1951

Mar. 13, 14, 15 & 16, Apr. 30 May 1 & 2.

July 26

BETWEEN:

JOE'S & CO. LIMITED .....SUPPLIANT;

AND

HIS MAJESTY THE KING .....RESPONDENT.

Crown—Petition of Right—Contract—No recovery on quantum meruit or for damages—Petition dismissed.

Suppliant contracted with the Crown to construct twenty dwelling houses. After completion of the work suppliant was paid in full the contract price and the security deposited by it was returned. It now seeks to recover from respondent a further sum made up of several items set forth in the petition no claim for which was at any time made by suppliant in writing to the respondent during the course of the work contracted to be done, nor was the contract repudiated by suppliant. Some of the claims refer to specific items covered by the contract and others are alleged to have arisen through wrongful acts or omissions of the respondent.

The Court found that the suppliant failed to substantiate its claim for the specific items covered in the contract and that the acts or omissions complained of should have been in the contemplation of suppliant at the time the contract was signed.

Held: That the rights of the parties must be determined by the provisions of the contract and the contention of suppliant that it is entitled to recover on a *quantum meruit* basis fails since the contract provided the amounts to be paid to suppliant and any claim for damages must also fail as suppliant has not established any breach of the obligations imposed on respondent by the contract.

PETITION OF RIGHT by suppliant to recover from the Crown money alleged owing it.

The action was tried before the Honourable Mr. Justice Graham, Deputy Judge of the Court, at Winnipeg.

Irving Keith, K.C. and *P. W. A. Westbury* for suppliant.

Hugh Phillipps, K.C., C. K. Tallin, K.C. and *K. E. Eaton* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

GRAHAM, D. J. now (July 26, 1951) delivered the following judgment:

The suppliant, Joe's & Company Limited, carries on its business of contractors, builders and engineers, in the province of Manitoba. Its active principal is Mr. Joe Jacobucci who has had considerable experience in the contracting business of the nature here involved.

On August 30, 1948, the suppliant submitted a tender for the construction of twenty dwelling houses for the Minister of Justice, representing the Crown, at or near the Manitoba Penitentiary at Stony Mountain. The houses were to be built for the use of members of the staff of the Penitentiary.

The amount of the tender was $147,700. However, before any contract was signed, the suppliant found that labour and material costs had advanced in the interval and as a result a fresh tender was submitted for $162,900. This was accepted, and on September 30, 1948, a contract was duly entered into between the respondent and the suppliant.

The contract is in the form usual in such transactions and attached thereto and made part of the contract were the plans and specifications of the works to be completed by the suppliant.

The contract is a "lump sum" or "firm" contract in as much as the contractor agrees to accept a fixed amount as payment for the work to be performed. The houses were to be of three types, distinguished as types A, B and C. They were laid out in groups. Group 1 comprised eight houses; group 2, three houses; group 3, six houses and the southern group, three houses.

The suppliant, as it was required to do, prior to submitting its tender, had examined the site of the proposed buildings and certified to this in the tender submitted.

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The evidence discloses that rods were driven into the ground at different points on the site to determine the nature of the terrain below the surface.

This examination disclosed the likelihood that rock would be encountered in making the excavations of the basements called for in the contract. When the parties met to sign the contract, Mr. Jacobucci intimated this likelihood to Mr. Catto, the Chief Penitentiaries Engineer, and the one authorized to act for the respondent. What was said at the time is not too clear, but it appears that Mr. Catto told Mr. Jacobucci that in such an event, the respondent would help in the blasting and removal of the rock. In any event rock was encountered and the respondent did the necessary blasting, removal of boulders, filling in where necessary and the rough levelling of the basement sites.

After the signing of the contract, representatives of the parties, including Mr. Catto, and Mr. Brown, the engineer and secretary of the suppliant company, met at the site to determine the levels at which the houses were to be built and the location of the individual houses. The governing factor in determining the levels was the relationship of the sewer connections to be installed to a main sewer line already in existence on or near the site, and with which the new lines would be connected.

The suppliant then moved a bulldozer out to the premises and commenced excavating some of the basements. Rock was encountered at different levels ranging from 9 inches to 2 feet. It then became apparent that blasting operations would be necessary if the levels agreed upon were to be maintained.

As a result of discussions that took place between Mr. Lyons, the chief trade instructor of the Penitentiary and Mr. Brown, the engineer in charge for the suppliant, authority was received on October 16, from the Commissioner of Penitentiaries, to raise the levels to "rock level" as found necessary, but with the limitation that each individual house be held as nearly as possible to original grade level. The levels were raised accordingly in some cases from 2 to 3 feet, and the houses built to conform thereto.

There is a conflict in the evidence as to which parties suggested this change. Mr. Jacobucci says that Mr. Lyons did, and that he (Mr. Jacobucci) pointed out that such a change would involve considerable added expense because of the pouring of concrete at higher levels, the necessity of using ramps and added scaffolding and the filling in of the surrounding area to the grade level. He says that he was assured that the filling in would be done by the respondent as soon as the forms for the concrete were taken down. Mr. Lyons on the other hand, says that Mr. Brown, the suppliant's engineer, asked permission to change the levels and that he undertook to submit the matter through the Warden, to the Chief Penitentiaries Engineer in Ottawa, which he did.

If it were necessary, I would have to accept the evidence of Mr. Lyons as to what took place and to hold that the suggestion to raise the levels came from the suppliant. I come to this conclusion not only because of the credence I give to the evidence of Mr. Lyons, with whom I was favourably impressed as a witness, but on the circumstances and position of the contracting parties at that time.

However, it is not necessary that this point be decided since the evidence shows that there was a mutual acceptance of the change in the levels, and in my opinion, neither party can now complain as to the results that flowed from that decision. The settlement of the levels is always a preliminary to the work of construction such as contemplated here.

The works covered by the contract were in due course completed. During the course of the work, progress reports were made from time to time, and payment, I assume, made accordingly. In any event, it is not disputed that the suppliant received in final settlement under the contract the full sum of $162,900, and the security deposited by it, returned.

The suppliant now claims, by way of petition of right, that the respondent should pay to the suppliant the further sum of $26,205.31.

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This claim is comprised of several items which may be summarized as follows:

1.	The filling in of mortised recesses in doors and the re-mortising to fit different types of hardware supplied by respondent	$ 1,004.00
2.	Cutting back of eaves on four houses	300.00
3.	Cutting back of bulkheads on stairway in 8 houses to give head-room	960.00
4.	Change in windows on 5 type B houses	175.00
5.	Cost of levelling basements	979.20
6.	Cost of lumber and labour for constructing scaffolds and ramps	1,275.00
7.	Cost of extra labour in pouring concrete	680.00
8.	Cost of moving back equipment, materials and labour to site for laying of sidewalks	494.50
9.	Added labour costs	20,337.61
	Total:	$ 26,205.31

At the hearing, the petition was amended to correct an error of $10 in the mathematical computation of the claim asserted in Item 3 which should total $960, and again to correct the total claimed in the prayer of the suppliant from $25,710.81 to $26,205.31.

It should be noted that the suppliant at no time during the course of the work made any claim in writing to the respondent for payment of any of these items.

On July 25, 1949, the suppliant wrote Mr. Catto a letter, exhibit 10, in which it is stated that the houses could not be completed for less than $9,500 per unit, an amount in excess of what was to be paid. The letter says that there were several contributing causes, one of which was the "layout of the terrain as each unit has been practically surrounded by sewer excavations and ditches which has made material handling extremely difficult and has increased our labour costs by approximately 2/5 more than anticipated." Another is stated to be "the overall wage increase granted by the Manitoba Fair Wage Act." Finally the letter asks for favourable consideration and an adjustment of the contract price. This request was refused and the suppliant so advised.

In my opinion, this letter of Mr. Jacobucci was a general plea for recognition of the difficulties encountered by the suppliant but is not a claim in writing for payment of any of the above items in conformity with clauses 41 and 42 of the contract.

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These clauses read as follows:

41. It is intended that every allowance to which the Contractor is fairly entitled will be embraced in the Engineer's monthly certificate, but should the Contractor at any time have claims of any description which he considers are not included in the progress certificates such claims must be made in writing to the Engineer within thirty days after the date of the delivery to him of the certificate from which he considers the items of such claims to have been omitted, but in no case beyond the period of sixty days from the date of the practical completion of that portion of the work to which such claims apply. And in default of the presentation of such claims within the time or times so limited the Minister may treat such claims as absolutely barred.

42. The Contractor in presenting claims of the kind referred to in the last preceding clause must accompany them with satisfactory evidence of their accuracy and the reason why he thinks they should be allowed.

The other clauses of the contract which have peculiar importance in dealing with the issue before me are Clauses 7, 8, 10, 17 and 56. These read as follows:

7. The Engineer may, in writing, at any time before the final acceptance of the works, order any additional work or materials or things not covered by the contract to be done or provided, or the whole or any portion of the works to be dispensed with, or any changes to be made which he may deem expedient in or in respect of the works hereby contracted for, or the plans, dimensions, character, quantity, quality, description, location or position of the works or any portion or portions thereof or in any materials or things connected therewith or used or intended to be used therein or in any other thing connected therewith or used or intended to be used therein or in any other thing connected with the works, whether or not the effect of such orders is to increase or diminish the work to be done or the materials or things to be provided or the cost of doing or providing the same, and the Engineer may in such order, or from time to time as he may see fit, specify the time or times within which each order shall, in whole or in part, be complied with. The Contractor shall comply with every such order of the Engineer. The decision of the Engineer as to whether the compliance with such order increases or diminishes the work to be done or the materials or things to be provided, or the cost of doing or providing the same and as to the amount to be paid or deducted, as the case may be, in respect thereof, shall be final. As a condition precedent to the right of the Contractor to payment in respect of any such order of the Engineeer the Contractor shall obtain and produce the order, in writing, of the Engineer and a certificate in writing, of the Engineer showing compliance with such order and fixing the amount to be paid or deducted in respect thereof.

8 All the clauses of this contract shall apply to any changes, additions, deviations, or additional work, so ordered by the Engineeer, in like manner and to the same extent as to the works contracted for.

10. The Engineer shall be the sole judge of the work and material, in respect of both quality and quantity, and his decision on all questions in dispute with regard thereto or as to the meaning or intention of this contract and as to the meaning or interpretation of the plans, drawings and specifications shall be final, and no work under this contract shall be deemed to have been performed nor materials nor things provided so as to

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entitle the Contractor to payment therefor unless and until the Engineer is satisfied therewith, as evidenced by his certificate in writing, which certificate shall be a condition precedent to the right of the Contractor to be paid therefor.

17. His Majesty may, at any time, and without payment therefor, send and employ on, in and about the works other contractors and workmen, with such horses, machinery, tools, plant, equipment, materials, articles and things as the Engineer may deem necessary to do any work not comprised in this contract, and the Contractor shall afford to them all reasonable facilities, to the satisfaction of the Engineer, for doing such work, the work of the Contractor being interfered with as little as the Engineer may deem practicable . . .

56. This contract is made and entered into by the Contractor and His Majesty on the distinct understanding that the Contractor has, before execution, investigated and satisfied himself of everything and of every condition affecting the works to be executed and the labour and material to be provided, and that the execution of this contract by the Contractor is founded and based upon his own examination, knowledge, information and judgment, and not upon any statement, representation, or information made or given, or upon any information derived from any quantities, dimensions, tests, specifications, plans, maps or profiles made, given or furnished by His Majesty or any of His Officers, employees or agents; and that any such statement, representation or information, if so made, given or furnished, was made, given or furnished merely for the general information of bidders and is not in anywise warranted or guaranteed by or on behalf of His Majesty; and that no extra allowance will be made to the Contractor by His Majesty and the Contractor will make no claim against His Majesty for any loss or damage sustained in consequence of or by reason of any such statement, representation or information being incorrect or inaccurate, or on account of unforeseen difficulties of any kind.

Now as to the claims in detail.

1. *The filling in of mortised recesses in doors and the re-mortising to fit different types of hardware supplied by respondent.*

Under the terms of the contract, the respondent was to furnish the finish hardware, including door locks. The suppliant was to mortise the doors to permit these locks to be fitted therein. Apparently the suppliant assumed the respondent would furnish standard hardware, and without instructions proceeded to mortise the doors accordingly. When furnished with the locks, it was apparent that these would not fit the mortised recesses in the doors, and as a result, the suppliant had to fill in the recesses and re-mortise to fit the locks furnished by the respondent. This is clearly evidenced by the letter of Mr. Jacobucci put in as Exhibit E and dated July 7, 1949. It follows therefore,

that the extra work that had to be done was the result of the suppliant's failure to await instructions as he was required to do. This claim must fail.

2. *Cutting back of eaves on four houses.*

In the plans, the stairway from the first to the second floor calls for eleven risers of a fixed depth from the first floor to a landing on the stairs and for three further risers from the landing to the second floor. The landing was just above the location of a rear door from the kitchen, and the suppliant, in building the stairway, decided that if it were built according to plan it would not permit (in height) the installation of the door in the kitchen. Without consulting anyone representing the respondent, the suppliant added a riser to the eleven called for in the plan. As a result, the landing was raised by some 7½ inches. A door opened from the landing on to the upstairs balcony and it was found that the storm door thereon opening outwards would not open because it came in contact with the eaves. In order to take care of this problem, a portion of the eave was cut out, thus permitting room for the door to open. When this was drawn to the attention of Mr. Catto, he accepted the change but instructed that the eave on the other side of the house be cut out to the same extent to balance the appearance of the house. This was done and the claim made by the suppliant rests on these facts.

However, it was pointed out by Mr. Catto, that the better way to solve the original difficulty was to decrease the height of the door in the kitchen; this would permit the stairway to be built to plan and there would be no difficulty with the storm door off the landing. This was done in the remaining houses of that type.

In my opinion, this extra work and expense was occasioned by the suppliant's failing to consult and secure the approval, as required in the contract, of the respondent, before making a change in the plans. Apparently the engineer or foreman of the suppliant failed to take into proper account the results of inserting the extra riser and the raising of the landing floor. The suppliant therefore, was the author of his own difficulty and this claim cannot succeed.

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3. *Cutting back of bulkheads on stairway to give head-room.*

This change was made necessary by the lack of head-room on the stairs from the first to the seecond floor. Mr. Lyons noticed the difficulty when going over a "model house" with the suppliant's foreman and drew attention to it. At the hearing there was considerable discussion as to the cause of this deficiency of head-room. The suppliant says it resulted from an error in the plans, and the respondent that it was due to the unauthorized insertion of the extra riser in the stairs. The evidence is confusing on the latter point. I am of the opinion, that if the stairway was actually built from the same starting point on the first floor and the measurements of the risers and steps made as called for in the plans, and providing the landing was cut back or changed to permit the insertion of an extra riser, that this would not affect the head-room. If however, the landing was not altered and the slant of the stairway was made steeper to permit of the insertion of the riser then of course the angle of ascent would affect the head-room. However, Mr. Catto, on being advised of the difficulty, approved of cutting off of an angle of the floor of the upstairs linen closet which formed the bulkhead and this alteration provided the necessary head-room. The deficiency was discovered in the early stage of construction and the correction would have involved little labour and cost, much less, in my opinion, than claimed by the suppliant, both as to the number of houses affected and the cost of making the alteration.

Such a difficulty must often occur in building contracts of this nature, and I would assume the suppliant's engineer or foreman would have noticed it immediately and taken the proper steps to have it corrected. However, assuming there was an error in the plans and that as a result the alteration had to be made, the suppliant failed to carry out the provision of the contract in asserting such a claim. Clause 7 of the contract deals with "extra work" and payment therefor. Clauses 41 and 42 provides for the manner and the time in which such a claim must be made.

I find that the suppliant failed to comply with the provisions referred to and this claim is therefore barred.

These provisions I may say have application to all of the claims asserted by the suppliant and I propose to refer to them later in this judgment.

4. *Change in windows on five type B houses.*

This change was made with the approval of Mr. Catto to correct the difficulty of the stair landings in type B landings projecting over the kitchen window. The solution adopted was to cut down the size of the window in each kitchen. The error was discovered after the window frames had been inserted in two houses. The suppliant says he had ordered the frames for all of the houses although these had not been delivered. Just what extra cost was involved is not clear from the evidence. This claim, in my opinion, would be justified as an extra to the extent it imposed extra labour and cost on the suppliant. However, here again the suppliant is met by his failure to comply with the provisions of the contract in asserting this claim. My remarks with regard to item 3 are generally applicable to this claim and it too must fail.

5. *Cost of levelling basements.*

This claim has no merit. Under the contract, the suppliant is required to level the basements and the evidence establishes he did no more than he would be required to do in any contract of this nature.

The claims already dealt with differ from the other claims asserted by the suppliant in as much as they refer to specific items covered by the contract. The remaining claims and to some extent the last dealt with claim, item number 5, are alleged to have arisen through the wrongful acts or omissions of the respondent.

These alleged wrongful acts or omissions may be listed as follows:

1. The raising of the levels of the houses.

2. The failure of the respondent to fill in the areas surrounding the dwellings as soon as this should have been done.

3. The blasting of the sewer and water mains by the respondent during the time the suppliant's workmen were engaged on the work.

4. The employment of prison labour by the respondent.

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5. The bricklaying done by the respondent and the interference caused thereby to the workmen of the suppliant.

6. The failure of the respondent to back fill at the proper time up to the proper level to permit the suppliant to lay the sidewalks.

These acts and omissions, as alleged, are set out in detail in the suppliant's petition of right, and these details need not be repeated here. The suppliant says in effect, that none of them were contemplated at the time of entering into the contract, that they interfered with the suppliant's carrying out of its work and that they imposed on the suppliant added labour and material costs which should be borne by the respondent.

The suppliant is somewhat vague as to the legal basis of its claim. Counsel submitted that it rests in either damages or compensation. I can understand the difficulty with which counsel was faced in this matter. The principle chiefly relied upon is that enunciated in *Bush* v. *Whitehaven Trustees,* reported in the 4th ed. of Hudson on Building Contracts, vol. II, at p. 122. The principle referred to is set out in the headnote:

> Where the circumstances contemplated by a building contract for works are so changed as to make the special conditions of the contract inapplicable, the contractor may treat the contract as at an end and recover upon a *quantum meruit.*

Counsel for the suppliant cited a number of authorities to show that here and in England the decision in the Bush case has been and continues to be approved by the Courts. *Lyall* v. *Clark,* (1); *Boyd* v. *South Winnipeg Ltd.,* (2); *British Movietonews Limited* v. *London and District Cinemas, Limited* (3).

There is a question in my mind as to whether such a principle would be applicable to the Crown. Many statutory safeguards are provided against the Crown being faced with unauthorized liability. The provisions in the Public Works Act, ch. 166 (1927) R.S.C. and the Consolidated Revenue and Audit Act, ch. 178 of the same statutes are examples of these.

(1) (1933) 2 D.L.R. 737.
(2) (1917) 2 W.W.R. 489.
(3) (1950) 66 No. 2 T.L.R. 203.

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Ritchie, J. in *Jones* v. *The Queen* (1), discusses a similar type of contract and the position of the Crown in relation thereto, and his remarks have some application here. It is apparent that difficulties would arise if public officials denied the authority without compliance with the safeguards to make contracts binding on the Crown, could by their laches bring about the same result. However, it is not necessary for me to decide this particular point and I do not attempt to do so in this judgment.

In the Bush case, the decision was based on a finding by a jury that the conditions of the contract had so completely changed by reason of the failure of the defendant to hand over the sites of the work as required as to make the special provisions of the contract inapplicable.

It was on that finding of fact that the Court of Appeal upheld the judgment below: that the plaintiff was entitled to consider the original contract at an end and to claim on a *quantum meruit* basis for the work performed.

Here the suppliant saw fit to rely on the contract throughout, to accept interim payments and finally, to accept a final settlement thereunder. At no time did the suppliant repudiate the contract, and at the hearing counsel made it clear that the suppliant had no intention of so doing. I think for this reason, if for no other, the suppliant fails to bring his petition within the principle laid down in the Bush case and thus become entitled to claim on a *quantum meruit.*

Furthermore, I am unable to find that the conditions under which the work was performed were so changed from those contemplated at the time of entering into the contract as to give rise to the application of the decision in the Bush case.

I have carefully considered the acts and omissions complained of and already listed herein, and in my opinion, these should have been anticipated by the suppliant at the time of entering into the contract. I have, to some extent, already dealt with the raising of the levels of the houses. When these were raised by mutual agreement the suppliant knew, or should have known, of the results that would flow therefrom; in fact, in his evidence, Mr. Jacobucci says that

(1) (1877) 7 S.C.R. 570 at 600.

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at the time of raising the levels he anticipated most of the results therefrom. The need of longer ramps, increased scaffolding, the difficulty of getting material into the houses, and the necessity of filling up to grade must all have been in the mind of the suppliant or its principals at the time the levels were settled. It is true that some of the filling up by the respondent was delayed by the lack of trucks available to move the material. This delay, however, did not constitute such a change as to disturb the contractual relationship of the parties.

Section 17 of the contract provides that the respondent may move materials and workmen on the site at any time. The construction of the sewer and water lines was to be done by the respondent. The suppliant was well aware of the presence of rock and that the excavation of the trenches would necessitate blasting operations by the respondent.

In my opinion too, the suppliant should have anticipated the employment of prison labour by the respondent in carrying out the work to be done by the respondent in and around the site. This comment applies equally to the bricklaying which the suppliant knew was to be done by the respondent.

The evidence is not too satisfactory as to the back filling necessary to permit the laying of the sidewalks. However, assuming that the respondent delayed the filling in, this was comparatively a minor inconvenience and would not disturb the application of the contract.

Finding as I do that the acts or omissions complained were or should have been in the contemplation of the suppliant at the time of signing the contract, it follows that the rights of the parties must be determined by the provisions of the contract. See remarks of Lamont, J. in *Lyall* v. *Clark* (*supra*) at p. 744.

Counsel for the suppliant criticizes the contract as harsh and one sided, submitting that the Court will, under certain circumstances relieve against the "tyranny" of the provisions. *Parkinson* v. *Commissioners of Works* (1); *British Movietonews Ltd.* v. *London and District Cinemas, Limited* (*supra*).

(1) (1949) 2 K.B. 632.

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I must say that I cannot agree with counsel that the judicial decisions referred to have application here. When it is recalled that the Dominion Government, as representing the Crown, has to enter into many contracts in all parts of Canada of a like nature, it is not surprising that the terms are stringent in order to protect the public treasury. I think the words of Ritchie, J. in *Jones* v. *The Queen* (*supra*) at p. 616 have application here:

> The contract may be of a stringent nature, but whether more so than the nature of the subject-matter, the magnitude of the undertaking and the large public interests involved required and the action of Parliament necessitated, may be extremely doubtful. It must be borne in mind that the commissioners and chief engineer, with whom the contractors had to deal, and in whom such large powers were, no doubt, vested, stand in a very different position from private parties or corporations contracting on their own behalf, or engineers employed by parties so situated. They were appointed by the Crown to manage, superintend and carry to completion a great Dominion undertaking in which they had no private or individual interest. Disinterested public officers, who stood indifferent as it were, between the Crown and the contractors, and who could have no interest in bearing hardly or unjustly on the contractors, and whose only interest could be honestly and faithfully to discharge their public duties. Very probably considerations of this character may have influenced the contractors in agreeing to be bound by stipulations so stringent; be this so or not, the parties voluntarily entered into the contract, and by it must they be bound. It is difficult to recognize any very great hardship, still less any wrong, in requiring parties to be bound by and fulfil contracts fairly entered into according to their plainly expressed terms and conditions.

In that decision, the learned judge discusses at some length contracts of a like nature and reviews decisions of the Courts both in England and the United States in regard thereto.

The officials of the Crown who were before me appeared without exception to be "disinterested public officers," and I doubt if any interpretation of the contract or its application made by these would be unduly harsh or unconscionable in so far as the suppliant was concerned.

If the suppliant, therefore, claims on a *quantum meruit* this must fail since the contract provides for the amounts to be paid to the suppliant. If the suppliant rests his claim in damages then it must be for some breach of the obligations imposed by the contract on the respondent. I can find no such breach and such a claim too, must fail. If, finally, it is for extra compensation, then I must hold that

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the parties are bound by the terms of the contract and there is no provision therein for any such extra compensation.

The suppliant's claim must therefore be dismissed with costs.

While, there is, I repeat, no legal liability resting on the respondent, I am of the opinion that the suppliant has some claim for compensation on moral grounds in regard to the following items:

1. Cutting back of bulkheads to give head-room on stairways;

2. Changes in kitchen windows;

3. The added cost occasioned the suppliant by the respondent's inability to fill in up to grade as quickly as anticipated, and,

4. The interference with the suppliant's workmen due to the blasting operations in excavating the sewer and water lines.

I therefore make the suggestion that the added labour and material costs occasioned by these, could reasonably be determined by the Chief Penitentiaries Engineer and the amount so found, paid *ex gratia* by the respondent to the suppliant.

I make the above recommendation because I am of the opinion that had the suppliant complied with the provisions of the contract in regard to asserting such claims in the proper manner and at the proper time, these might well have been allowed.

Judgment accordingly.