IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 195 of 2017

BETWEEN: **COMPUTECH ELECTRONICS LTD** trading as **DALTRON** a limited liability company having its registered office at Agro Street, Walu Bay, Suva.

PLAINTIFF

AND: **WESTERN BUILDERS LTD** a limited liability company having its registered office at Lot 1, Koula Road, Ba.

DEFENDANT

Before: Hon. Justice Mr. Justice Deepthi Amaratunga

Counsel: Mr. Narayan E and Mr. Nand N for the Plaintiff
Mr. R. Singh for the Defendant

Date of Judgment: 01.10.2025

JUDGMENT

INTRODUCTION

[1] Plaintiff, trading as Daltron, claims the sum of $285,315.73[1] being monies due and owing under Purchase Orders No. 125168 and 125171 (Purchase orders) for the supply, installation and commissioning of CCTV, PA duress alarm system and PABX (The Work) at the Remand Centre at Suva, belonged to Fiji Corrections Service ("FCS"). Plaintiff was subcontractor under main contract between FCS and Defendant for New Remand Prison Project, and there was no written subcontract executed[2] between parties to this action.

[2] A subcontract was formed from the written documents including communications between parties to pay under the two Purchase Orders for the Work.

[2] The Defendant, does not deny its obligation to pay under two Purchase Orders but counterclaims the sum of $420,000.00 as liquidated damages, alleging that

[1] Both Purchase orders total to$277,593.73 but Plaintiff had included alleged purchase order for $7,720 which Plaintiff's witness admitted there was no evidence .
[2] Sub contract was drafted but not executed.

Daltron's substantial delays caused FSC to impose liquidated damages upon the Defendant, for 136 days at the rate $1,000 per day.

[3] There was no dispute that the Work was completed on 29.4.2014 by Plaintiff and it was an inordinate delay on its part. The time period Plaintiff agreed for the Work was less than two months and had taken more than a year from the revised completion date of 5.3.2013.

[4] There was no dispute that FCS had imposed liquidated liability under Construction Contract it had with Defendant and the rate was $1,000 per day. The liquidated damage was capped, for the time ending on 19.7.2013 (delay of 136 days) and there were no further claims by FCS.

[5] In lieu of this claim based on liquidated damages, an additional work was performed by Defendant to FCS to the value of $142,000 after commercial negotiations with FCS, by Defendant.

[6] Defendant was terminated Plaintiff's engagement on 13.8.2013 and also informed that it was liable to indemnify, the liquidated damages imposed by FCS to Defendant.

[7] Plaintiff was able to deal directly with FCS for its reinstatement for the Work and for this a meeting was held with all stake holders on 19.8.2013 (D18). Accordingly, Plaintiff was required to sign a subcontract but again this had not materialized for the second time but Plaintiff reinstated to complete the Work on 14.11.2013 (D20) and the remaining work completed by 29.4.2014.

[8] Plaintiff completed the Work, subjected to payment of liquidated damages imposed by FCS, but again it had delayed the completion till 29.4.2014.

[9] Plaintiff had by its letter of 5.2.2014 deducted the liquidated damages claim of $ 156,400 (VIP)[3] on the basis of tri partied negotiations had on 16.8.2013, to indemnify the liquidated damages claim of FSC. Plaintiff had agreed to indemnify Defendant regarding liquidated damages claim by FCS before it was reinstated to complete the Work on 13.11.2013 (See documents marked D19 and D20)

[10] Defendant's position at hearing was that due to delay on the part of Plaintiff it remained on the site from 5.3.2013 to 29.4.2014 and the liquidated damages claim for Defendant based on 420 days delay at the rate of $1,000.

[3] $136,000 VEP as liquidated damaged up to 19.7.2013

[11] It contends that this liquidated damage was the amount Defendant was liable under the Construction Contract it had entered with FCS and Plaintiff was aware of that hence, Defendant Plaintiff was liable to pay such liquidated damages, despite not having a written contract with a clause on liquidated damages.

[12] The issue is whether Defendant could impose $1000 per day liquidated damages to Plaintiff based on such term in its main contract. Plaintiff was aware of this and had also agreed to deduct liquidated damages at $1,000 up to 19.7.2013, but this was part of negotiations after termination of its contract and to reinstate Plaintiff to compile the work.

[13] There was neither liquidated damages clause negotiated between Plaintiff and Defendant nor there was specific liquidated damages agreed between Plaintiff and Defendant. The agreement to indemnify the liquidated damages claimed by FSC, this cannot be extended to cover entire period of 420 days. It can only be restricted to the claim of FCS, which was set off with additional work carried out by Defendant to Plaintiff.

[14] Even if I am wrong on the above, Defendant cannot claim liquidated damages for 420 day time period, as Plaintiff was terminated for a period of around three months [4]. Apart from that liquidated damages clause must be certain and there should be start and end date with a cap or in simply it be proportional to the damage[5]. Liquidated damages clause should also be agreed between parties and should be part of negotiated settlement between the parties, to the contract [6]

[15] Defendant's claim for liquidated damages failed, but it is not precluded from claiming under common law for damages it had incurred upon proof of that. The purpose of liquidated damages is to avoid difficult task of proof of damaged to delay.

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[4] *Triple Point Technology Inc v PTT Public Co Ltd*, [2022] 3 All ER 601

[5] *Cavendish Square Holding BV v El Makdessi; ParkingEye Ltd v Beavis* [2016] 2 All ER 519

'The penalty rule in England is an ancient, haphazardly constructed edifice which has not weathered well, and which in the opinion of some should simply be demolished, and in the opinion of others should be reconstructed and extended. For many years, the courts have struggled to apply standard tests formulated more than a century ago for relatively simple transactions to altogether more complex situations. The application of the rule is often adventitious. The test for distinguishing penal from other principles is unclear. As early as 1801, in *Astley v Weldon* (1801) 2 Bos & Pul 346 at 350 Lord Eldon confessed himself, not for the first time, 'much embarrassed in ascertaining the principle on which [the rule was] founded'. Eighty years later, in *Wallis v Smith* (1882) 21 Ch D 243 at 256, Sir George Jessel MR, not a judge noted for confessing ignorance, observed that 'The ground of that doctrine I do not know'. In 1966 Diplock LJ, not a judge given to recognising defeat, declared that he could 'make no attempt, where so many others have failed, to rationalise this common law rule': *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128 at 142, [1966] 1 WLR 1428 at 1446. The task is no easier today. But unless the rule is to be abolished or substantially extended, its application to any but the clearest cases requires some underlying principle to be identified.'

[66] *Dunlop Pneumatic Tyre Co, Ltd v New Garage and Motor Co, Ltd* [1914-15] All ER Rep 739

[16] In this action Defendant had built a new remand prison and apart from granting access to the building why it needed extra expense to be on the site was not explained. The Work of Plaintiff was installation of cameras and communication system. It is not clear that when Defendant completed additional work in lieu of liquidated damages for FSC and for that Defendant had remained on the premises.

[17] Plaintiff's claim for two Purchase Orders allowed there is additional claim for variation without a Purchase Order or request of Defendant. This was part of negotiated settlement on 16.8.2013 at tri partied settlement and request was from FCS for which Plaintiff agreed in order to get Plaintiff reinstated. So this amount of $7720 is not part of contract agreed between the parties formed from Purchase Orders and communications.

FACTS AND ANALYSIS

[18] Defendant had a contract with FCS which contained liquidated damages at the rate of $1,000 per day for the delay and this was communicated to Plaintiff. Defendant is engaged for installation of CCTV, PA system and PBAX system (The Work) and Plaintiff had agreed to complete the Work by 20.12.2012. At that time there was no negotiation about liquidated damages for delay.

[19] Plaintiff and Defendant had entered in to a contract through series of communications and documents exchanged between the parties. Even these communications did not state about liquidated damages. So there was no agreement between parties to this action at the time when the contract was formed for the Work based on Purchase Orders and communications to impose liquidated damages to Plaintiff.

[20] The Plaintiff adduced evidence through Mr. Daniel Whippy, (PW1) and Ms. Helen Koi, Senior Accounts Officer of FSC gave evidence. The later witness gave evidence regarding the payments made to Defendant under its contract with Defendant, and the evidence is undisputed.

[21] It is not disputed that FCS had paid to Defendant full contract price without deduction.

[22] It was also not disputed FCS had claimed liquidated damages up to 19.7.2013 at the rate of $1,000 per day and this amount was negotiated between Defendant and FCS to do additional work on the site for a sum of $142,038 VEP. Accordingly, Defendant had done additional work for the set off of the liquidated damages claimed for delay of 136 days from 5.3.2013.

[23] Plaintiff by its letter of 5.2.2014 forwarded a letter and had indemnified as agreed by them and deducted a sum of $156,400 VIP from the total sum payable by Defendant for its Work, for the claim for liquidated sum of FSC to

Defendant up to 19.7.2013, which was set off by additional work for a higher value stated.

[24] Mr. Whippy (PW1) testified that Defendant issued two purchase orders to it, for the supply and installation of CCTV, PA duress alarm and PABX systems as a subcontractor to the main contract between Defendant and FCS.

[25] He admitted that completion of the Work by them was on 29 .4. 2014 a Certificate of Completion (P12) was issued. He stated that despite repeated demands, the Defendant failed to pay the balance of $285,315.73. which was claimed in the statement of claim.

[26] He further maintained that liquidated damages were never part of the purchase orders and this is correct, but Purchase Orders also contained conditions, which is dealt later.

[27] Under cross-examination, he admitted that its subcontract had been terminated on 13 .8. 2013 for delay, later reinstated, after a meeting with all the parties including FCS.

[28] PW1 also accepted that one invoices raised by them and claimed in the statement of claim was unsupported by the Purchase Orders and they were for variation claimed $7,720.00 which was made after completion of the Work on 29.4.2014. On the balance of probability this was the variation suggested by FCS which Plaintiff had agreed in the negotiations with FCS and Defendant for the reinstatement. There was no additional work requested by Defendant from a purchase order or otherwise, so that cannot be claimed from Defendant. Plaintiff had agreed to do this work as part of bargain for them to be reinstated by Defendant upon the intervention of FCS. There was no discussion about that cost be borne by Plaintiff. (See D18 and D18A)

[29] Defendant had never sought additional work when Plaintiff could not even finish the Work it agreed to finish less than two months. So payment for that at that time or even after that till completion of the project was never mentioned and or sought from Defendant. (See P11 and D18 A minutes of the meeting circulated and accepted by the parties without objection at that time and also at hearing)

[30] Plaintiff had completed the Work to the satisfaction of FCS and completion certificate was issued and FCS had paid full contract price to Defendant. So Plaintiff is entitled to the full payment under Purchase Orders subject to deduction for damages to Defendant for delay.

[31] Defendant raised an issue on document marked P9 which was an issue of invoice. It had not included Purchase Order number, but it was admitted this was issued to Defendant.

[32] Plaintiff had completed the Work and it had paid full sum subject to deductions for damages incurred to Defendant. So in my mind rather than technical defect it should be accepted and Plaintiff should be paid price agreed with deduction for damages incurred to Defendant. So I refuse to exclude this invoice from the payment sum agreed.

[33] Even without this invoice Defendant become liable for payment for the sum agreed with parties upon completion of the Work invoices were raised for partial timely payments.

[34] Ms. Koi tendered payment records confirming that Fiji Corrections Service had fully paid WBL, which, she said, was obliged to discharge its liabilities to subcontractors. Her evidence was unchallenged.

[35] The Defendant relied on three witnesses. Mr. Roveen Permal, Civil Engineer and Superintendent for Edison Consultants, testified that Defendant completed its works by 5.3. 2013 and this was the revised completion date for completions of the New Remand Prison Project (see letter of consultant to the project D2 dated 1.8.2013). According to D2 Practical Completion Achieved on 19.7.2013. It seemed that Practical Completion of work except Plaintiff was achieved on 19.7.2013. The only remaining issue raised by the Project consultants as well as FCS was the delay of the Work.

[36] Defendant's witness, also stated that Defendant incurred additional costs in remaining on site during delay, of Plaintiff's work, which he valued at approximately $600 per day. He did not state how such a value was calculated and had picked it from air.

[37] Such damages needs to be proved. How many people were employed on the site and for what purpose should be stated at least. I cannot see the reason for such a high cost to remain on the premises. The premises is a secure place and there was no evidence of any security being employed. So once 'practical completion' achieved the buildings could be locked safely without additional expense considering the nature of the Work of Plaintiff which was not completed.

[38] Mr. Hazrat Abbas Ali, Project Manager of Defendant, gave evidence and stated the delay of the Work.

[39] Whether Defendant had completed its work in order for Plaintiff to install CCTV or PBAX which are sensitive to dust and possibility of these being damaged when the work was incomplete state not clear. It should also noted that Plaintiff had warranty and maintenance of the systems under the Work it was assigned.

According to D2 *'Practical Completio*n' of work achieved only on 19.7.2013. PW1 could not give evidence on these aspects.

[40] There are numerous correspondences between the parties after 19.7.2013 the inability of Plaintiff to complete the work.

[41] On 13.8. 2013 Defendant terminated Plaintiff's subcontract, for delay and defects, and stated that liquidated damages as a result of the breach of contract and additional costs will be charged.

[42] Following intervention by FCS, Plaintiff was reinstated on 14.11.2013 but subject to the condition that liquidated damages charged by FSC be indemnified by Plaintiff. (See D19 page 2 and D20).

[43] The Defendant's Finance Manager, confirmed that purchase orders were issued and invoices submitted, though he challenged the accuracy of several invoices as inconsistent with the purchase orders. To me that may only be an issue before completion certificate was issued for partial payments and cannot use defects in the invoices to deny payments agreed between the parties subject to deduction for damages due to delay.

[44] Defendant's Finance manager could produce only reconciliations and communications. Even after re instatement of Plaintiff after termination there was no clause for liquidated damages in the draft sub contract which again remained unexecuted.

[45] Communications between the parties show they were not in agreement beyond the indemnification of the liquidated damages claimed by FCS to Defendant which they had capped to 19.7.2013

[46] There was correspondence showing that liquidated damages were calculated at $1,000 per day and that Defendant, by letter dated 5 .2. 2014, accepted to deduct the sum of $156,400 as at damages tup to 19.7.2013. He maintained that Defendant was entitled to recover $420,000 for 420 days' delay. He stated that performance contract was extended but failed to provide the cost of that.

WHETHER THERE WAS A BINDING CONTRACT BETWEEN PLAINTIFF AND DEFENDANT?

[47] Although the Plaintiff did not sign the subcontract agreement with the Defendant, Plaintiff had a valid sub contract with the Defendant for the Work.

[48] This had been proved by the conduct and performance by partied. There is admitted evidence that Plaintiff had completed the Work as Tender document issued by FCS to Defendant.

[49] The New Remand Project and the correspondences between the parties (D13, D14, D15, D19, D24, D25, D27, D28 and D29) established that there is a binding subcontract between the parties. Claims of the respective parties relied on legal contract and they are estopped from denying formation of contract.

[50] Plaintiff had instituted this action for breach of that and estopped from denying a subcontract as evidenced from offer and acceptance of two Purchase Orders and other documentary evidence before the court as stated above.

[51] *RTS Limited v Molkerei Alois Muller GmbH* [2010] 1 WLR 753: held,

> "45…It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement."

[52] In circumstance where works have been carried it, it will usually be implausible to argue that there was no contract. Plaintiff had instituted this action under the Purchase Orders marked P2 and P3 and the contract between the parties can be gleaned from P1 including its contract proposal and emails.

[53] In *G Percy Trentham v Archital Luxfer Limited* [1993] 1 Lloyd's Rep 25, Steyn LJ said:

> "One must not lose sight of the commercial character of the transaction. It involved the carrying out of work on one side in return for payment by the other side, the performance by both side being subject to agreed qualifying stipulations. In the negotiations and during the performance of phase 1 of the work all obstacles to the formation of a contract were removed. It is not a case where there was a continuing stipulation that a contract would only come into existence if a written agreement was concluded. Plainly the parties intended to enter into binding contractual relations. The only question is whether they succeeded in doing so….The judge analysed the matter in terms of offer and acceptance. I agree with his conclusion. But I am, in any event, satisfied that in this fully executed transaction a contract came into existence during performance even if it cannot be precisely analysed in terms of offer and acceptance. And it does not matter that a contract came into

existence after part of the work had been carried out and paid for."

[54] *Tekdata Interconnections Ltd. V Amphenol Ltd* [2009] EWCA Civ 1209; [2010] 1 Lloyd's Rep 357. In paragraph [24]-[25] of that judgment, Dyson LJ said:

> " The paradigm battle of the forms occurs where A offers to buy goods from B on its (A's) conditions and B accepts the offer but only on its own conditions. As is pointed out in *Cheshire, Fifoot & Furmston's Law of Contract* (15th ed.) at p 210, it may be possible to analyse the legal situation that results as being that there is (i) a contract on A's conditions; (ii) a contract on B's conditions; (iii) a contract on the terms that would be implied by law, but incorporating neither A's nor B's conditions; (iv) a contract incorporating some blend of both parties' conditions; or (v) no contract at all.
>
> In my judgment, it is not possible to lay down a general rule that will apply in all cases where there is a battle of the forms. It always depends on an assessment of what the parties must objectively be taken to have intended. But where the facts are no more complicated than that A makes an offer on its conditions and B accepts that offer on its conditions and, without more, performance follows, it seems to me that the correct analysis is what Longmore LJ has described as the "traditional offer and acceptance analysis", ie that there is a contract on B's conditions. I accept that this analysis is not without its difficulties in circumstances of the kind to which Professor Treitel refers in the passage quoted at [20] above. But in the next sentence of that passage, Professor Treitel adds: "For this reason the cases described above are best regarded as exceptions to a general requirement of offer and acceptance". I also accept the force of the criticisms made in *Anson*. But the rules which govern the formation of contracts have been long established and they are grounded in the concepts of offer and acceptance. So long as that continues to be the case, it seems to me that the general rule should be that the traditional offer and acceptance analysis is to be applied in battle of the forms cases. That has the great merit of providing a degree of certainty which is both desirable and necessary in order to promote effective commercial relationships."

[55] The above judgment was applied in more recent case UK case of *Jaevee Homes Ltd v Fincham* [2025] EWHC 942 (TCC) (16 April 2025)

[56] Parties did not execute a subcontract at the commencement of award of the the Work. It should also be noted that the price stated in the unexecuted document is substantially higher and this was not explained and can be an expansion of the engagement beyond New Remand Prison Project This had

not happened, but Plaintiff is relying on Purchase Orders for its claim and sub contract was formed from the Purchase Orders and communications between the parties to conclude the Work by 20.12.2012.

[57] Due to delay Plaintiff's engagement was terminated by 13.8.2013 but re engaged after FCS had intervened, but again no subcontract was entered again though parties had agreed to enter in to subcontract for the second time. Again the subcontract was drafted but there was reinstatement from 13.11.2013 and this is contained in tab 2 of Defendant's bundle of documents. Even in this document there is no clause for liquidated damages at the rate of $1,000 per day.

[58] Defendant did not communicate a defined liquidated damages with start and end dates with cap. This was requested by Plaintiff in its email 13.12.2013 marked D 30 asked for these by PW1 but these were not clarified.

[59] Plaintiff had agreed to indemnify liquidated damages imposed by the consultants of the New Remand Prison Project under the contract between Defendant and FCS. See D19 -two pages and D20 both on 13.11.2013

[60] As the subcontract was not reduced in to writing there was no clause for liquidated damages for the delay, but from the letter of 5.2.2014, Plaintiff had admitted liquidated damages up to 19.7.2013 as $156,4000 (VIP) and in fact it had deducted this sum from the balance of the contract sum from Purchase Order 125168.

[61] In the analysis of evidence it is proved on balance of probability that Plaintiff was reinstated after termination on the basis of it indemnifying liquidated damaged imposed by FCS to Defendant.

[62] The liquidated damages was stated in the reconciliation of the contract account as of 19.7.2013 and the basis was delay of 136 days from 5.3.2013 to 19.7.2013 at the rate of $1000 per day imposed by FCS to Defendant under its contract. This amount was commercially negotiated to do additional work for 142,033.00 VEP (See D 22) and set off. It was admitted fact that Defendant was claimed for liquidated damages by Project Consultant for 136 days at the rate of $1,000 per day and this was set off for the additional work it had done on the roads inside the Remand Prison.

[63] From document marked D2 the Project Manager for the FCS had imposed liquidated damages for $136,000 VEP

CLAIM FOR THE WORK FROM PURCHASE ORDERS

[64] Document marked P1 dated 19.9.2012 Plaintiff submitted a Revised Proposal for a sum of $253,662.45 (VIP) for the Work based on the discussion it had with Defendant who was the main contractor for construction of New Remand Centre. This contained detailed proposal that included its background

including partnerships, current resource capabilities with details as to backup, support services etc. It also had terms and conditions. Under General Conditions of Sales it further stated

> 'Daltron to be given specific time frame to compile the work. This is to avoid delay in installation from the purchase of the equipment'

[65] According to proposal or quotation submitted by Plaintiff, Defendant issued a Purchase Order 125168 on 24.10.2012 for a total sum of $253,662.45. This Purchase order is marked as P2 and it further stated

> 'A formal sub-contractor agreement will need to be executed prior to any payment being effected by Western Builders Limited (WBL). This Purchase Order forms an internal part and must be read in conjunction with the executed formal sub contract agreement of WBL.'

[66] In P2 further noted that;

"

1. All invoices and or Delivery Dockets must bear the Western Builders Limited (WBL) Purchase Order number and Job/vehicle number.
2. WBL reserves the right to deduct monies owing or make adjustments supplier price due to delays in delivery end or defective goods and services
3. Another from of order apart from this singed Purchase Order will not be accepted and deemed to be null and void.
4. All invoices and or Delivery Dockets must bear the name and signature of the receiver.
5. Alterations or erasures recorded on this Purchase Order will automatically renter this Purchase Order invalid.
6. Payment will only be effected after deliver of goods and services it received by WBL in good condition.
   P3 is another Purchase Order bearing No 125171 to carry our communication works as per the drawings specification final submission as per your quotation of 22nd October, 2012 for a sum of $94,227.00. This Purchase Order had identical conditions to the P2.

7. According to P1,P2 and P3 Defendant had subcontracted Plaintiff for specified work agreed by the parties for the agreed sum stated in P2 and P3 under the conditions stated therein.
8. One pre-condition for the Plaintiff to obtain payment under Purchase Orders P2 and P3 was to enter in to '*formal subcontract*' between the parties. This sub contract was never executed though there was a sub contract made by Defendant which inter alia included specific provision under Section 7 dealt al with delay and liability of damages including consequential and liquidated

damages, but it had not stated any amount. This was marked as D23 and found in the Plaintiff's bundle of documents item No 6 and dated as 28.2.2013. This document was admitted by PW1 but stated it was not executed by them."

[67] Email dated 24.10.2012 from Defendant marked D14 awarded sub contract for the work assigned and agreed between the parties and it further stated that completion dated was 20.12.2012. This deadline was unconditionally accepted on the same day prior to this email by emails exchanged between the parties marked D13 where Plaintiff stated ''…*meeting what 20th deadline will be no problem for us'*.

[68] Further in the same email Plaintiff agreed to start the work immediately upon confirmation of the award of subcontract.

[69] In D31 Defendant had raised the issue of Plaintiff changing its invoices in email of 17.2.2014.

[70] The Plaintiff in its Statement of Claim seeking a sum of $285,315.73 and interest. It was based on pleadings. This sum include an additional sum of $7,720 which was not supported by purchase order or request for additional work by Defendant, which was discussed earlier and the said amount is deducted.

[71] Plaintiff claim is proved subject to deduction for damages for delay, as follows:-

Sum claimed		$285,315.73
(LESS Invoice No. 315 (**P11**) PW1 agreed it should not be considered	$7,720.00	
Plaintiff's claim		$277595.73[7]

[72] PW1 in his evidence said that Daltron by its letter dated 05.02.2014 by document marked P16, where Plaintiff agreed and deducted a liquidated damages in the sum of $156,400.00 as VIP for $136,000 claimed by FCS from Defendant for the delay up to 19.7.2013.

Whether the Defendant validly imposed liquidated damages on the Plaintiff, and if so, in what amount

[73] In Halsbury's Laws of England, Building Contracts (Volume 6 (2023)) under '367. Extension of time and liquidated damages[8]. Stated,

[7] Total of two purchase orders marked P2 and P3

[8] Halsbury's Laws of England Building Contracts (Volume 6 (2023))2. Performance of the Contract(1) Duty to Complete the Works(iii) Extension of Time and Liquidated Damages for Delay

> "Generally, contracts for construction works provide that in the event of the contractor's failure to complete by the date specified for completion the contractor is to pay a specified sum or that the employer may deduct a specified sum from money due to the contractor. There must be a definite date from which liquidated damages are to run; if there is no specified date or if the date for completion is invalidated by an instruction to the contractor to carry out additional work or by some other fault of the employer the employer's right to claim or deduct liquidated damages will be lost. The parties therefore frequently give to the architect or engineer power to grant the contractor an extension of time for the completion of the works, and thus a new completion date is substituted and the right to liquidated damages remains alive.
>
> Liquidated damages and extension of time clauses are construed against the party wishing to enforce them and will not embrace delays caused by a breach of contract by the employer or acts of the architect unless clear words are used. If, however, the contractor has undertaken to complete the work and any additional work which may be ordered within the specified time, they are bound to do so and the existence of an extension of time clause in the contract is immaterial. A contractual provision for extension of time for delay due to the employer's breach of contract or by ordering extra work will not exclude the contractor's rights to damages or additional payment." (Foot notes deleted)

[78] UK House of Lords decision of *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79, [1914–15] All ER Rep 739, laid foundational case established guidelines to distinguish valid liquidated damage case from unenforceable penalties. It held that liquidated damages must be a genuine pre-estimate of loss, not extravagant; if the sum is disproportionate to the greatest conceivable loss, it's a penalty.

> [9] The distinction between a clause providing for a genuine pre-estimate of damages and a penalty clause has remained fundamental to the modern law, as it is currently understood. The question whether a damages clause is a penalty falls to be decided as a matter of construction, therefore as at the time that it is agreed: *Public Works Comr v Hills* [1906] AC 368 at 376; *Webster v Bosanquet* [1912] AC 394; *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 at 86–87, [1914–15] All ER Rep 739 at 741–742 (Lord Dunedin); and *Cooden Engineering Co Ltd v Stanford* [1952] 2 All ER 915 at 919, [1953] 1 QB 86 at 94(Somervell LJ). This is because it depends on the character of the provision, not on the circumstances in which it falls to be enforced. It is a species of agreement which the common law considers to be by its nature contrary to the policy of the law. One consequence of this is that relief from the effects of a penalty

is, as *Hoffmann LJ put it in Else (1982) Ltd v Parkland Holdings Ltd* [1994] 1 BCLC 130 at 144, 'mechanical in effect and involves no exercise of discretion at all'. Another is that the penalty clause is wholly unenforceable: *Clydebank Engineering and Shipbuilding Co v Don Jose Ramos Yzquierdo y Castaneda* [1905] AC 6 at 9, 10 (Lord Halsbury LC); *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1973] 3 All ER 195 at 199, [1974] AC 689 at 698(Lord Reid); [1973] 3 All ER 195 at 204, [1974] AC 689 at 703(Lord Morris of Borth-y-Gest); and [1973] 3 All ER 195 at 220–221, [1974] AC 689 at 723–724 (Lord Salmon); *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana*, The Scaptrade [1983] 2 All ER 763 at 768, [1983] 2 AC 694at

702 (Lord Diplock); *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 at 191–193 (Mason and Wilson JJ). Deprived of the benefit of the provision, the innocent party is left to his remedy in damages under the general law. As Lord Diplock put it in The Scaptrade ([1983] 2 All ER 763 at 767, [1983] 2 AC 694 at 702):

> 'The classic form of penalty clause is one which provides that on breach of a primary obligation under the contract, a secondary obligation shall arise on the party in breach to pay to the other party a sum of money which does not represent a genuine pre-estimate of any loss likely to be sustained by him as the result of the breach of primary obligation but is substantially in excess of that sum. The classic form of relief against such a penalty clause has been to refuse to give effect to it, but to award the common law measure of damages for the breach of primary obligation instead.'

[10] Equity, on the other hand, relieves against forfeitures 'where the primary object of the bargain is to secure a stated result which can effectively be attained when the matter comes before the court, and where the forfeiture provision is added by way of security for the production of that result': *Shiloh Spinners Ltd v Harding* [1973] 1 All ER 90 at 101, [1973] AC 691 at 723(Lord Wilberforce). As Lord Wilberforce said ([1973] 1 All ER 90 at 100, [1973] AC 691 at 722), the paradigm cases are the jurisdiction to relieve from a right of re-entry in a lease of land and the mortgagor's equity of redemption (and the associated equitable right to redeem) in relation to mortgages. Save in relation to non-payment of rent, the power to grant relief from forfeiture to lessees is now contained in s 146 of the Law of Property Act 1925, and probably exclusively so (see Official Custodian for *Charities v Parway Estates Departments Ltd* [1984] 3 All ER 679, [1985] Ch 151). Relief for mortgagors through the equitable right to redeem is (save in relation to most residential properties) largely still

based on judge-made law. However, neither by statute nor on general principles of equity is a lessor's right of re-entry or a mortgagee's right of sale or foreclosure treated as being by its nature contrary to the policy of the law. What equity (and, where it applies, statute) typically considers to be contrary to the policy of the law is the enforcement of such rights in circumstances where their purpose, namely the performance of the obligations in the lease or the mortgage, can be achieved in other ways—normally by late substantive compliance and payment of appropriate compensation. The forfeiture or foreclosure/power of sale is therefore enforceable, equity intervening only to impose terms. These will generally require the lessee or mortgagor to rectify the breach and make good any loss suffered by the lessor or mortgagee. If the lessee or mortgagee cannot or will not do so, the forfeiture will be unconditionally enforced—although perhaps not invariably (see per Lord Templeman in Associated British Ports v CH Bailey plc [1990] 1 All ER 929 at 931, [1990] 2 AC 703 at 707–708 in the context of s 146, and, more generally, the judgments in Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd (No 2) [2013] UKPC 20, [2013] 4 All ER 936, [2015] 2 WLR 875).

[11] The penalty rule as it has been developed by the judges gives rise to two questions, both of which have a considerable bearing on the questions which arise on these appeals. In what circumstances is the rule engaged at all? And what makes a contractual provision penal?

In what circumstances is the penalty rule engaged?

[12] In England, it has always been considered that a provision could not be a penalty unless it provided an exorbitant alternative to common law damages. This meant that it had to be a provision operating upon a breach of contract. In Moss' Empires Ltd v Olympia *(Liverpool) Ltd* [1939] 3 All ER 460, [1939] AC 544, this was taken for granted by Lord Atkin ([1939] 3 All ER 460 at 463, [1939] AC 544 at 551) and Lord Porter ([1939] 3 All ER 460 at 467, [1939] AC 544 at 558). As a matter of authority the question is settled in England by the decision of the House of Lords in Export Credits Guarantee Dept v Universal Oil Products Co [1983] 2 All ER 205, [1983] 1 WLR 399('*ECGD*'). Lord Roskill, with whom the rest of the committee agreed, said ([1983] 2 All ER 205 at 224, [1983] 1 WLR 399 at 403):

> '[P]erhaps the main purpose, of the law relating to penalty clauses is to prevent a plaintiff recovering a sum of money in respect of a breach of contract committed by a defendant which bears little or no relationship to the loss actually suffered by the plaintiff as a result of the breach by the defendant. But it is not and never has been for the courts to relieve a party from the consequences of what may in the event prove to be an onerous or possibly even a commercially imprudent bargain.'

As Lord Hodge points out in his judgment, the Scottish authorities are to the same effect.

[13] This principle is worth restating at the outset of any analysis of the penalty rule, because it explains much about the way in which it has developed. There is a fundamental difference between a jurisdiction to review the fairness of a contractual obligation and a jurisdiction to regulate the remedy for its breach. Leaving aside challenges going to the reality of consent, such as those based on fraud, duress or undue influence, the courts do not review the fairness of men's bargains either at law or in equity. The penalty rule regulates only the remedies available for breach of a party's primary obligations, not the primary obligations themselves. This was not a new concept in 1983, when *ECGD* was decided. It had been the foundation of the equitable jurisdiction, which depended on the treatment of penal defeasible bonds as secondary obligations or, as Lord Thurlow LC put it in 1783 in *Sloman*, as 'collateral' or 'accessional' to the primary obligation. And it provided the whole basis of the classic distinction made at law between a penalty and a genuine pre-estimate of loss, the former being essentially a way of punishing the contract-breaker rather than compensating the innocent party for his breach. We shall return to that distinction below.

[14] This means that in some cases the application of the penalty rule may depend on how the relevant obligation is framed in the instrument, ie whether as a conditional primary obligation or a secondary obligation providing a contractual alternative to damages at law. Thus, where a contract contains an obligation on one party to perform an act, and also provides that, if he does not perform it, he will pay the other party a specified sum of money, the obligation to pay the specified sum is a secondary obligation which is capable of being a penalty; but if the contract does not impose (expressly or impliedly) an obligation to perform the act, but simply provides that, if one party does not perform, he will pay the other party a specified sum, the obligation to pay the specified sum is a conditional primary obligation and cannot be a penalty.

[15] However, the capricious consequences of this state of affairs are mitigated by the fact that, as the equitable jurisdiction shows, the classification
[2016] 2 All ER 519 at 531
of terms for the purpose of the penalty rule depends on the substance of the term and not on its form or on the label which the parties have chosen to attach to it. As Lord Radcliffe said in ***Bridge v Campbell Discount Co Ltd*** [1962] 1 All ER 385 at 394, [1962] AC 600 at 622, '[t]he intention of the parties themselves', by which he clearly meant the intention as expressed in the agreement, 'is never conclusive, and

may be overruled or ignored if the court considers that even its clear expression does not represent “the real nature of the transaction” or what “in truth” it is taken to be' (and cf per Lord Templeman in *Street v Mountford* [1985] 2 All ER 289 at 294, [1985] AC 809 at 819). This aspect of the equitable jurisdiction was inherited by the courts of common law, and has been firmly established since the earliest common law cases.

[16] Payment of a sum of money is the classic obligation under a penalty clause and, in almost every reported case involving a damages clause, the provision stipulates for the payment of money. However, it seems to us that there is no reason why an obligation to transfer assets (either for nothing or at an undervalue) should not be capable of constituting a penalty. While the penalty rule may be somewhat artificial, it would heighten its artificiality to no evident purpose if it were otherwise. Similarly, the fact that a sum is paid over by one party to the other party as a deposit, in the sense of some sort of surety for the first party's contractual performance, does not prevent the sum being a penalty, if the second party in due course forfeits the deposit in accordance with the contractual terms, following the first party's breach of contract—see the Privy Council decisions in *Public Works Comr v Hills* [1906] AC 368 at 375–376, and *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* [1993] 2 All ER 370, [1993] AC 573. By contrast, in *Else (1982) Ltd v Parkland Holdings Ltd* [1994] 1 BCLC 130 at 146, Hoffmann LJ, citing *Stockloser v Johnson* [1954] 1 All ER 630, [1954] 1 QB 476in support, said that, unlike a case where 'money has been deposited as security for due performance of [a] party's obligation', 'retention of instalments which have been paid under contract so as to become the absolute property of the vendor does not fall within the penalty rule', although, he added that it was 'subject … to the jurisdiction for relief against forfeiture'.

[17] The relationship between penalty clauses and forfeiture clauses is not entirely easy. Given that they had the same origin in equity, but that the law on penalties was then developed through common law while the law on forfeitures was not, this is unsurprising. Some things appear to be clear. Where a proprietary interest or a 'proprietary or possessory right' (such as a patent or a lease) is granted or transferred subject to revocation or determination on breach, the clause providing for determination or revocation is a forfeiture and cannot be a penalty, and, while it is enforceable, relief from forfeiture may be granted: see *BICC plc v Bundy Corp* [1985] 1 All ER 417 at 424and 427–428, [1985] Ch 232 at 246–247 and 252 (Dillon LJ) and *The Scaptrade* [1983] 2 All ER 763 at 767–768, [1983] 2 AC 694 at 701–703 (Lord Diplock). But this does not mean that relief from forfeiture is unavailable in cases not involving land—see *Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd (No 2)* [2013] 4 All ER

936, [2015] 2 WLR 875, especially at paras [92]–[97], and the cases cited there.

[18] What is less clear is whether a provision is capable of being both a penalty clause and a forfeiture clause. It is inappropriate to consider that issue in any detail in this judgment, as we have heard very little argument on forfeitures—unsurprisingly because in neither appeal has it been alleged that any provision in issue is a forfeiture from which relief could be granted.

[73] In this action Defendant could not prove any damage to the tune of $1,000 per day for delay other than the sum claimed by FCS as liquidated sum, which was capped at $136,000 up to 19.7.2013 and Plaintiff had agreed to pay VIP for that at the sum of $156, 400.

[74] In more recent decision by House of Lords in *Cavendish Square Holding BV v El Makdessi; ParkingEye Ltd v Beavis* [2016] 2 All ER 519, held

> "[12] In England, it has always been considered that a provision could not be a penalty unless it provided an exorbitant alternative to common law damages. This meant that it had to be a provision operating upon a breach of contract. In Moss' *Empires Ltd v Olympia* (Liverpool) Ltd [1939] 3 All ER 460, [1939] AC 544, this was taken for granted by Lord Atkin ([1939] 3 All ER 460 at 463, [1939] AC 544 at 551) and Lord Porter ([1939] 3 All ER 460 at 467, [1939] AC 544 at 558). As a matter of authority the question is settled in England by the decision of the House of Lords in *Export Credits Guarantee Dept v Universal Oil Products Co* [1983] 2 All ER 205, [1983] 1 WLR 399('ECGD'). Lord Roskill, with whom the rest of the committee agreed, said ([1983] 2 All ER 205 at 224, [1983] 1 WLR 399 at 403):
>
> '[P]erhaps the main purpose, of the law relating to penalty clauses is to prevent a plaintiff recovering a sum of money in respect of a breach of contract committed by a defendant which bears little or no relationship to the loss actually suffered by the plaintiff as a result of the breach by the defendant. But it is not and never has been for the **courts to relieve a party from the consequences of what may in the event prove to be an onerous or possibly even a commercially imprudent bargain.**'
>
> As Lord Hodge points out in his judgment, the Scottish authorities are to the same effect.
>
> [13] This principle is worth restating at the outset of any analysis of the penalty rule, because it explains much about the way in which it has developed. There is a fundamental difference between a **jurisdiction to review the fairness of a contractual obligation and a jurisdiction to regulate the remedy for its breach.** Leaving

aside challenges going to the reality of consent, such as those based on fraud, duress or undue influence, **the courts do not review the fairness of men's bargains either at law or in equity. The penalty rule regulates only the remedies available for breach of a party's primary obligations, not the primary obligations themselves.** This was not a new concept in 1983, when ECGD was decided. It had been the foundation of the equitable jurisdiction, which depended on the treatment of penal defeasible bonds as secondary obligations or, as Lord Thurlow LC put it in 1783 in Sloman, as 'collateral' or 'accessional' to the primary obligation. And it provided the whole basis of the classic distinction made at law between a penalty and a genuine pre-estimate of loss, the former being essentially a way of punishing the contract-breaker rather than compensating the innocent party for his breach. We shall return to that distinction below.

[14] This means that in some cases the application of the penalty rule may depend on how the relevant obligation is framed in the instrument, ie whether as a conditional primary obligation or a secondary obligation providing a contractual alternative to damages at law. **Thus, where a contract contains an obligation on one party to perform an act, and also provides that, if he does not perform it, he will pay the other party a specified sum of money, the obligation to pay the specified sum is a secondary obligation which is capable of being a penalty; but if the contract does not impose (expressly or impliedly) an obligation to perform the act, but simply provides that, if one party does not perform, he will pay the other party a specified sum, the obligation to pay the specified sum is a conditional primary obligation and cannot be a penalty**.

[15] However, the capricious consequences of this state of affairs are mitigated by the fact that, as the equitable jurisdiction shows, the classification

Further held,

"[40] In the course of his cogent submissions, Mr Bloch QC, who appeared for Mr Makdessi on the first appeal, suggested that, as an alternative to confirming or abrogating the penalty rule, this court could extend it, so that it applied more generally. As he pointed out, this was the course taken by the High Court of Australia, and it would have the advantage of rendering the penalty rule less formalistic in its application, and, which may be putting the point in a different way, less capable of avoidance by ingenious drafting.

[41] This step has recently been taken in Australia. Until recently, the

law in Australia was the same as it is in England: see IAC Leasing Ltd v Humphrey (1972) 126 CLR 131 at 143 (Walsh J); O'Dea v Allstates Leasing System (WA) Pty Ltd (1983) 152 CLR 359 at 390 (Brennan J); AMEV-UDC (1986) 162 CLR 170 at 184 (Mason and Wilson JJ, citing ECGD among other authorities), at 211 (Dawson J); Ringrow Pty Ltd v BP Australia Pty Ltd (2005) 224 CLR 656 at 662. However, a radical departure from the previous understanding of the law occurred with the decision of the High Court of Australia in Andrews v Australia and New Zealand Banking Group Ltd (2012) 247 CLR 205. The background to this case was very similar to that in Office of Fair Trading v Abbey National plc [2009] UKSC 6, [2010] 1 All ER 667, [2010] 1 AC 696. It concerned the application of the penalty rule to contractual bank charges payable when the bank bounced a cheque or allowed the customer to draw in excess of his available funds or agreed overdraft limit. These might in a loose sense be regarded as banking irregularities, but they did not involve any breach of contract on the part of the customer. On that ground Andrew Smith J had held in the Abbey National case that the charges were incapable of being penalties: [2008] EWHC 875 (Comm), [2008] 2 All ER (Comm) 625, paras [295]–[299] (the point was not appealed). In Andrews, the High Court of Australia disagreed. They engaged in a detailed historical examination of the equitable origin of the rule and concluded that there subsisted, independently of the common law rule, an equitable jurisdiction to relieve against any sufficiently onerous provision which was conditional upon a failure to observe some other provision, whether or not that failure was a breach of contract. At para 10, they defined a penalty as follows:

'In general terms, a stipulation prima facie imposes a penalty on a party (“the first party”) if, as a matter of substance, it is collateral (or accessory) to a primary stipulation in favour of a second party and this collateral stipulation, upon the failure of the primary stipulation, imposes upon the first party an additional detriment, the penalty, to the benefit of the second party. In that sense, the collateral or accessory stipulation is described as being in the nature of a security for and in terrorem of the satisfaction of the primary stipulation. If compensation can be made to the second party for the prejudice suffered by failure of the primary stipulation, the collateral stipulation and the penalty are enforced only to the extent of that compensation. The first party is relieved to that degree from liability to satisfy the collateral stipulation.'

[42] Any decision of the High Court of Australia has strong persuasive force in this court. But we cannot accept that English law should take the same path,….(emphasis added)

[75] As much as it is not the task of the court to review the clauses agreed by the parties it is not the task of the court to include a liquidated damages which was

not a part of the bargain parties agreed for a specific price.

[76] Defendant had not included liquidated damages clause in both unexecuted contracts. Even after the negotiations between the parties to this action and FCS, Plaintiff had not agreed to any liquidated sum, but had consented to indemnify Defendant from such claim by FSC. This would also be recoverable under actual damaged incurred to Defendant from the delay of Plaintiff. So this cannot be overstretched to agreement between parties to this action for liquidated damages for $1,000.

[77] Defendant had not included liquidated damages clause in both unexecuted contracts. Even after the negotiations between the parties to this action and FCS, Plaintiff had not agreed to any liquidated sum , but had consented to indemnify Defendant from such claim by FSC . This would also be recoverable under actual damaged incurred to Defendant from the delay of Plaintiff but since this was a negotiation between parties Plaintiff is estopped from denying that. This is limited to the period of liquidated damages claimed by FSC.

[78] PW1 in his evidence stated liquidated damages was not part of their bargain.

[79] On 22.10.2012 from the email marked D13 Gordon Yee from Plaintiff had accepted 20.12.2012 as deadline for them to perform the contract. This allowed them less than two months to complete the subcontract as agreed between parties from P1, P2 and P3. It was not clear that Defendant had completed its work in order to meet this to be realistic deadline, but this was what Plaintiff had had agreed on a commercial contract entered at arms length.

[80] It is admitted that subcontract agreement was received by Daltron but it was not signed and the said agreement contained the clause which deals with delay but there was no provision for liquidated damages.

[81] It was admitted that contract between Plaintiff and Defendant was terminated on 13.8.2013 but by 19.8.2013 Plaintiff was able to directly communicate with FCS and to made Defendant to agree to rescind the termination and also commence work. In the discussion between FCS and parties to this action it was agreed that any liquidated damages charged to the Defendant will be passed to Plaintiff. See D 18A minutes to the meeting circulated on the following day by email D18 dated 20.8.2013.

[82] Document marked D19 indicate that even as late as 13.11.2013 Plaintiff was not mobilised to the site. See email D19. PW 1 was emailed that Plaintiff was required to borne the liquidated damages imposed on Defendant on 11.11.2013 and this was agreed by email marked D20 which stated;

> “Noted with thanks. Yes agreed to that. See you outside gage 9 am tomorrow.

[83] So Plaintiff had commenced work on or around 14.11.2013 on the condition Defendant communicated to PW1 from the email marked D19 (which was attached to email to Niten Kumar and his reply on the same day (document marked D 20) after about three and half hours after receipt of the email as 'Yes agreed'. Indicating it had agreed to item no 4 on the email to PW1 which stated '*Liquidated Damages as imposed by Consultants for the CCTV works would be borne by Dalton (Fiji)Ltd*[9]*'*

[84] In the email of 13.12.2013 marked as D30 PW1 had raised the issue of liquidated damages and start and end date for such damages and reasons for initiating liquidated damages. This shows Plaintiff was asking why such liquidated damages imposed without proof of such a claim from FCS after initial claim 136 days which Plaintiff had agreed to indemnify.

[85] So there was no agreement between the parties as to liquidated damages from 19.7.2013. Plaintiff had agreed to indemnify Defendant and it had done so up to 19.7.2013. Document marked D 23 dated 3.12.2013 stated that damages '*would be to the extend of the damages as certified by the superintendent or as assessed by the contractor which shall be due and payable'*. This was regarding queries raised by Plaintiff earlier

[86] Defendant cannot impose non existent liquidated damages clause only because such a clause was contained in its contract with FCS. The fact this was known to Plaintiff and had consented to indemnify Defendant is not as same as executing a contract with specific clause for liquidated damages. Indemnification for a claim from FCS is not the same as contracting to impose liquidated damages as part of bargain and be formed as part of contract.

[87] Defendant can claim damages for delay and for damages it incurred. This needs to be proved with evidence.

[88] It is not in dispute that Plaintiff remained on the site from 5.3.2013 till it was terminated on 13.8.2013 and from reinstatement on 14.11.2013 to 29.4.2014 and for this delay Plaintiff had consented to deduct $156,400 which was more than to indemnify FCS's claim of $136,000 . In lieu of the said claim Defendant had done additional work and this required Defendant to be on the site. The damage or (as to Defendant from liquidated damage claim cannot be calculated with certainty other than value stated in D22. So when such work completed and how many additional people remained on the site for what purpose needs to be proved. So in my mind what agreed by Plaintiff is adequately compensated Defendant for losses due to delay.

[9] Plaintiff

CALCULATION

Plaintiff's claim proved (from purchase Orders marked P2 and P3)		$347,889.45
Less A. total payments (admitted paragraph 3 of statement of defence and payment of two invoices to the total value of	$70,293.72	
B. Plaintiff had admitted and deduct liquidated damages in its letter of 5.2.2014 for	$156,400	($226,693.72)
So the total payable is		$121,195.73
Interest from date of institution of this action to the date of judgment 4.7.2017 to 1.10.2025 at the rate of 3% (approx..)		$30,000
Total (approx.)		**$151,195.73**

CONCLUSION

[89] Plaintiff's claim for liquidated damages fails due to absence of agreed term between the parties either in unexecuted subcontracts or in the negotiations between the parties at the commencement of the formation of the contract though Purchase Orders and also other communications.

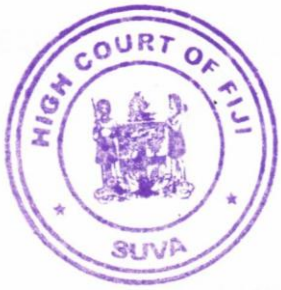
[90] Plaintiff had agreed to perform the Work within time less than two months, but it had completed the work only on 29.4.2014. Even after reinstatement on 14.11.2013 Plaintiff had taken more than five months to complete its work.

[91] Plaintiff was also terminated from performance for a period of from 13.8.2013 till 14.11.2013 but this reinstated upon the condition Plaintiff would indemnify the liquidated damages claim and Plaintiff is estopped from denying this. Plaintiff had by its letter of 5.2.2014 deducted a sum of $156,400 as VIP for $136,000 in terms of that. Plaintiff is also entitled to 3% interest from date of institution of this action to the date of judgment and this is approximately $30,000. Cost of this action is summarily assessed at $5,000 to be paid by Defendant to Plaintiff within twenty-one days.

FINAL ORDERS;

a. Defendant is ordered to make a payment of $151,195.73 to Plaintiff.

b. Cost of this action is summarily assessed at $5000 to be paid by Defendant to Plaintiff within 21 days.



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Deepthi Amaratunga

Judge

At Suva this 01st day of October 2025.

Solicitors

Sherani & Company
Vama Law