My Lords, in the agreement, the cost of building the two hostels in today's Ghana Cedis is GHS1,388,763.80 (Thirteen Billion, Eight Hundred and Eighty Seven Million, Six Hundred and Thirty Seven Thousand, Nine Hundred and Fifty Eight Cedis, Fifty Two Pesewas at the time). The contract period was fixed at eighteen months within which the plaintiff was to practically complete and hand over the works as set out in detailed drawings. There was however a provision for extension of time to be granted to the plaintiff if certain stated conditions outside the control of the plaintiff occurred and caused delay in completion within the contract period. It was provided in the agreement that if the plaintiff shall fail to complete and hand over the works within the 18 months, which was stated to end on 29th December, 2004, or within such extended time granted pursuant to the provisions of the contract, plaintiff was liable to pay liquidated and

ascertained damages. The agreement provided a formula for calculating those damages.

The 3rd defendant paid to the plaintiff an advance fee of GHS180,000.00 for it to mobilise and commence the works. By the terms of the agreement, the plaintiff was required to provide guarantees in respect of the advance fee and the liquidated and ascertained damages so it got the 1st defendant/respondent/respondent (1st defendant) to issue guarantee bonds to that effect. The bond for the liquidated and ascertained damages is in the sum of GHS416,800.00. It meant that if the plaintiff failed to utilise the advance fee for the works, or if it became liable to pay the liquidated and ascertained damages, then 3rd defendant could request the 1st defendant to pay on the bonds. In accordance with the terms of the agreement, the 3rd defendant appointed a consortium of consultants as the Contract Administrator to represent it in all dealings with the plaintiff as far as the contract was concerned.

My Lords, it bears noting that the above provisions in the agreement of the parties are normal terms of modern construction contracts. In this case, the plaintiff was unable to complete the works within the contract period so it wrote a letter dated 13th December, 2004 to the Contract Administrator applying for extension by six additional months in order to complete. At the time of applying for the extension, the project was clearly far behind schedule with the plaintiff putting most of the blame on the Contract Administrator who in turn accused the plaintiff as being the cause of the delay. The plaintiff alleged that the Contract Administrator and the 3rd defendant breached a number of terms in the agreement and that those breaches in addition to inclement weather were the cause of the delay. The Contract Administrator on the other hand argued that the delay was because the plaintiff failed to undertake the works with due diligence for which they had written several letters to it and even threatened to determine the agreement at some point.

Notwithstanding these complaints, when the plaintiff applied for the extension, the Contract Administrator was prepared to consider it, so they requested plaintiff to

present a programme for completion of the remaining works. This the plaintiff provided and there was a meeting on 23rd December, 2004 which did an overview of the project and discussed the plaintiff's programme for completion. In a written report on what transpired at that meeting, this is what the Contract Administrator stated with regard to plaintiff's request for extension;

"The Contract Administrator informed members that he would accept the contractor's new programme as it is and communicate any findings to the contractor later. He went on to say that a letter would be written to that effect."

The Contract Administrator did not write to the contractor before the end of the contract period, which is 29th December, 2004. However, on 5th January, 2005 they wrote to the plaintiff stating that it had by then completed only 15% of the works so the six months extension requested for completion was not realistic and plaintiff needed to justify it. The letter concluded as follows;

"As activities on the site indicate you have failed to execute the works with reasonable diligence and in fact there has been no work on the site since 23rd November, 2004."

The above letter did not directly state whether the request for extension was granted or rejected so the plaintiff continued to stay away from the site. On 27th January, 2005 it wrote again to the Contract Administrator for a definitive extension of the contract but there was no response.

Then by a letter dated 8th April, 2005 the 3rd defendant wrote to determine the contract with effect from 18th April, 2005 pursuant to Clause 20(b) of the agreement. The reasons stated for the determination include plaintiff's failure to return to the site to continue with the project after the meeting of 23rd December, 2004 and its failure, generally, to execute the works with reasonable diligence despite nine letters written to it earlier. By a copy of the termination letter, the 1st defendant was requested to pay to

the 3rd defendant the sums guaranteed under the advance fee and performance bonds.

The plaintiff's reaction was to file the present case in the Commercial Division of High Court, Accra on 11th May, 2005. In its amended writ of summons the plaintiff claims the following reliefs;

a. An order of perpetual injunction restraining the 1st Defendant from paying up on the Advance Payment Guarantee and the Performance Bond issued as securities for the GET Fund Hostels project in Tamale Polytechnic.

b. A declaration that termination of the contract is unlawful and breach of contract on the part of the Client and occasioned by breaches of professional duty by the Consultant.

c. A declaration that the contractor was frustrated in its ability to complete the contract on time owing to the breaches of contract and duty by the client and its consultant and by natural and elemental factors.

d. Damages, including special damages in the sum of ¢3,970,071,624.64 and costs of this action.

e. An order compelling the Parties to submit the dispute raised in this action to an Arbitrator for settlement in accordance with section 32 of the Main Contract.

At paragraph 29 of the amended statement of claim the plaintiff pleaded the following as special damages;

Particulars of Special Damages

a. The Value of Works done as at April, 2005 -¢839,608,624.64

b. 30% interest on the said amount from September 2004 to April 2006-¢630,463,000.00

c. Compound interest of 40% per anum from August 2004 to April 2006 on the short term Loan of ¢390,000,000.00 granted by CDH Finance Holding Ltd when the cash flow problem arose. This was guaranteed by GETFund And Provident Insurance Company Limited. ¢480,000,000.00

d. Value of outstanding works for entire contract of ¢14,000,000,000.00, out of which the Plaintiff was entitled to 15% amounting to ¢1,750,000,000.00

e. 5% of profit for attendance for value of works
for sub-contractors and nominated suppliers in the sum of ¢320,000,000.00

It added the Attorney-General as 2nd defendant but the office did not actively participate in the proceedings. The 1st defendant filed a defence, which substantially supported the case of the plaintiff, and denied liability to pay on the bonds contending, that midstream in the project, the 3rd defendant entered into a Supplementary Agreement with the plaintiff so the guarantee was no longer binding on it. It also associated itself with the case of the plaintiff that the employer was responsible for the delay in completing the works so it was not entitled to liquidated and ascertained damages. The 3rd defendant filed a defence maintaining that the determination of the agreement was in accordance with Clause 20(b) of the agreement so it was lawful. It counterclaimed for payment by plaintiff of the amount it would cost to complete the project. In fact, by the time the trial commenced in the High Court, the 3rd defendant had re-awarded the works to two other contractors to complete.

The High Court and the Court of Appeal found for the plaintiff, declared the termination of the contract by the 3rd defendant as unlawful and granted all the damages including special damages claimed by the plaintiff in the sum of GHS397,007.63. Being aggrieved, the 3rd defendant has filed this appeal.

An appeal is a rehearing, so we are required to rehear the case and determine if the findings in the judgment of the Court of Appeal are supported by the evidence on the record and further, if the court correctly applied the relevant law to the evidence in

arriving at its conclusions in the case. See the case of **Kolex Ltd (No.2) v Field [2000] SCGLR 175.**

As pointed out earlier in the judgment, there is very little dispute as to the essential facts of the case which are largely documentary and the rights and obligations of the parties are expressly set out in the written agreement. But, a matter of grave concern to us is, that both the High Court and the Court of Appeal approached the case without considering some important legal questions that arise on the pleadings and evidence but which are relevant for a correct determination of the case in accordance with law. At the pre-trial conference in the Commercial Court, after settlement failed, the parties set down fourteen issues for trial with the main issue being whether the termination of the agreement by 3rd defendant is lawful. However, the agreement in question contained a time limitation which expired before the purported termination and appears not to have been extended as provided in the agreement. So, the foremost legal question is whether, as at 8th April, 2005 when the 3rd defendant purported to determine the agreement under Clause 20(b), the agreement between the parties was still binding on them? This question escaped the High Court and the Court of Appeal but it ought not to have.

In the case of **Fattal v Wolley [2013-2014] 2SCGLR 1070 at page 1076** Georgina Wood, C J said as follows;

"Admittedly, it is, indeed, sound basic learning that courts are not tired down to only the issues identified and agreed upon by the parties at pre-trial. Thus, if in the course of the hearing, an agreed issue is clearly found to be irrelevant, moot, or even not germane to the action under trial, there is no duty cast upon the court to receive evidence and adjudicate upon it. The converse is equally true. If a crucial issue is left out, but emanates at the trial from the pleadings or the evidence, the court cannot refuse to address it on the ground that it is not included in the agreed issues."

The agreement was clear that unless the time was extended, the agreement will automatically determine on 29th December, 2004. The plaintiff's case at all material times is that the Contract Administrator failed to extend the contract and for that reason it did not return to the site. It argued that by industry practice, extension of contract period must be explicit. That is correct, because the time for completion was explicitly stated in the agreement so the extension which is provided for in the agreement ought to be explicit. In fact, the Contract Administrator at the meeting of 23rd December, 2004 promised to write to the plaintiff on their findings on the request for extension and when it wrote on 5th January, 2005 it, in effect, rejected plaintiff's request for six months extension. That notwithstanding, the 3rd defendant now argues, that by the statement of the Contract Administrator that they would accept the contractor's programme of completion and communicate in writing, the contractor should have taken that as the extension and returned to the site and resumed work. The question is; on what length of extension did they expect the contractor to be working if it went back to the site? This argument is untenable, because by their conduct they rejected the request for the six months extension before 8th April, 2005 when they purported to exercise a right under the agreement to determine it. In our opinion, the 3rd defendant failed to extend the contract so there was no agreement binding on the parties at the time it purported to act under Clause 20(b) to determine the agreement. The Court of Appeal faced a similar situation in the case of; **In Re Timber and Transport Kumasi-Krusevac Co. Ltd; Zastave v Bonsu & Anor [1981] GLR 256.** At page 262 of the Report Sowah JSC, delivering the unanimous judgment of the court said as follows;

"The crucial issue which in our view was avoided by the High Court is whether the agreement was still binding on the parties. On this issue, we are thrown back on first principles and particularly on the effect of breaches of an agreement by one or other of the parties. The principle which emerges from a long line of decisions is that where one party manifests a clear intention to be no longer bound by the terms of his contract or where he

openly repudiates it, the innocent party may treat the contract as at an end and seek such remedies as are open to him. Where the breach hits at the root or substance of the contract, in other words, where the breach is fundamental, the innocent party may accept the breach and treat it as absolving him from his own obligations under the contract. The question whether a breach is fundamental is, of course, for the court to determine: see Wallis, Son & Wells v. Pratt and Haynes [1910] 2 K.B. 1003, C.A.; Sweet & Maxwell Ltd. v. Universal News Services Ltd. [1964] 3 All E.R. 30 and Joseph v. Boakye [1977] 2 G.L.R. 392 at p. 402, C.A."

On the facts in this case, when the 3rd defendant failed to extend the agreement, the plaintiff refused to return to the site, meaning it considered the agreement at an end. The plaintiff considered itself discharged from its contractual obligations to continue the works. Therefore, the issue whether the 3rd defendant was justified in terminating the agreement is not the crucial issue in this case but rather, whether the 3rd defendant's refusal to extend the contract amounted to a breach of the agreement, and if it was, was it fundamental as to entitle the plaintiff to treat the agreement as discharged, as explained above by Sowah JSC?

In order to answer that question, we need to refer to the terms of the agreement on extension of time, which is Clause 19. It provides as follows;

"19. Delay and Extension of time

If in the opinion of the Contract Administrator the works be delayed:

(i) By force majeure, or

(ii) By reason of any exceptional inclement weather, or

(iii) By reason of loss or damage by any one or more of the contingencies referred to in Clause 16 of these conditions, or

(iv) By reason of civil commotion, local combination of workmen, strike or lockout affecting any of the trades employed upon or in connection with the works, or

(v) By reason of the Contract Administrator's Instructions given in pursuance of Clause 2 of these conditions (variations by the employer), or

(vi) Because the contractor has not received in due time necessary instructions from the contract Administrator for which he shall have specifically applied in writing, or

(vii) By delay on the part of nominated sub-contractors or nominated suppliers which the Contractor has in the opinion of the Contract Administrator all practicable steps to avoid or reduce, or

(viii) By delay on the part of other Contractors or tradesmen engaged by the Employer in executing work not forming part of this contract, or

(ix) By the Contractor's inability for reason beyond his control and which he could not reasonable have foreseen at the date of this Contract to secure such labour, goods or materials as are essential to the proper carrying out of the works;

then in any such case, the Contract Administrator shall make a fair and reasonable extension of time for completion of the works. Upon the happening of any such event causing delay the contractor shall immediately give notice thereof in writing to the CONTRACT Administrator, but he shall nevertheless use constantly his best endeavours to prevent delay and shall do all that may reasonably be required to the satisfaction of the contract Administrator to proceed with the works. Provided that the Contract Administrator shall not be bound to grant any such extension unless the contractor has within 28 days after the occurrence of any of the aforesaid matters given written notice to the contract Administrator of a claim for

extension of time with full and detailed particulars of the matters alleged to justify such a claim."

The clause gives a number of situations the presence of any one of which entitle the plaintiff, as of right, to extension of time for it states, that in those circumstances, **"the Contract Administrator *shall* (emphasis supplied) make a fair and reasonable extension of time for completion of the works."** The use of the word "shall", by **section 42 of the Interpretations Act, 2009, (Act 792)** connotes a mandatory requirement.

On the evidence, there was variation of drawings in relation to the foundation and starter columns of one of the hostels as a results of the discovery of clay deposits when the contractor started the excavation. The employer had the duty to have correctly tested the soil and making the appropriate drawings so it meant that was a failure on the part of the employer. From the evidence, when this was brought to the attention of the Contract Administrator, it took some time for new drawings to be provided to the contractor. This undoubtedly took part of the time plaintiff was to use to complete the works. This qualifies plaintiff to be given extension under Clause 19 (v) of the agreement.

Then, the Contract Administrator delayed in responding to the contractor's written request for instructions in respect of using high tensile rods. At page 367 of volume 3 of the record, there is a letter from the Contract Administrator giving instructions to the plaintiff with regard to high tensile rods. That letter was in response to a letter by plaintiff seeking instructions on that matter. The Plaintiff made the request in a letter dated December 2, 2003 but the directions are dated March 2, 2004, three months later. Additionally, the plaintiff experienced unforeseen challenges in respect of materials required for the works. The quarry at Pwalugu near Bolgatanga that had been earmarked to supply aggregate for the works broke down in the course of the construction, meaning they had to source for aggregate from a longer distance and that affected the time within which they could execute the works. There was also the issue

of unusually heavy rains between July and November that disrupted availability of sand and prevented them from working. These matters are contained in letters and reports that the plaintiff submitted to the Contract Administrator before the purported termination of the agreement and they are in evidence. The Contract Administrator acknowledged the challenges the plaintiff faced regarding materials in a report appearing at page 402 volume 3 of the record. It states as follows;

"Tamale Polytechnic. Material Supply.

This is the worst hit contractor in terms of materials procurement. Contractor is unable to get coarse aggregate, timber and iron rods to the site. So acute are these shortages that there has been no meaningful work on site since February 25th this year (2004)."

These without doubt affected the time within which the plaintiff had to execute the works and are covered by Clause 19 (vi) &(ix) of the agreement.

Clause 19 states that, "if in the opinion of the Contract Administrator", these events occurred, it shall grant the extension. Though, generally, the Contract Administrator is the agent of the employer, when considering the existence of factors that entitle the contractor to extension of contract time, she is required to act honestly and impartially. See the Australian case of **Peninsula Balmain v Abigroup Contractors [2002] NSWCA 211.** Consequently, the plaintiff is justified in saying that it was entitled to extension of time under the terms of the agreement.

But the 3rd defendant has countered by saying, that by the same Clause 19, the Contract Administrator was not bound to grant any extension unless the application for extension was made by the Contractor within 28 days of the occurrence of the matter forming the basis for the application. It has argued that all the issues relied upon by the plaintiff to request for the extension occurred more that 28 days before the application for extension of time. To our understanding, this proviso affords the Contract Administrator a ground to refuse to consider the application for extension on its merits.

In this case, the when the plaintiff applied for the extension, the Contract Administrator did not exercise that right of rejection but actually accepted the request and considered it on the merits. In those circumstances, they are deemed to have waived the time provision and cannot now rely on the proviso in their defence. In one breath, the 3rd defendant has argued that it in deed granted the extension so it lies ill in its mouth to turn round and rely on the proviso. See the case of **Gaymark Investments Pvt Ltd v Walter Construction Group [1999] NTSC 143.**

Therefore, in our view, the Contract Administrator breached Clause 19 of the agreement when they failed to grant plaintiff a reasonable extension of time to complete the works. What we understand by reasonable extension is, that the Contract Administrator ought to have considered all the matters that constituted excusable delay and estimated how much time was lost to the project on account of those matters and granted an extension to cover the estimated lost time. We do not think that when a contractor applies for extension, the Contract Administrator is bound to grant the length of time requested by the contractor, but may only grant such time as would cover the time justifiably lost. It appears the Contract Administrator was of the mistaken view that if at the time of requesting for extension, the contractor is in breach of its obligations, it would not be entitled to grant of extension. That is not what the agreement the parties signed stated and they are bound by the agreement. They are therefore in clear breach of the agreement by failing to grant any extension at all.

The question that follows is whether that breach was so fundamental as to be considered by the plaintiff as bringing the agreement to an end. That is beyond dispute on the facts of this case. Without the time extension, it was impossible for the plaintiff to discharge its obligation in the agreement to carry out the construction so the breach was fundamental and plaintiff was entitled to accept the contract as ended and sue for damages.

On the issue of special damages, in the plaintiff's pleadings at paragraph 29 of its amended statement of claim, and in the testimony of its managing director, who was its

only witness, it stated that if reasonable time were extended it would have completed the project, would be paid the remaining contract sum, 15% of which would have been its profit. It would also have earned 5% of the value of sub-contracts for works and materials supplies. The 3rd defendant has challenged these claims of the plaintiff and argued that it did not prove the special damages pleaded. That aside, the question is, is it probable that the plaintiff would have completed the works within the six months it requested for and thereby earned the whole remainder of the contract sum? The Contract Administrator doubted this and based their challenge on the analysis, that it took plaintiff 18 months to achieve only 17% of the works so six extra months would not have taken it far. This is a valid argument and the plaintiff is not to expect that the court would just award its speculative claim of earning a certain amount without offering concrete proof.

The 3rd defendant has argued before us that the plaintiff did not tender any documents to justify its claims for special damages and this is a matter that there should have been documentary evidence. It is trite learning that special damages must be pleaded and proved strictly. In **Delmas Agency Ghana Ltd vrs Food Distributors International Ltd [2007-2008] SCGLR 748** at page 760 this court said as follows;

"Where the plaintiff has suffered a properly quantifiable loss, he must plead specifically his loss and prove it strictly. If he does not, he is not entitled to anything unless general damages are also appropriate."

The 3rd defendant has criticised the High Court and the Court of Appeal for failing to evaluate the evidence before endorsing all the amounts pleaded by the plaintiff as special damages. There is merit in this charge. The High Court, after concluding that 3rd defendant had breached the agreement, did not review and analyse any evidence led on the special damages but proceeded to grant the figure endorsed on the amended writ of summons. The Court of Appeal too did not advert their mind to the requirement of the law that special damages ought to be proved strictly.

As we are rehearing the case, we shall examine the evidence to determine if the plaintiff proved its claims for special damages. The plaintiff's claim that it would have made a profit of 15% out of the contract sum could have been proved by showing that, of the amount paid to it that far, its profit was 15%. Then its claim that it would have earned 5% on sub-contracts and material supplies was not proved. Clause 22 of the agreement provides for Nominated Sub-Contractors to be appointed upon the recommendation of the contractor and by Clause 22 (b), in paying the sub-contractor, the employer may pay a retention to the contractor as the contractor may be entitled to under an agreement with the sub-contractor. The plaintiff could have tendered a prototype contract with a materials supplier to the project in which it was to be paid 5% of the value of the materials, or at least led evidence to that effect. It did not.

In any event, in the assessment of damages that the plaintiff would be entitled to in this case, the court has to take into account the fact that the delay in completion was partly as a result of the defaults of the plaintiff. This is referred to as concurrent delay in Construction Law. Clause 19 of the agreement states in part as follows;

"……Upon the happening of any such event causing delay the contractor shall immediately give notice thereof in writing to the CONTRACT Administrator, but he shall nevertheless use constantly his best endeavours to prevent delay and shall do all that may reasonably be required to the satisfaction of the contract Administrator to proceed with the works."

By this provision, the plaintiff was obligated to continue with the works with reasonable diligence notwithstanding the variations and the challenges with the supply of materials that it faced. The case of the 3rd defendant is that the plaintiff did not use reasonable endeavours to prevent further delay of the project. The reports and letters by the Contract Administrator on the reviews of the project which were written before the litigation were tendered in evidence to corroborate this aspect of the case of the 3rd defendant. As there are documents in this case, we do not see any justification for the trial court and the Court of Appeal to have discredited the evidence of Sir Knight

Akwaboah. His testimony was based on official reports he received as a member of the consortium of consultants on the project so his evidence deserved to be accorded weight.

By Exhibits "9b", "9c" and "9d" dated between 1st April, 2004 and 30th April, 2004, the Contract Administrator complained to the plaintiff that for three months no work was going on at the site and threatened to determine the agreement pursuant to Clause 20 (1) (b). Following those letters, the plaintiff wrote Exhibit "P3" dated 29th April, 2004 in which report it sought to explain away the reasons for the delay of the project and pointing to the challenges it was facing. In the Exhibit 9 series, the Contract Administrator had stated that the challenges the plaintiff faced had been addressed and it should have been on the site working. Exhibit "AA" at page 446 of Volume 3 of the record is a letter dated 21st October, 2004, that is after the plaintiff had explained why the work had slowed. It is signed by the Chief Consultant, Nana Y. B. Karikari on behalf of the Contract Administrator. It referred to the earlier letters written to the plaintiff complaining that it was not executing the works with due diligence, meanwhile payments had been made to it, cement, iron rods and chippings requested by plaintiff had been paid for by the employer, and concluded as follows;

"It is our view that all the required actions by the client and consultants to encourage you to proceed with the works with reasonable diligence had been taken. We expect that you will on your part take appropriate measures to meet your contractual obligations."

Despite the above letters to the plaintiff, it appears it did not attend to the work with diligence. In Exhibit "8" the Contract Administrator stated that no work had been done on the site since 23rd November, 2004, meaning the plaintiff was not working immediately before the completion date. From the above exhibits, we have come to the conclusion that the plaintiff did not employ reasonable diligence in executing the works during the contract period and that if it had done so, a greater percentage of the works would have been completed within the contract period than was accomplished. That

would have reduced the cost of completion of the works that the 3rd defendant bore and that extra cost has to be applied in reducing whatever damages the plaintiff may be entitled to.

Courts in different jurisdictions have grappled with how to award damages for failure to extend time in cases of concurrent delays. The difficulty is how to apportion the delay between the contractor and the employer. Common law courts evolved tools of analysis such as the dominant cause approach and the critical path cause approach, but these are not applicable in this case since there is a clear contractual provision on the matter. See the book by Richard J. Long. P.E; **"Analysis of Concurrent Delay on Construction Claims. (2018) Long International, Inc.** Apportionment and calculation of damages in concurrent delays is a specialized field where persons trained apply matrixes to adjust the claims. In that exercise, they make use of the planned programme of work that the contractor submitted to the employer at the start of the project and the adjustments made to it in the course of executing the works. Such adjustments would have taken account of delays and recorded the amount of time lost on account of each factor causing delay so there would be a record of how much delay was caused by the employer's defaults and the contractor's. Then the site records kept by the contractor would also be referred to in the exercise.

From the evidence on record, the plaintiff is supposed to have presented work programmes to the Contract Administrator and kept a book at the site in which all activities are recorded. In the letters written by the Contract Administrator, there were requests at each stage for the plaintiff to present a programme of work but it never really acted on the failure of the plaintiff to provide such programme, except at the last stage when the plaintiff requested for the extension of time. These records that are required for a competent apportionment of delay in this case are not in evidence so the court will not attempt such an exercise.

What is clear to us is, that since some of the delay is attributable to the employer, the contractor was entitled to some extension of time and general damages are appropriate

for the breach by 3rd defendant in not granting the reasonable extension. Extension would have enabled plaintiff to undertake additional works and earned some profit from it. When we deduct the time lost through the delay caused by the plaintiff, a reasonable extension, on the probabilities, would not have led to a completion of the project for the plaintiff to be paid the remainder of the contract sum. By the calculation at paragraph 29(d) of the amended statement of claim, the plaintiff avers that it would have earned profit of GHS175,000.00 if it completed the project and was paid the remaining contract sum. Taking all the circumstances into consideration including the delay caused by the plaintiff, we award plaintiff general damages in the sum of GHS70,000.00.

We shall next consider the plaintiff's claim of special damages for works completed but not paid for at the time of the determination of the contract. This, to all intents and purposes, is a claim for *quantum meruit*. In the case of **Skanska Jensen International v Klimatechnik Engineering Ltd [2003-2004] SCGLR 698** this Court said as follows;

"The law in this area draws two clear distinctions. There are two bases for fixing the value of that quantum meruit: (a) reasonable remuneration fixed by the court. (b) quantum meruit assessed at the contract rate. Where one party starts to perform the contract but is prevented from completing it by the other party's breach, he can claim quantum meruit at the contract rate. In Lodder v. Slowey (1904) AC 442,"

The agreement in this case had a contract rate for calculating the value of works executed by the plaintiff and it is the rate that was applied in raising certificates for payment of the plaintiff. Therefore, this claim is a matter of evidence. In the statement of case of the plaintiff in this appeal it states the amounts it was paid at paragraph 1.3 thereof and contends that the total amount is less than the value of works it executed in all. In his evidence, the managing director of the plaintiff testified in one breath that the amount owed it for unpaid work is GHS83,960.82 as pleaded in paragraph 29 of its

amended statement of claim, then in another breath, he gave the amount as GHS252,756.44. He claimed that this figure was arrived at by measurement of the works by officials of the plaintiff. But as the 3rd defendant pointed out in its statement of case, the plaintiff did not tender any document to support either the first or the second figure both of which were challenged.

The practical way to resolve this issue is to value the works executed by the plaintiff and the costs of any materials and machinery at the site at the date the contract came to an end and deduct the total amount paid to the plaintiff. If the result is a positive figure, then that would be the amount owed the plaintiff, but if the result is a negative figure, then it would mean the plaintiff was overpaid. As the parties were disputing over these figures, the trial court, with the consent of the parties, appointed the Architectural and Engineering Services Ltd (AESL), a reputable architectural and engineering services company in Ghana, to take an inventory of building materials and machinery and establish extent of works done on the hostels project. Their report is in the record and we shall rely on it in resolving this issue. The report of AESL at page 606-632 gives the total value of works including variations as **GHS207,937.04**. Against this value, the plaintiff admits in its statement of case to have received the following payments;

i. Certificate No 1; GHS180,000.00 (paid as Advance mobilization).
ii. Certificate No. 2; GHS58,754.65 (paid on 26/11/2003)
iii. Certificate No. 3; GHS27, 996.21 (paid on account)
iv. Certificate No. 4; GHS20,809.04 (paid partly for works and fluctuations)

Total GHS287,559.90

When the assessed value of works is deducted from the amount paid to the plaintiff, we get an amount of GHS79,622.86 in favour of the 3rd defendant. The report of AESL at paragraph 6.6 is not clear as to whether fluctuation claims that the plaintiff is entitled to under the Supplementary Agreement were factored into their work. It is possible that the amount of GHS79,622.86 paid to the plaintiff in excess of the value of the works could be accounted for by fluctuations in base prices of material. Whatever it is, the 3rd

defendant did not make a claim for recovery of any over payment and the plaintiff too did not lead sufficient convincing evidence to satisfy us that it is entitled to the amounts it claimed by way of works unpaid for. In the circumstances, we are of the view that the plaintiff failed to prove that it is entitled to be paid *quantum meruit.*

The trial High Court also granted plaintiff's relief (c) on the amended writ of summons and the Court of Appeal affirmed it. The relief as stated above is as follows;

"A declaration that the contractor was frustrated in its ability to complete the contract on time owing to the breaches of contract and duty by the client and its consultant and by natural and elemental factors."

Frustration is a concept in law of contract that refers to the occurrence after a contract has been entered into of unforeseen contingencies through no fault of the parties which make it impossible to perform the contract or radically change the nature of the obligation under the contract. When such event occurs, the contract is said to be frustrated and the parties are discharged from future performance of their obligations. The drafting of the relief above which says "the plaintiff was frustrated" can only mean that "frustrated" here was used in its ordinary English language sense and not as a term of art. In contract law we only talk of the contract being frustrated and not a party being frustrated. If the word "frustrated" was used in its ordinary English language meaning, then it cannot be a relief that a court can grant. As explained above, in law, the breach of terms of a contract by one of the parties cannot result in frustration. Also, the case of the plaintiff is that the inclement weather caused a delay in the execution of the works not that it made execution impossible. A change in conditions that make performance of obligations of a contract merely harder than it would have been does not amount to frustration. See the case of **Afordi & Ors v Ghana Publishing Corporation [2005-2006] SCGLR 1104.**

Consequently, the use of the word "frustrate" in relief (c) is misconceived and the relief ought to have been struck out *in limine* so it is hereby dismissed.

We find no merit whatsoever in the plaintiff's claim for special damages in respect of the loan it purportedly took from CDH Finance. No documents on the averment were tendered and it is surprising that the plaintiff who allegedly contracted the loan has no documentation on it. If the 3rd defendant in deed guaranteed such a loan, then it is for the lender to proceed against it on the guarantee and not the plaintiff. We accordingly dismiss that claim.

This leads us to a consideration of the case of the 1st defendant. It has been shown above that the value of the works executed by the plaintiff is valued more than the GHS180,00.00 the 1st defendant guaranteed with the advance fee bond. That means plaintiff is not liable to refund that money so there is no liability on 1st defendant to pay on that bond. However, the performance bond is still to be resolved since it is clear that the plaintiff failed to complete the works within the time stated in the agreement. The 1st defendant argued that the Supplementary Agreement fundamentally changed the nature of the agreement and consequently discharged it of its obligations. But, as has been rightly argued by the 3rd defendant, in the bond, the 1st defendant had agreed that no change or addition or other modification of the terms of the contract shall release it of its liability. The argument that the Supplementary Agreement fundamentally changed the terms of the agreement is disingenuous and unacceptable. The Supplementary Agreement was meant to change the formula for calculating fluctuation claims to the benefit of the plaintiff. Additionally, it provided for the 3rd defendant to pay directly for construction materials to be used by the plaintiff. This was to ease the burden on the plaintiff and make it easier to discharge its obligations. Therefore, the Supplementary Agreement did not radically change the terms of the main contract as contended by the 1st defendant.

The second contention of 1st defendant that the 3rd defendant did not notify it of the plaintiff's default too is not borne out of the agreement. Though during the subsistence of the agreement the 3rd defendant made a number of complaints of breaches of the contract by the plaintiff, it did not exercise its right to determinate the contract so there was no requirement to notify the 1st defendant as no liability of the plaintiff to pay

damages arose. It was when it terminated the contract and the plaintiff would have become liable to pay damages that it needed to notify 1st defendant which it did by copying the letter to 1st defendant.

The formidable case put up by the 1st defendant against the claim of the 3rd defendant for payment on the guarantee bonds is the one on the defaults by the Contract Administrators that affected the time within which the plaintiff could complete the works. The general principle of the common law is, that where a contractor is prevented by the owner from performing its obligations by the contractual completion date, the owner will not be entitled to claim liquidated damages for the delay. See the case of **Wells v Army & Navy Cooperative Society [1902] 86 LT 764.** It is referred to as the "Prevention Principle". As Lord Fraser of Tullybelton put it in **Percy Bilton Ltd v Greater London Council, [1982] 1 WLR 794, at 801:**

"1. ...The general rule is that the main contractor is bound to complete the work by the date for completion stated in the contract. If he fails to do so, he will be liable for liquidated damages to the employer.

2. That is subject to the exception that the employer is not entitled to liquidated damages if by his acts or omissions he has prevented the main contractor from completing his work by completion date.... "

The principle was explained by Salmon LJ in **Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd, [1970] BLR 111, at 121.**

He said; **"The liquidated damages clause contemplates a failure to complete on time due to the fault of the contractor. It is inserted by the employer for his own protection; for it enables him to recover a fixed sum as compensation for delay instead of facing the difficulty and expense of proving the actual damage which the delay may have caused him. If the failure to complete on time is due to the fault of both the employer and the contractor, in my view the clause does not bite. I cannot see how, in the**

ordinary course, the employer can insist on compliance with a condition if it is partly his own fault that it cannot be fulfilled…. I consider that unless the contract expresses a contrary intention the employer, in the circumstances postulated, is left to his ordinary remedy; that is to say, to recover such damages as he can prove flow from the contractor's breach."

In the instant case, and as has been abundantly demonstrated above, the failure to complete the works by the contractual date was due to the fault of both plaintiff and the Contract Administer who is 3rd defendant's agent. Even the contractual term on damages for non-completion in the agreement in this case reflects the prevention principle referred to above. Clause 18 of the agreement is as follows;

18. Damage for non-completion

If the Contractor fails to complete the works by the date stated in the appendix to these conditions or within any extended time fixed under Clause 19 of these Conditions *and the Contract Administrator certified in writing that in his opinion the same ought reasonably so to have been completed,* the Contractor shall pay or allow the Employer a sum calculated at the stated in the said appendix as Liquidated and Ascertained Damages for the period during which the said works shall so remain or have remained incomplete, and the Employer may deduct such damages from any monies otherwise payable to the Contractor under this contract.

On the facts in this case, the Contract Administrator, who is required by law to act honestly and impartially in certifying matters of this nature, could not, in all honesty, have certified that the plaintiff ought reasonably to have completed the works within the 18 months, having regard to the delays attributable to the employer. In the circumstances, the 3rd defendant would not be entitled to the liquidated and ascertained damages stated in the agreement so the 1st defendant is not required to pay on the performance bond.

The provision in building contracts for extension of time is for the benefit of the employer. If the employer wants to preserve her right to liquidated damages set out in the contract, it has to extend the time where she is wholly or partly to blame for the delay in completion. On the facts of this case, the 3rd defendant ought to have granted the extension of time to preserve its right to claim on the liquidated and ascertained damages provision.

We shall now deal with the counterclaim of the 3rd defendant which was stated as follows;

a) An order for assessment of financial loss occasioned the 3rd defendant/employer consequent upon the termination of the contract between the Plaintiff/Company and the 3rd defendant/employer.

b) An order for recovery of any difference in cost between the original contract sum and the cost of completion of the project

c) Such further or other reliefs as to the honourable Court may be just.

The counterclaim is premised on the ground that the 3rd defendant lawfully determined the agreement in accordance with Clause 20(b). However, we have held that the case is governed by the provisions of Clause 19 and not 20 of the agreement. The contract was repudiated by the 3rd defendant which repudiation was accepted by the plaintiff so the agreement came to an end on that basis and we have considered the rights and liabilities of the parties under Clause 19. The 3rd defendant who repudiated the agreement cannot turn round to seek remedies under provisions of that agreement. See **Joseph v Boakye [1977] 2 GLR 392. C.A.** Consequently, the counterclaim is dismissed.

In conclusion, the 3rd defendant/appellant/appellant's appeal fails in part and succeeds in part. The judgments of the High Court dated 29th July, 2011 and of the Court of Appeal dated 3rd November, 2016 are hereby set aside and in their place we make the following orders;

(i) The counterclaim of the 3rd defendant is hereby dismissed.

(ii) The plaintiff's relief (a) is granted. Consequently, the 1st defendant is perpetually restrained from paying on the guarantee bonds.

(iii) The plaintiff's reliefs (b), (c), (d) and (e) are hereby dismissed but the plaintiff is awarded general damages against the 3rd defendant in the sum of GHS70,000.00 for the 3rd defendant's breach of Clause 19 of the agreement by failing to extend the contract time.

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

P. BAFFOE-BONNIE
(JUSTICE OF THE SUPREME COURT)

S. K. MARFUL-SAU
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