

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.1985/C171

BETWEEN COOPER AND ASSOCIATES LIMITED PLAINTIFF
AND THE NATIONAL WATER COMMISSION DEFENDANT

Dennis Goffe instructed by Myers, Fletcher and Gordon for the Plaintiff.

Burnham Scott, Q.C. and Norman Harrison instructed by Burnham Scott and Company for the Defendants.

March 19, 20, 21, 22; July 3, 9, 10, 12;
October 3, 1991; June 5, 1992

CLARKE, J.

The defendants are a public authority. In pursuance of their public duty to provide and improve sewerage systems throughout the country they contracted in writing with the plaintiffs on May 9, 1980 for the construction of pumping mains at Nanse Pen in Lower St. Andrew. The construction would be part of the first phase of the Kingston and St. Andrew Sewerage Scheme. Reid Crowther and Partners, consulting engineers, were appointed by the defendants as the engineers for the purpose of the contract, designated "Contract No. 6."

After experiencing delays due to security problems at the work site the plaintiffs completed the construction in 1983. They now seek by their amended statement of claim "to recover the sum of \$961,308.87 being the amount due and owing to the plaintiff by the defendant for a claim dated 14th June, 1983 made by the plaintiff against the defendant for production losses pursuant to Contract No. 6 entered into between the plaintiff and the defendant: particulars of which claim have already been supplied to the defendant."

The defendants deny that they are indebted to the plaintiffs for any claim for production losses pursuant to Contract No. 6. They also plead the Public Authorities Protection Act as a bar to this action which commenced on March 10, 1985.

At the threshold Mr. Scott contended that the action is caught by Section 2(1)(a) of the Public Authorities Protection Act which provides:

"Where any action ... is commenced against any person for any act done in pursuance, or execution, or intended execution, of any law or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such law, duty, or authority the following ... shall have effect --

- (a) the action ... shall not lie or be instituted unless it is commenced within one year next after the act, neglect or default complained of, or, in the case of a continuance of injury or damage, within one year next after the ceasing thereof ..."

The pith of Mr. Scott's argument has only to be stated to be rejected. He argued that in contracting with the plaintiffs the defendants were discharging a public duty under the National Water Commission Act and, therefore, any default by the defendants relating to performance under the contract would come within the protection of Section 2(1)(a) of the said statute of limitation.

The law, in my judgment, imposes no public duty on the defendants to contract with the plaintiffs. And surely, it is not enough to conclude that the subsection applies merely on the footing that the contract was made in execution of some public duty imposed by statute or by statutory authority, for if the contract were not so made it would be **ultra vires** the defendants.

The public duties cast upon the defendants include the duty to provide within the limits of their resources sewerage systems throughout Jamaica. Consequently, they engaged the plaintiffs by way of private contract to construct pumping mains at Manse Pen as part of a particular sewerage scheme. As Mr. Goffe submitted, it is the alleged breach of that private contract, to wit, the non payment of money for production losses due to lack of security that this action is about. It is not about a plaintiff injured by a breach of the defendants' public duty requiring them to do the act contracted for. The Public Authorities Protection Act therefore affords no defence to the action. See, for instance, Sharpington v. Fulham Guardians [1904] 2 Ch.449 where Farwell J. employing a like approach reached the same conclusion on facts not materially dissimilar to this part of the instant case.

The other part of the case goes to the merits. The plaintiffs predicate the action on a claim dated June 14, 1963 and on the contract itself.

The claim, particulars of which they supplied to the defendants before the commencement of the action, speaks of production losses due to lack of security in the context of the contract between the parties. The plaintiffs contend that under the contract it was the defendants' responsibility to provide security or adequate security to protect their, the plaintiffs' workers, equipment and materials while engaged in the execution of the works. This, they say through Caleb Cooper, their managing director, the defendants failed to do during certain periods. The defendants on the other hand testify through Bernard Van Hees, the engineers' representative, that nothing in the contract required them to provide any such security. So, this primary issue falls to be resolved by my construing the terms of the contract relating to security at the work site.

Those terms are mainly contained in two of several documents comprising the contract: (1) "notice to tenderers" and (2) "the conditions of contract." Clause 19 of the latter document reads:

"The [plaintiffs] shall in connection with the works provide and maintain at [their] own cost all lights, guards, fencing and watching when and where necessary or required by the Engineer or by any competent statutory or other authority for the protection of the Works or for the safety and convenience of the public or others."

"Works" is defined by clause 1 of that document as works to be executed in accordance with the contract. Clause 20 so far as is relevant says:

- "(1) from the commencement to the completion of the Works the [plaintiffs] shall take full responsibility for the care thereof ... and in case any damage, loss or injury shall happen to the Works or any part thereof ... from any cause whatsoever, save and except the Excepted risks as defined in sub - clause (2) of this clause, shall at [their] own cost repair and make good the same ...
- (2) The "Excepted Risks" are war, hostilities ... invasion ... or unless solely restricted to employees of the [plaintiffs] and arising from the conduct of the Works, riot, commotion or disorder ..."

Clause 19 (supra) shows the very limited range of the plaintiffs' responsibility for security. That clause requires them to establish at their own cost, watchmen, lighting, fencing and guards. They claimed only \$7,000.00 for this purpose, a true measure of their very limited responsibility in this area: see Bill No. 1 - Preliminaries of Bill of Quantities at BQ 1/1 of the contract. The clause aims at providing protection for the works and the public. It stops well short of requiring the plaintiffs to provide security for their workers, equipment and materials on the site.

Clause 20 also makes no such provision. It obliges the plaintiffs to take full care of the works from start to completion and renders them liable to make good any damage or loss to the works save for the excepted risks as detailed in the clause.

The plaintiffs make it clear in another contract document, "the schedule of particulars", which accompanied their tender, that "our bid takes into account the provision of site security at no cost to us", see page SP6 of the contract. Clause 22 of the "notice to tenderers" is important, for it seems to address the question of security at the site. Mr. Scott maintains that that clause imposes no obligation on the defendants to provide security at the site and that such payments as are made by the defendants to defray the costs of such security are ex gratia payments. On the other hand Mr. Goffe contends that, over and above the plaintiffs' limited obligation under clauses 19 and 20 of the "conditions of contract", under clause 22 of the "notice to tenderers," the defendants effectively promise to provide police protection at the work site at their expense. That clause (see Addendum No. 3(B) at page A3/1 of the contract) provides:

"SECURITY AT THE SITE"

- (1) The [defendants have, held detailed discussions with the Police Commissioner's office with respect to security at the site, and [have] received assurance, that special security arrangements will be made by the Police for the protection of the [plaintiff's] personnel, equipment and materials while [they are] engaged in the execution of the contract. This will be additional to the protection that the [plaintiffs] must provide in the way of watchmen and similar.
- (2) Such Police protection will be provided at no cost to the [plaintiffs]. The [plaintiffs] shall fully co-operate with the Police ...
 - (a) ...
 - (b) ...
 - (c) The [plaintiffs] shall make [their] own arrangements for the watching of equipment and materials on Site by the employment of watchmen who shall also co-operate with the Police.
 - (d) ...
 - (e) ...
 - (f) ... "

Now, the parties have reduced their agreement to the terms of Contract No. 6 of which clause 22 (supra) is a part. Looking at the contract as a whole I must determine whether the parties intended that the defendants should at their expense provide police protection for the plaintiffs' workers etc. on the site while engaged in the execution of the contract. Since "such police protection will be provided at no cost to the [plaintiffs]" did the parties by the terms of the contract intend to have the defendants provide it at the defendants' expense? Against the background of the prevalence of violence in the area where the contract would be executed such police protection had to be provided to prevent gunmen and other unruly persons engendering commotion or disorder at the work place. Consistent with the need for such provision is the engineers' letter of September 18, 1980 to the plaintiffs:

"Re. Kingston and St. Andrew Sewerage Scheme:
Phase 1 Contract No. 6 - Nansu Pen
Pumping Mains Provision of Security

In accordance with clause 63(1)(b) of the Conditions of Contract we herewith give you written notice to proceed with the Works commencing on 23 September 1980 at 9:00 a.m. at which time full scale protection of the Site by the Security Forces will be instituted.

Police protection will generally be provided between the hours of 8:30 a.m. and 4:30 p.m. Mondays to Fridays and 8:30 a.m. on Saturdays, thus enabling you to work at least 40 hours per week with full protection.

...

All necessary support for the Police will be provided and paid for directly by the Water Commission and/or the Security Forces.

..."

In my judgment the answer to the question posed in the preceding paragraph must be answered in the affirmative once clause 65(4) of the conditions of contract along with the other contractual terms adverted to is properly construed. That sub-clause reads.

"The [defendants] shall repay to the [plaintiffs] any increased cost of or incidental to the execution of the Works ... which is howsoever attributable to or consequent on or the result of or in any way whatsoever connected with the said special risks ... but the [plaintiffs] shall as soon as any such increases of cost shall come to [their] knowledge forthwith notify the Engineer thereof in writing."

"Special risks" includes commotion or disorder provided that such commotion or disorder is not restricted to the employees of the plaintiffs or their sub-contractors and does not arise from the conduct of the works. clause 65(1) of the conditions of contract.

The clause looked at leave no doubt as to the ambit of the parties obligations in relation to security. I therefore make three points to sum up this aspect of the case: (1) the plaintiffs were responsible for providing at their own expense watchmen and the like to protect the works; (2) beyond that it was the defendants' responsibility to provide at their expense security to protect the plaintiffs' workers engaged at the work site in the execution of the contract; (3) if a lack of adequate security led, for instance, to commotion or disorder as qualified by clause 65(1) (supra), the defendants would be obliged to meet any consequential increased costs incurred by the plaintiffs in the execution of the works upon the plaintiffs promptly notifying the engineers in writing of such costs.

I find that the plaintiffs have satisfied the requirement of notice having regard to the on-going correspondence between the engineers and themselves on the questions of security and the costs resulting from a lack of it. Once the plaintiffs incurred increased expenditure that was security-related, they would seek to vary the contract so as to increase the contract price by the extent of the expenditure. This they would do by assenting to the mechanism of written variation orders. Increased costs within the meaning of clause 65(4) (supra) would, in my judgment, embrace what the plaintiffs term "production losses due to lack of security." The evidence discloses that such losses consist of two heads.

Falling under the first head would be expenditure by the plaintiffs to provide security to protect their workers engaged in the execution of the works. I accept Caleb Cooper's evidence that on a number of occasions during the period of construction, police security was either not provided or proved inadequate. The plaintiffs were duly reimbursed by the defendants for the costs of providing private security as well as for the costs of transportation and other support services for the police: see variation orders Nos. 5, 7, 9, 13 13C, 13D, 18, 20, 22, 24 and 4b varying the contract.

The evidence categorizes the second head of "production loss due to lack of security" as loss from shutdowns or closures of the works or reduced working hours caused by security problems for which the defendants were responsible. See, for example, variation order No. 6 varying the contract to enable the defendants to meet the plaintiffs' costs arising from closures over the periods stated therein. The body of that variation order reads thus:

DESCRIPTION	COST VARIATION	
	ADD	DEDUCT
For costs of closure of Site on 14 October and from 28 October to 7 November 1980. Equipment standby and overhead costs as follows:		
One backhoe @ \$24.00/hr. x 1.11 x 8 x 5 =	1,065.60	
One front-end loader @ \$48.62/hr. x 1.11 x 8 x 5 =	2,158.73	
One pump @ \$30.00/day x 1.11 x 5 =	166.50	
One truck @ \$14.75/hr. x 1.11 x 8 x 5 =	654.90	
One tamper @ \$20.00/hr. x 1.11 x 2 x 5 =	386.00	
One come-along @ \$100.00/day x 1.11 x 5 =	555.00	
Sub-total =	5,488.73	
Standby rates @ two-thirds	3,659.15	
Preliminaries for one week	769.13	
Total per week	4,428.38	
Total for two weeks	<u>8,856.76</u>	
Water Commission's letter of approval dated 17 November 1980 refers		

Adjusted Contract Amount before Variation Order No. 6 Ja. \$3,258,469.42
Adjusted Contract Amount after Variation Order No. 6 Ja. \$3,267,346.18."

The following extract from the cross-examination of Van Hees accords with the true position as to the defendants' responsibility under this second head of production loss due to lack of security:

"Mr. Goffin: If a shutdown were caused from security problems, should the contractor be compensated for any loss resulting from the shutdown?

Van Hees: Yes, if that were claimed as an incident of special risk, then the clause pertaining to that would apply."

A claim for such a loss need not in terms stipulate that that loss was due to a special risk, something that Van Hees himself must have recognised, as witness the following letters exchanged between Caleb Cooper and himself.

16th. July, 1980.

Reid, Crowther Partners Ltd.
5 Oxford Park Avenue
Kingston 5

Attention: Mr. B.C. Van Hees

Dear Sirs,

Re: Kingston & St. Andrew Sewerage Scheme - Phase 1
Contract C6 - Manse Pen Pumping Mains

We write to inform you that work on the above project has been suspended as of the 16th. July. On that date a group of unknown men invaded the site and threatened serious bodily harm to our workmen if they continued to work. When their instructions were dis-obeyed they started to stone our workers who were obliged to seek refuge.

On the following morning i.e. 17th. July, within a few chains of our work area gunmen killed two men and shot two women seriously. A number of men were spotted in the bushes adjacent to the work area. These men were brandishing guns and rifles.

We obviously cannot continue to work under these conditions and unless we are given adequate security the site will remain closed.

The matter has been reported to the Nants Bay Police.

Please note that since the project started we have not been given any police protection on site despite our many requests.

In the mean time we wish to record that the cost of this shut-down will be to the Owners account.

Yours faithfully,
COOPER & ASSOCIATES LIMITED

/Sgd./ C.D. Cooper
.....
C.D. COOPER
Managing Director

August 5, 1980.

Cooper & Associates Ltd.
3 Lancelin Avenue
P.O. Box 89
Kingston 10.

Attention: Mr. C. Cooper

Dear Sirs:

Re: Kingston & St. Andrew Sewerage Scheme: Phase 1
Contract No. 6 - Manse Pen Pumping Mains

Reference is made to your letter of July 16, 1980 re suspension of work on July 16, 1980 due to invasion of the site by gunmen, and the last paragraph thereof in which you record that the cost of this shut-down will be to the owners account.

In principle we are in general agreement with this particular claim. Please advise us of your estimate of the time duration and cost of the shut-down.

Yours very truly,

/Sgd./ B.C. Van Hees
B. C. Van Hees
Project Director
Reid, Crowther & Partners Limited."

This action to recover the sum of \$961,308.27 falls to be determined under the second security-related head of loss as shown by the particulars referred to in the amended statement of claim as well as by the evidence given in support of those particulars. I accept Caleb Cooper's evidence that the plaintiffs lost production time on account of reduced working hours and temporary shutdowns for the periods May 23, 1960 to August 28, 1960; September 23, 1960 to 31st January, 1962 and February 1, 1962 to March 10, 1963. I find that the losses flowing from the reduced hours of work and shutdowns were due to disorder caused by persons invading the work site or threatening to do so. That was in turn due to the defendants failure to provide security for the plaintiffs' workers, equipment and materials on the site during the said periods. And, be it noted, without such security the plaintiffs could not, as the engineers admitted, execute the works in accordance with the contract.

Despite those temporary shutdowns and occasions of reduced working hours, some of the plaintiffs' plant and equipment had to remain on the site for the eventual completion of the construction. They were to that extent "tied up," and were either not utilised or fully utilised. And so were the plaintiffs' labour force. All that naturally led to three basic sets of losses. (1) equipment cost; (2) overheads; and (3) labour costs. Those basic costs were included by the plaintiffs in their preliminary claim sent under cover of their letter of 25th January, 1962 to the engineers. The particulars of that claim are as follows:

COOPER & ASSOCIATES LIMITED

CONTRACT # 6 - NANSE PEN PRESSURE MAIN

COST TO COVER PRODUCTION LOSSES DUE TO LACK OF SECURITY.

PERIOD:

MAY 19 - 1980

AUGUST 28 - 1980

4 JCB's Backhoes .40x35x2x13x5x1.11x8).66	\$10,828
2 Front End Loaders .4x2x50x1.11x13x5x8x.66	15,238
Dump Truck & Flat Body Truck	
.4x2x20x1.11x13x5x8x.66	3,800
1 Pick-up Truck .4x15x1.11x13x5x8x.66	2,286
Pumps .4x102x2x5x13x.66	3,500
Tampers .4x25x9x5x13x.66	3,432
Comalong .4x190x5x13x1.11x.66	1,190
Air Compressor .4x17x1.11x13x5x8x.66	<u>2,590</u>

TOTAL (Equipment Cost)	\$39,442
Actual Labour Cost	\$ 94,000
Non Productive Labour Cost (40%)	\$ 37,600
Over/Head Charges 40%	\$1395/week
= 13 x.4 x 1895	<u>\$9854</u>
TOTAL COST FOR PERIOD	\$ 86,895.00

PERIOD 23rd SEPTEMBER 1980 to 31st JANUARY 1982

North West Backhoe - November 1980 to July 1981 (703 hrs)	
703x80x1.11x.37x.66	<u>\$15,245</u>
F & H Backhoe - October 16, 1980 to January 31, 1982	
15 1/2 x22x8x50x1.11x.37x.66	<u>\$59,156</u>
1 JCB Backhoe - September 23 1980 to January 31, 1982	
16.2x22x8x35x1.11x.37x.66	<u>\$27,050</u>
Front End Loaders - One full time and one 40% of Time = 1.4 Front End Loader Availability	
1.4x.37.16.2x22x8x50x1.11x66	<u>\$54,100</u>
2 Trucks (1 Dump Truck 1 Flat Body)	
16.2x22x8x20x1.11x.37 x.66 x2	<u>\$30,914</u>
1 Pick-up 16.2x22x8x15x1.11x.37x.66	<u>\$11,593</u>

Pumps 2x15.2x22x102x1.11x.37x.66	\$19,708
Tampers 16.2x22x8x25x1.11x.37x.66	\$19,322
Comalong 16.2x22x100x1.11x.37x.66	\$ 9,661

Air Compressor

12x22x8x17x1.11x.37x.66	\$ 9,732
Torex 8240 (C6) Bulldozer	
3x22x8x20x1.11x.37x.66	\$11,450
Roller (14 Ton) 2 months	
2x22x8x30x1.11x.37x.66	2,863
Vibrating roller	
2x22x8x15x1.11x.37x.66	1,431

TOTAL (EQUIPMENT COST)	<u>272,225</u>
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ACTUAL LABOUR	\$ 485,000.00
Non. Prod. Labour .37	<u>\$ 179,450.00</u>

Overhead @ 37%

$\frac{\$16.2x.37x98540}{12}$	<u>\$55,298</u>
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Total Cost this period	<u>\$ 451,675.00</u>
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Interest Charges

Total Amt claimed x 5% (86,895 + 451,675)
from June 1981 to January 1982

7 Months $(.05 \times 5389570 \times \frac{7}{12})$	15,708.00
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Opportunity - Cost (Lost)

Based on past performance of Company over the last two (2) years	<u>\$ 123,500.00</u>
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TOTAL OVERALL COST	<u>\$ 677,778.00</u>
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The engineers replied by letter dated 31st May, 1982 inviting the plaintiffs to respond to certain observation of theirs in regard to the claim and suggesting that the plaintiffs, the defendants and themselves meet to see if there was a basis to settle the claim. In a letter of even date they wrote to the defendants thus:

31st May 1982

The National Water Commission
4 Marescaux Road
Kingston 5.

Attention: Mr. W. R. Gauntlett
Deputy Technical Manager Special Projects (Actg.)

Dear Sirs,

Re: Kingston & St. Andrew Sewerage Scheme, Phase 1
Contract No. 6 - Security-related Claim

With reference to the attached copy of our letter of 31 May 1982 to Cooper & Associates Ltd. concerning a major security-related claim, we recommend strongly that you review this matter urgently at the highest level and subsequently call a meeting with the Contractor. (A copy of Cooper's 25 January letter and claim is attached for your information.)

The matter raised in the claim, although not technical, needs to be dealt with, particularly in view of the fact that until now adequate security for completion and testing of these Contract Works could not be obtained by the Contractor nor could it be provided by the Security Forces.

We wish to emphasize once more that the entire Lower West Area sewerage system could not be put into operation unless the pumping mains were fully completed and tested, which appears to be possible only if adequate official security could be provided.

Yours very truly,

/Sgd./ H. K. Unger
H. K. Unger
Project Director. "

The plaintiffs did not reply to the engineers letter to them of 31st May, 1982. However, on 14th June, 1983 the plaintiffs wrote to the engineers as follows:

"June 14, 1983

Reid Crowther Partners Ltd.,
5 Oxford Park Avenue
Kingston 5.

Attention: Mr. E. C. Brown

Dear Sirs,

Re: Contract C6 - Nasse Pen Pumping Mains
Lost Production Time throughout Duration
of Contract due to Lack of Adequate Security

We refer to our preliminary claim of the 25th January, 1982 relative to the above and attach hereto our final claim. Although we have had several discussions on the claim to date we are not aware of anything positive being done.

From the magnitude of the claim it is clear to see that our company must be suffering hardship due to the protracted delay.

We are therefore requesting that you deal with the matter urgently.

Thanking you for your co-operation.

Yours faithfully,
COOPER & ASSOCIATES LIMITED

/Sgd./ C. D. COOPER
C. D. COOPER
Chairman/Chief Executive

They attached thereto their final claim, particularised thus:

<u>COOPER & ASSOCIATES LIMITED</u>	
<u>CONTRACT # 6 -- NANSE PEN PARESEURE MAIN</u>	
<u>COST TO COVER PRODUCTION LOSSES DUE TO LACK OF SECURITY</u>	
<u>PERIOD.</u>	
<u>1ST February 1982 to 10th March 1983</u>	
1 P & H Backhoe for 50% of Time i.e. $\frac{273}{2}$ days =	<u>137 days</u>
$137 \times 8 \times 110 \times 1.11 \times .37 \times .66$	= \$32,679
1 JCB Backhoe for full period	
$273 \times 8 \times 45 \times 1.11 \times .37 \times .66$	= \$26,640
1 966 Caterpillar Front end Loader for 50% of Time i.e. <u>137 days</u>	
$137 \times 8 \times 55 \times 1.11 \times .37 \times .66$	= \$14,800
1 Pick-up for full Time i.e. <u>273 days</u>	
$273 \times 8 \times 20 \times 1.11 \times .37 \times .66$	= \$11,840
4 Pumps for 75% of Time i.e. <u>205 days</u>	
$4 \times 205 \times 150 \times 1.11 \times .37 \times .66$	= \$33,341
1 Test Pump for full Time i.e. <u>273 days</u>	
$273 \times 150 \times 1.11 \times .37 \times .66$	= \$11,100
TOTAL EQUIPMENT COST	<u>\$ 146,740.00</u>
(i.e. 30% of \$261,960 representing work done and certified)	
Non -Productive Labour $.37 \times 78588$	\$29,073
Overheads @ 37%	
$\frac{273}{5} \times .37 \times 1895$	\$38,283

Opportunity Cost (Lost) as per original claim	<u>\$30,000</u>
Total claim for period	<u>\$ 294,101</u>
Claim to 25th January 1982	<u>\$ 677,778</u>
	971,879
Interest Charges @ 19%	<u>184,657</u>
TOTAL CLAIM	<u>\$1,156,536</u>

Signed:

Date:14/6/83..... "

Some \$430,000 in the round comprising what the plaintiffs call "opportunity cost (lost)", interest charges as well as equipment and labour costs swelled the preliminary claim of \$677,778 to \$1156,536, the final claim. Van Hees said that the calculations for both claims were unintelligible to him. There was, he said, no supporting information as to the nature of the calculation. But, in my view, it was unnecessary that any explanatory information appear *ex facie* the claims in relation to the basic sets of costs mentioned earlier. The bases of the calculations must have been well known to Van Hees. See both Caleb Cooper's evidence explaining the bases, and letter of 13th October, 1980 from the engineers over the signature of Van Hees, himself, in which they evaluated the plaintiffs' earlier claims (since settled) and applied to two of those claims the same or similar formulae later employed by the plaintiffs to compute the disputed claims.

I accept as reasonable the plaintiffs' method of measuring by reference to their profits over two years preceding the start of the works, the cost of the opportunity they lost to secure other construction contracts which might have commenced at any time after the period scheduled for completion of the works under contract No. 6. That opportunity was lost because their equipment and key personnel were tied up at the site for an extra two years or so, due to the aforesaid security-related delays.

Now, the sum of \$250,925.13 paid to the plaintiffs in respect of the final claim of 14th June 1983 clearly constituted only a payment on account or part payment of the claim, even though the defendants would have hoped that the payment would serve to settle the claim once and for all.

The variation order under which the payment was made was a unilateral document of the defendants' making. It was not a document to which the plaintiffs had assented. And they made it clear upon receiving the payment that they were accepting it as an advance on the claim and without prejudice to their rights under the contract.

The plaintiffs however, have no right under the contract to be paid interest in respect of their claim. Since the parties have agreed neither expressly nor implicitly for the payment of interest, interest charges amounting to \$200,305 must be deducted from the sum of \$961,308.87 claimed in the amended statement of claim. There will accordingly be judgment for the plaintiffs for \$760,943.87.

They have been kept out of that money from 14th June, 1983 when they made their final claim. So in the exercise of my discretion under the Law Reform (Miscellaneous Provisions) Act I award interest on that sum at 15% per annum from 14th June, 1983 to today.

The defendants must also pay the plaintiffs' costs which are to be taxed if not agreed.