G.P.-S.33967—1968-69—1,000. J. 219.

17/70

In the Supreme Court of South Africa.
In die Hooggeregshof van Suid-Afrika.

(APPELLATE ~~Provincial~~ Division.)
(~~Provinsiale~~ Afdeling.)

Appeal in Civil Case.
Appèl in Siviele Saak.

OERLIKON SOUTH AFRICA(PROPRIETARY) LIMITED Appellant,

versus

CITY COUNCIL OF JOHANNESBURG Respondent

Appellant's Attorney Kannemeyer,W & A.
Prokureur vir Appellant

Respondent's Attorney
Prokureur vir Respondent

Appellant's Advocate O. Rathouse S.C.
Advokaat vir Appellant D M Ettlinger

Respondent's Advocate G A Coetzee S.C.
Advokaat vir Respondent D J B

Set down for hearing on
Op die rol geplaas vir verhoor op 12 - 5 - 70

Steyn CJ, Rumpff, Holmes, Wessels JJA, de Villiers A J A

WLD

9.45 am — 11.00 am
11.15 am — 1.00 pm
2.15 pm — 4.00 pm
4.15 pm — 6.00 pm

C. A. V.

29-5-70 Rumpff J.A.
Appeal allowed with costs including two counsel as per judgment filed.

REGISTRAR, APPEAL COURT
GRIFFIER, APPÈLHOF.
BLOEMFONTEIN.

29-5-1970

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Bills Taxed.—Kosterekenings Getakseer.

Date. Datum.	Amount. Bedrag.	Initials. Paraaf.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

OERLIKON SOUTH AFRICA (PROPRIETARY)
LIMITED ..... Appellant

and

CITY COUNCIL OF JOHANNESBURG ..... Respondent

CORAM: STEYN, C.J., RUMPFF, HOLMES, WESSELS, JJ.A. et
DE VILLIERS, A.J.A.

HEARD: 15.5.1970. DELIVERED: 29.5.1970.

J U D G M E N T

RUMPFF, J.A. :

In this matter the appellant and the respondent entered into an agreement in terms of which the appellant undertook to supply, deliver and erect, for the respondent, three 60,000 K.W. turbo-generator sets and auxiliary apparatus at the Kelvin "B" Power Station, near Johannesburg. The contract consists of three documents, respectively called the Memorandum of Agreement, the Conditions of Contract and the Specification, and it provides for different dates within which

(I) the material is to be ready for shipment by the appellant, (II) the appellant is to be given access to the site and provided with the foundations and (III) the work is to be completed in respect of each generator, the completion dates being respectively the 30th September, 1968, the 31st December, 1968 and the 31st August, 1969. It is common cause that the first generator (known as "No. II Generator" and hereinafter referred to as "the generator") had reached the stage of practical completion by the 15th January, 1969, but was damaged in a fire which occurred on the 13th March, 1969. Before the date of the fire it had run under full load continuously from the 20th February, 1969, to the 13th March, 1969, and the respondent had agreed to issue a take-over certificate operating retrospectively to the 15th January, 1969. The certificate had been prepared but because of the fire it was never signed. It is also common cause that the certificate would have been delivered in the ordinary course, had it not been for the fire, and that the generator had been taken over by the respondent from the appellant on some date unspecified prior to the occurrence of the fire.

A dispute arose between the parties as to the liability for damage to the generator, and as to the liability to keep the three generators insured against damage in terms of the contract, and the respondent asked for an order, in the Witwatersrand Local Division, declaring that upon a proper construction of the contract, the appellant was responsible for the damage to the generator and liable to keep all three generators insured until the practical completion and taking of beneficial occupation by the respondent of all three generators. The appellant counterclaimed an order declaring that upon the proper construction of the contract the respondent carried the risk of damage to the generator caused on the 13th March, 1969, and that the obligation of the appellant to keep the first generator insured had terminated before the 13th March, 1969. The Court issued an order as claimed by the respondent, with costs, and the present is an appeal, by consent directly to this Court, against that order.

What is in issue between the parties, is the meaning of the last sentence of clause 10 of the Conditions of Contract and of clause 23 (a) of the Conditions of Contract.

Clause 10 reads as follows:

"On the written order of the Engineers given at any time during the progress of the Works and within twelve months after the practical completion and the taking of beneficial occupation of the Works the Contractor shall at his own cost and within such reasonable time as shall be specified in such order remove from the Works any materials which in the opinion of the Engineers are not in accordance with the Specification or their instructions and substitute proper materials therefor, and remove and properly re-execute any work executed with materials and workmanship which in the opinion of the Engineers are not in accordance with the Contract Document or their instructions, and amend and make good any defects, shrinkage, defaults or other damage which may appear arising from defective or improper materials or workmanship or from any neglect, omission, act or default of the Contractor. Until the date of taking over the Works from the Contractor for the beneficial use by the Council, the Contractor shall be responsible for any damage to the Works which may occur from any accident, fire, drought, flood, frost or tempest."

Clause 23 (a) provides as follows:

"From the commencement of the Contract until the practical completion and taking of beneficial occupation of the Works the Contractor at his own cost

shall/....

shall in the name of the Council and with a Company approved by the Council insure and keep insured against damage by or resulting from fire, the Works and all materials, temporary buildings, staging, fixed machinery and plant vested in the Council under the provisions of Clause 18 hereof in such amounts as the Engineers shall from time to time determine."

On behalf of the appellant it was contended that the Court a quo erred in holding that the word "Works" in the last part of clause 10 was intended to mean "the whole of the Works". On behalf of the respondent it was submitted that the word "works" in the industrial or building sense is not just the plural of "work", but a word whose ordinary and primary meaning is wider, and that it connotes the totality of the whole of the building operations. It was argued that the parties intended the word "Works" in the last part of clause 10 to have its primary meaning in the building sense, namely, "the whole of the works".

It must be accepted, I think, that in the absence of any intention to the contrary, the word "works" in a building or construction contract would mean the totality of what has to be done.

The issue in this case is what the parties intended to convey by the word "Works" in the phrase: "the date of taking over the Works from the contractor for the beneficial use by the Council". If the contract had provided for a date for "taking over the Works for the beneficial use by the Council" that would have meant the end of the matter. But there is no such date stipulated in the contract and the parties never envisaged such a date. They could not have contemplated such a date because what they expressly provided for was the taking over by the respondent for its beneficial use of each generator on a separate date, in other words, they contemplated a taking over by sections. That the appellant is obliged to hand over to the respondent a completed generator appears from clause 3 of the Memorandum of Agreement which reads:

> "The Contractor shall commence the Contract Works forthwith (except where the Specification requires an order to be first given by the Council or the Engineers) and shall continuously proceed with the Contract Works until each section thereof is completely finished ready for actual operation or use by the date stipulated in the Specification for completion of such section and shall carry out such tests on

completion as are required by the Specification and shall hand over each section thereof to the Council or where any such section is to be delivered but not erected by the date so stipulated for delivery. The expression "the date for completion" when hereinafter used shall mean the date so stipulated for completion or delivery of the Contract Works or such section as the case may be as varied (if at all) under the provisions of this clause."

Payment is, inter alia, dealt with in clause 29 of the Conditions of Contract and the first part of that clause reads as follows:

"Subject to the deduction of any amounts which may be due by the Contractor to the Council under this Contract or otherwise, the Council shall on the Certificate of the Engineers make payment to the Contractor of the sums due for the execution of the Works and the supply of materials and plant in the following manner:-

(a) As materials or plant forming part of the Contract Works are from time to time delivered to Site 80 per cent. of the delivered to Site Price of such material or plant. In the case of material manufactured in South Africa 80 per cent. of the value of the material delivered to the Site.

(b) The cost of spare parts if any when taken over by the Council.

(c) As erection proceeds in South Africa an amount

assessed by the Council from time to time so as to bring the payment up to 80 per cent. of the Contract Price of each part of the Contract Works.

(d) Such additional payment which together with the payments already made under (a) and (c) of this Clause shall bring the amount up to 95 per cent. of the Contract Price of each part of the Contract Works at the expiration of one month after each part of the Contract Works has been taken over by the Council.

(e) The balance of 5 per cent. of the Contract Price of each part of the Contract Works at the expiration of twelve months after each part of the Contract Works has been taken over by the Council."

A further term in clause 29 reads:

"Where any separate section of the Contract Works is to be delivered but not laid or erected the percentage to be paid under sub-section (a) of this Clause shall be 95 instead of 80 and the balance of the Contract Price shall be paid on acceptance thereof by the Engineers."

The provision that the balance of 5 per cent of the Contract Price of each part of the Contract Works is payable at the expiration of twelve months after each part of

the/.....

the Contract Works have been taken over, must be read with the provisions of the first part of the maintenance clause, which has already been quoted. It cannot be disputed, I think, that the word "Works" where it appears in the first part of clause 10 does not mean the whole of the works but a section of the works, namely each generator. If each generator is to be completed and taken over, as the contract provides, the taking over for beneficial use is the final act of taking over in respect of each generator. There cannot be a second taking over for beneficial use when there already has been a taking over for beneficial use. The whole concept of two takings over for beneficial use, would lead, with respect, to an absurdity. The fact that the parties contemplated only sections of the work to be taken over for beneficial use by the respondent, and that the contract provides only for such taking over, leads to the almost irresistible inference, in my view, that the parties intended the word "Works" in the whole of clause 10 to mean "a section of the works". There is a further consideration that militates against the construction of clause 10 as contended for by the respondent. The balance of the Contract

Price in respect of each generator becomes payable at the expiration of 12 months after such taking over and the maintenance period of twelve months is effective in respect of each generator separately.

Normally, all risk in connection with work completed by a contractor and accepted by the employer passes to the employer, see Bothwell v. Union Government (Minister of Lands) 1917 A.D. 262, where, in the judgment of the Court a quo, which was confirmed on appeal, it is stated at p. 280:

> "Voet in his Commentary (19, 2, 37) discusses the question of the risk of loss or damage occasioned by earthquake, flood, hurricane and the like-vis major or vis divina as the ancients called it - where the constructing of a work has been given out under a contract. In such a case, if the work has been given out as a whole, that is, by the job (aversione), and has been completed and approved or accepted by the employer, or is in such a state that it ought to have been approved by him, the loss will fall on the employer. But where the work has not yet been completed and approved, the loss or risk is with the contractor. So if the work has been given out and is to be completed in portions by the foot or by measurement, if the completed portions have been measured and approved by the employer, the risk or loss, if such portion or portions are

[illegible]

Normally, [illegible] in connection [illegible] work com- pleted [illegible] case [illegible] 2013 [illegible]

"Lost in [illegible] (10, 2, 77) [illegible] the question o the risk o loss or damage occasioned b earthquake, flood, [illegible] or civil [illegible] co[illegible] con- tract. In such cases, [illegible] work [illegible] given out as a whole, [illegible] the job [illegible], [illegible] have been completed [illegible] or [illegible] the employer, or in such [illegible] covered [illegible] the employer, [illegible] are the work has not yet been completed and approved, the [illegible] risk with the contractor, [illegible] the work has been [illegible] later [illegible] portions of the [illegible] completed or- tion [illegible] the employer, the risk or loss, in such portion or portions are

- project.....

destroyed or damaged through vis major, will fall on the employer, otherwise it is borne by the contractor. Glück in his exposition of the Pandects (Bk. 19, tit 2, sec. 1,055, vol. 17, p. 238 et seq.) agrees with the law as laid down by Voet, and adds that the contract between the parties may, however, contain a stipulation to the contrary with respect to the risk."

A common feature in building and construction contracts is, of course, a maintenance provision coupled with the right to retain a balance of the contract price. The nature of the duties to maintain would depend on what the parties have agreed upon. In Roux v. Colonial Government, 18 S.C. 143, at p. 147, such duties are described as follows: "On reference to the books it will be found that there are three distinct classes of undertakings which are commonly entered into with regard to retention money, the first being a repairing clause; the second a clause that the builder shall rectify all defects appearing within a certain period, and the third a maintaining and upholding clause." When there is a duty to uphold and maintain, the contractor may be called upon to rebuild the works if they are accidentally destroyed, as by fire or tempest (cf. Hudson's Building and Engineering

Contracts, 8th Edition, p. 193). There is no term in the agreement between the parties which expressly imposes the duty on the appellant to maintain and uphold, for a period, each generator after it has been taken over by the respondent, or a duty to maintain and uphold, for a period, the whole of the works. The only obligation imposed on the appellant in relation to works which have been taken over is that found in clause 10, which is not a duty to maintain and uphold, but a duty to repair and replace defective work arising from improper materials or workmanship or from neglect or act or default of the contractor.

There is a further provision which imposes a liability on the appellant, not in respect of work taken over for beneficial use by respondent, but in respect of work partially completed and used by respondent. It is to be found in clause 34 which reads as follows:

> "If the Engineers shall at any time or times after the date for completion of any section of the Contract Works certify that such section or any part thereof though not completed can be used without material damage thereto the Council may on giving the Contractor 7 days previous notice in writing of its intention in that behalf use such section or part as the case

may be in a reasonable and proper manner and such use shall be at the Contractor's risk until such section shall be completed in accordance with the provisions of this Contract.

Provided always that if such use shall materially hinder or delay the completion of any other portion of the Contract Works the Contractor shall be allowed such extension of time (if any) for the completion of such other portion as the Engineers shall certify in writing to be reasonable."

Whereas the first part of clause 10 deals with the duty of repair for a period after the taking over of beneficial occupation by respondent, the last portion deals in express terms with risk before the taking over for the beneficial use by the respondent. The position in our law is that if performance of the contract has become impossible through no fault of the debtor, the obligations under the contract are extinguished. In Kontraktereg en Handelsreg of De Wet and Yeats, third edition, at p. 119 it is stated:

"As prestasie na sluiting van die ooreenkoms onmoontlik word, sonder die skuld van die skuldenaar, word die verbintenis eenvoudig uitgewis. Die reël word soms ook anders gestel, nl. dat die skuldenaar bevry word indien prestasie deur oormag belet word, en as oormag word beskou faktore wat mens nie kan voorsien nie

of waarteen mens geen weerstand kan bied nie, soos buitengewone natuurkragte en natuurtoestande, oorlog, staatsoptrede, siekte, dood, e.d.m."

On the other hand, the parties to a contract may agree that the risk of impossibility of performance is to fall upon the debtor. In Kontraktereg en Handelsreg (supra) at p. 121 it is stated: "Onmoontlikwording van die prestasie wis die verbintenis ook nie uit nie as die skuldenaar die risiko van onmoontlikwording van die prestasie op hom geneem het, D.45.1.23; Vinnius, ad Inst., 3.14(15).2, no. 6; Holl. Cons., 1.201; Voet, 22.1.8 en 18.6.2." In Hudson's Building and Engineering Contracts, supra, at p. 171, the authors, in dealing with the concept of "frustration" in English law, refer to certain dicta in an English case and to some summaries of other cases and state the position as follows:

"Put in another way, the test is whether the risk of what happened was a risk taken by one of the parties to the contract.

It is not always easy to apply this doctrine to building contracts. The cases illustrated below show that the destruction by fire of the place where the work is to be done can be a frustrating event, but in general the destruction by fire, storm or other natural agencies of that which is being built before it is completed is

a risk assumed by the builder, and the builder will remain under an obligation to complete the work by doing it over again: cf. the fire insurance provisions in the current standard form R.I.B.A. contract."

In my view the parties intended, in the last part of clause 10, to deal with the risk of impossibility of performance before completion of the work and to impose such risk relating to accident, fire etc. on the appellant. That was the object of the parties and they did not, in my view, intend to deal with the risk after taking over any work for beneficial use by the respondent.

If the argument advanced on behalf of the respondent is correct, it would mean that, notwithstanding the express obligations imposed in the first part of clause 10, the parties, in addition, intended to agree, in the last ~~portion~~ part of clause 10, that appellant in effect would incur the liability to uphold and maintain the first two generators after completion, but not the third generator, although the third generator has to be maintained under clause 10 for twelve months after its completion, and that the period of such liability would end not

at/.....

at a stipulated period, but when the last generator is taken over for beneficial use. If it had been the intention of the parties to create that kind of liability, which is an onerous liability, I would have expected them to agree in express terms upon a duty to maintain and uphold the works in respect of each generator, and not only in respect of two generators, and I would have expected them to use simple and positive terms, and not the inapposite and incongruous language contained in the last part of clause 10.

A reference to the word "Works" in other clauses of the documents that constitute the contract between the parties, is, in the present matter, of little assistance. Clause 1 of the Memorandum of Agreement, inter alia, states: "the word 'Section' shall mean a section of the Contract Works for which a separate date for completion is stipulated. 'Tests on Completion' shall mean such tests as are prescribed by the Specification to be made by the Contractor before the Contract

Works/.....

Works or any section as the case may be is taken over by the Council." There are in fact no prescribed tests to be made before the "Contract Works" are taken over. In terms of the contract only sections are taken over. Clause 2 of the Memorandum of Agreement reads as follows:

> "The Contractor shall at his own cost and risk in a proper and workmanlike manner and to the satisfaction of the Engineers supply the Plant and materials and execute and perform in strict accordance with this Contract the several works and things described or referred to therein (hereinafter called 'the Contract Works') and shall in all respects perform and observe all the conditions and agreements on the part of the Contractor contained in or reasonably to be inferred from this Contract."

The words "the Contract Works" only appear in a few clauses in the contract documents, whereas the words "the Works" appear quite often. No definition is given of "the Works" however. In some clauses the word "Works" clearly mean all the works, or even site, see portion of clause 12 of the Conditions of Contract, which reads:

> "The Contractor shall personally superintend the execution of the Works so far as may be necessary and

shall keep constantly and entirely on the Works a competent Erection Engineer or general foreman during the progress of the Works."

In some clauses there is a specific reference to "Contract Works or any section thereof", an example of which is the first part of clause 28 which reads:

"The Council and/or the Engineers may by notice in writing to the Contractor delay or postpone the Contract Works or any section thereof.

In the event of such delay or postponement or in the event of the Council failing to carry out their obligations to give access to the Site or to provide foundations, frames and buildings by the date or dates specified or agreed between the Contractor and the Engineers, the date for completion of the Contract Works or any section (as the case may be) shall be postponed to such later date or dates (if any) as the Engineers shall certify, in writing, in each case to be reasonable."

In other clauses the word "Works" clearly mean sections of the work. They include clauses 16, 17 and 26, which read as follows:

"16. The Engineers may by writing under their hand extend the time fixed for the completion of the works.

(a) On receipt of written notice from the Contractor

given/.....

given immediately upon the occurrence of the cause of delay that the completion of the Works will be delayed by any strike or lock-out of any workmen or by any inclement weather or any other unforeseen circumstances, but not if such cause of delay is due to the default of the Contractor; or

(b) if any extra or additional works beyond those included in the Contract Document are ordered by the Engineers provided that the period of the extension shall bear the same proportion to the time fixed for the completion of the Works as the character and value of the additional works bear to the character and value of the Works at Contract rates."

"17. The Engineers shall assign to the Contractor a sufficient area of ground on the Site and shall accord him sufficient rights of possession to enable him to carry out the Works at such a rate as to ensure their completion within the time fixed, provided that members of the Council shall at all times have reasonable access to the Works, and the Engineers, the Clerk of Works and any other persons authorised by the Engineers shall at any time have access to the Works, the Workshops of the Contractor and any other place where work is being prepared for the Works."

"26. If the Contractor fails to commence the Works or to proceed with and complete the Works in the manner required by the Contract Document and by the dates

fixed by this Contract or by the grant of any extension of time in terms of Clause 15 or 16 hereof then the Council shall have the right in its absolute discretion by notice in writing either to determine the Contract and adopt one or more or all of the remedies provided in Clause 27 hereof or to require the Contractor to proceed with the Works and for each week by which the completion of the Works is delayed, beyond the date fixed as aforesaid, deduct the sum of one half per cent. of the Contract Price or section thereof per week, from any sums which may be or become due to the Contractor under this or any other Contract with the Council. Any penalty which may be exercised in respect of delay in completion as described shall be limited to 15 per cent. of the Contract Works or of such section as the case may be."

It is common cause that the words "Contract Works" in the last sentence should read: "Contract Price".

It is of some significance, however, that when the parties do comtemplate a situation that arises after completion of the three generators, they express themselves in clear terms. Thus, clause 18 of the Conditions of Contract reads as follows:

"18. Until the final completion of the Works the Contractor shall be responsible to the Council for any loss or damage by reason of neglect, theft, the weather or otherwise to any materials, temporary buildings, staging, fixed machinery and plant intended for the Works and placed by the Contractor or by his order on the Site or adjacent thereto, all whereof shall vest in the Council and shall not be taken away or used by the Contractor except for the purposes of the Works without the written authority of the Engineers; but on final completion of the Works in accordance with the requirements of the Contract Document shall be removed by the Contractor and thereupon shall revert to the Contractor and become his sole property."

Similarly, when the parties envisage the operations from the beginning to the end, they convey their intention in clause 5 of the Conditions of Contract as follows:

"5. The Contractor shall in carrying out work in South Africa conform to and shall execute the whole of the Contract Works so as to comply with the statutory and other legal enactments applicable thereto and to the employment of labour in connection therewith and in carrying out work on the Site shall also comply with all bye-laws or regulations of the Council or other local authorities the regulations of the Insurance Companies or any other regulations (including the regulations embodied in the South African Mines and

Works/.....

Works Regulations of Factories Act) to which the Council is subject in respect of the Contract Works."

In arriving at its conclusion that the words "the Works" in the last part of clause 10 mean "the whole of the works", the Court a quo, inter alia, relied on two English cases, Marks & Spencer, Ltd. v. London County Council, 1952 Ch.D. 549 and Smith v. Martin, (1925) 1 K.B.D. 30. I do not propose to deal with the decisions in those cases because they appear to me to be distinguishable and of no assistance in construing clause 10 of the Conditions of Contract before us.

I am of opinion that the parties intended to give the same meaning to the words "the date of taking over the Works for the beneficial use by the Council" that they gave to the similar phrase in the first part of clause 10, and that they intended the word "Works" to mean "a section of the Works". Clause 23 must, I think, be read with clause 10. Both clause 10 and clause 23 terminate the appellant's liability upon the taking over of beneficial use by the respondent. I am of opinion, for the reasons set out above, that the parties did not contemplate a taking over at the completion of the whole

of the works and that the words in clause 23 (a) "taking of beneficial occupation of the Works" were intended to mean "taking of beneficial occupation of a section of the Works".

In the result, I am of the opinion that the Court a quo erred in issuing the order which it did and that the appeal should be upheld with costs, such costs to include the costs of two counsel. The order issued by the Court a quo is set aside and substituted by the following order:

"An order is issued

(1) declaring that, subject to the reservation as set out in par. 3 of Respondent's notice in terms of rule of Court 6 (5) (d) (iii), dated the 24th November, 1969,

(a) the Applicant carried the risk of damage to Turbo-Generator Set and its auxiliary apparatus known in the Contract as "No. II Generator" which was caused by fire on the 13th March, 1969;

(b) the obligation of the Respondent in terms of sec. 23 of the Conditions of Contract to "insure and keep insured against damage by or resulting from fire" had terminated prior to the 13th March, 1969, so far as there was a duty to insure No. II Generator.

(2)/.....

(2) directing the Applicant to pay the Respondent's costs, such costs to include the costs of two counsel."

RUMPFF, J.A.

WESSELS, J.A.
DE VILLIERS, A.J.A. } Concur.

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

OERLIKON SOUTH AFRICA (PTY) LTD. ..... Appellant.

and

CITY COUNCIL OF JOHANNESBURG ..... Respondent.

Coram: Steyn C.J., Rumpff, Holmes, Wessels, JJ.A., et
De Villiers, A.J.A.

Heard: 15 May, 1970. Delivered: 29 May 1970.

J U D G M E N T

HOLMES, J.A.:

This appeal turns on the meaning of two words in a contract of a hundred-and-forty pages for the supply and erection of three turbo-generator sets at a price of more than four million rand.

The contract was entered into in June 1967 between the Johannesburg City Council and Oerlikon South Africa (Pty) Ltd. I shall refer to the former as the council and the

2/... latter

latter as the contractor. The contractual date of commencement was retrospective to 27 October 1965.

It emerges from the contract that the council had an existing power station known as Kelvin B. It housed ten turbo-generators. The purpose of the contract was to add three more generators, under the existing roof, in connection with the supply of electrical energy to the council's system. It is common cause that the first generator had reached a stage of practical completion on 15 January 1969; that it had been taken over by the council and was in beneficial use until 13 March 1969; and that it was damaged by fire on that night. The other two generators had not then been taken over and were not in the beneficial use of the council.

The first question is whether the generator was still on risk to the contractor when it was damaged by fire, in other words, whether the contractor is liable for such damage. The contract contains a general risk clause, (No. 10 of the conditions of contract), the last sentence of which reads -

"Until the date of taking over the

3/... works

> Works from the Contractor for the beneficial use by the Council, the Contractor shall be responsible for any damage to the Works which may occur from any accident, fire, drought, flood or tempest".

The second question is whether the contractor is obliged to keep all three generators insured against damage by or resulting from fire, from the commencement of the contract until their practical completion and the taking of beneficial occupation thereof by the council. As to that, the conditions of contract contain an insurance clause in the following terms -

> "23(a) From the commencement of the Contract until the practical completion and taking of beneficial occupation of the Works the Contractor at his own cost shall in the name of the Council and with a Company approved by the Council insure and keep insured against damage by or resulting from fire, the Works and all materials, temporary buildings, staging, fixed machinery and plant vested in the Council under the provisions of Clause 18 hereof in such amounts as the Engineers shall from time to time determine."

The dispute between the parties turns on the meaning of the words "the Works" in the last sentence of clause 10 and in

4/... clause

clause 23(a). In the Witwatersrand Local Division, Franklin A.J. upheld the council's contention that "the Works" there mean the totality of the works contracted for, and not a section thereof such as one generator. The learned Judge therefore granted a declaratory order answering both the foregoing questions in favour of the council. The parties have appealed direct to this Court by consent.

In this Court the basis of the argument on behalf of the contractor was that the contract provides for performance by sections. Schedule E of the specification deals with the dates for completion. They are 30 September 1968 for the first generator set; 31 December 1968 for the second; and 31 August 1969 for the third. Schedule F states the prices. For the first two generator sets, which are grouped together as"Part 1", the price is R2,876,200. For the third generator set, under the heading of "Part 2", the price is exactly half, namely R1,438,100. Hence, so it was contended, clauses 10 and 23(a), aforesaid, contemplated the taking over of the works for the beneficial use of the council section by section, i.e. to say, as

5/... each

each generator was completed; and that therefore the risk should also pass section by section. Reliance was placed on the definition of "Section" in clause 1 of the memorandum of agreement, namely "a section of the Contract Works for which a separate date for completion is stipulated". In this connection it was urged that the contract did not stipulate a completion date for the contract as a whole. Further support was sought from the definition of "Tests on completion", namely, "such tests as are prescribed by the specification to be made by the Contractor before the Contract Works or any section as the case may be is taken over by the Council". It was contended that the parties here intended that the contract works would be taken over section by section, and that they would not be taken over uno ictu when the third generator was completed. Then, in elaboration, an argument was based on clause 10 as a whole, in the conditions of contract. It reads in full as follows -

> "10. On the written order of the Engineers given at any time during the progress of the Works and within twelve months after the practical completion and the taking of beneficial occupation

6/... of

> of the Works the Contractor shall at his own cost and within such reasonable time as shall be specified in such order remove from the Works any materials which in the opinion of the Engineers are not in accordance with the Specification or their instructions and substitute proper materials therefor, and remove and properly re-execute any work executed with materials and workmanship which in the opinion of the Engineers are not in accordance with the Contract Document or their instructions, and amend and make good any defects, shrinkage, defaults or other damage which may appear arising from defective or improper materials or workmanship or from any neglect, omission, act or default of the Contractor. Until the date of taking over the Works from the Contractor for the beneficial use by the Council, the Contractor shall be responsible for any damage to the Works which may occur from any accident, fire, drought, flood, frost or tempest."

The argument was that the first part of this clause imposes maintenance obligations on the contractor "during the progress of the Works"; that if "the Works" there mean the contract works as a whole, there would not be three maintenance periods of 12 months for each section; that, having regard to the dates for

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completion of the generators, the period of maintenance in respect of the first would be 23 months longer than that of the last; that this was an inherently improbable situation; that therefore "the Works" in the first sentence of clause 10 must mean a section of the works; and that the same meaning must be given to that expression in the last sentence of the clause. Finally, it was contended that it could not have been intended that the contractor must continue to bear the risk of, or insure, a completed generator which was already in use by the council, until the completion of the totality of the works contracted for.

For all the foregoing reasons the contention on behalf of the contractor was that the words "the Works", wherever they appear in clauses 10 and 23, mean a section of the Works.

As to that, one must start at the beginning, with the basic rules for the interpretation of contracts. The contract, drawn up by the council, is contained in three documents described as the memorandum of agreement, the conditions of contract, and the specification. It would appear that the conditions of contract were adapted from a standard form which the

council uses. It is therefore not precisely tailored to the particular facts of the contract in question. However, it is the parties' contract and the basic rule is that it must be construed according to the plain and ordinary meaning of the words which they used, unless it is clear that something else was intended. The Court's task is one of interpretation: in the absence of clear indications to the contrary it cannot depart from the plain meaning, even if it were to think that certain provisions are unusual or drive a particularly hard bargain.

Now I do not think that there can be any doubt but that the plain meaning of the expression "the Works", in a building or an engineering sense, is the totality of the undertaking. As applied to the contract in this case it would mean the totality of the works contracted for. Hence the enquiry is whether there is a sufficient basis for excluding that plain meaning in the last sentence of clause 10 and in clause 23(a). To answer that enquiry one looks at the rest of the contract. The following considerations seem to me cogent -

(i) The plain meaning aforesaid is supported by the wording of clause 2 of the memorandum of agreement. It provides that the contractor shall at his own cost and risk supply the plant and materials and execute and perform in strict accordance with the contract "the several works and things described or referred to therein (hereinafter referred to as 'the Contract Works')". The expression "the several works and things" amounts to a definition of "the Contract Works"; and it supports the connotation of plurality and totality, as distinct from a piecemeal approach.

(ii) Where the parties intended to include the words "or a section", they said so. For example, clause 26 of the conditions of agreement contains a provision for liquidated damages for delay. It concludes: "Any penalty which may be exercised in respect of delay in completion as described shall be limited to 15 per cent of the Contract Works or of such section, as the case may be." Similarly, clause 27, which deals with the council's remedies in respect of defaults by the contractor, refers to the completion of "the Works or any part thereof". Again, clause 29 provides for payment,

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and in paragraphs (d) and (e) it pointedly avoids the notion of the totality of the Works with the words "after each part of the Contract Works has been taken over by the Council". Lastly, clause 34 confers on the council the power to use "any section of the Contract Works" which, though not completed, can be used without material damage thereto.

(iii) It was argued, contra, that when the parties intended, in a couple of instances, to refer to the totality they said so, with words such as "When the whole of the Contract Works are completed" in clause 86 of the specification. See also "Final completion of the Works" in clause 18 of the condition of contract; and "Whole of the Contract Works" in clause 5 thereof. This argument is unavailing. There is no relevant difference in meaning between the Contract Works, the Works, and the whole of the Contract Works; and nothing turns on which is used. But there is an antithetical difference between any one of those expressions and the concept of a section of the Works. They are as different in meaning as the whole is from the part. Hence the significance of the pointed use of the word "section" referred to in (ii), supra.

(iv) While there is no direct definition, in the

memorandum of agreement, of "the Contract Works" or "the Works", the parties rather went out of their way to define the word "Section" as meaning a section of the Contract Works for which a separate date for completion is stipulated. Because of this specifically and clearly defined concept of a part as distinct from the whole, one would be slow to read "the Works" as meaning a section thereof, unless the context and subject matter clearly so require.

(v) Although clause 3 of the memorandum of agreement requires the contractor to commence the Contract Works and to proceed continuously with them until "each section thereof" is completely finished, this affords no argument for the view that this is a contract to be performed by sections. There is only one contract, and it is for the performance of the totality of the works. True, the contractor commences it by starting on the first generator; but that is merely the inception of the whole. There is nothing unusual about that concept. There always has to be a beginning.

(vi) I am unable to agree with the argument on behalf of the contractor that there is no stipulated

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date for the completion of the Works as a whole. A deadline is fixed for the completion of each generator set, and when the third is completed there is nothing left for the contractor to do - the Works as a whole will have been completed.

(vii) (a) On an analysis of clause 10 I accept the contention on behalf of the council that this clause deals with two distinct concepts. The first relates to supervision by the Engineer: he may order the substitution of proper materials, and the re-execution of work not properly done. And the contractor is obliged inter alia to make good any defects arising from any neglect, omission, act or default on his part. The last sentence of clause 10 is not in any way connected with or related to the foregoing. Indeed, this last sentence should be in a separate clause. It imposes on the contractor responsibility for damage caused, not by any act or omission of his own, but by accident, fire, drought, flood, frost or tempest. Some of these savour of what are called Acts of God.

(b) There is no real difference in meaning

between "the practical completion and the taking of beneficial occupation of the Works" in the first sentence of clause 10, and "the date of taking over the Works from the Contractor for the beneficial use by the Council" in the second sentence. But individual generators have different completion dates, and "during the progress of the work" means "while erecting any one of the generators". And the first sentence of clause 10 adds the words "and within twelve months" etc., while these are absent in the second sentence.

(c) All the foregoing indicate that there is no correlation between the first and the second sentences of clause 10. Hence, even if one were to interpret "the Works" in the first sentence as meaning or including "a section", that provides no basis for a similar construction of "the Works" in the second sentence. This analysis of clause 10 in my opinion refutes the argument based upon it on behalf of the contractor.

(viii) Clause 23(a) obliges the contractor to insure certain things from damage by or resulting from fire, from the commencement of the contract (i.e. in 1965) until the practical

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completion and taking of beneficial occupation of the Works. This clearly means from the beginning to the end of the whole contract. The things to be insured are:

> "the Works and all materials, temporary buildings, staging, fixed machinery and plant## vested in the Council under the provisions of Clause 18".

And the amount of the cover is "such amounts as the Engineers shall from time to time determine". Clearly the amount of the cover varies according to the value of the items WHICH ARE on the premises and liable to injury. And the materials etc., all belong to the council in terms of clause 18. If the latter are to be insured, why exclude a completed generator from insurance? In the context there is no warrant for confining the insurance to each section or generator while it is being erected.

(ix) Finally, it was argued that for a generator or section to remain on risk and on insurance to the contractor after it is in use for the council's service, would be so inequitable as to be unintended. As to that, one only has to look at the plain language of clause 2 of the memorandum of agreement and clause 8 of the specification. The latter reads: "Until the Contract Works have been

completed ... the Contractor shall be responsible (subject to the Memorandum of Agreement and the Conditions of Contract) for the Contract Works whether under construction, during tests, or in use for the Council's service" (My italics). And one reads this with clause 2, which requires the contractor to execute, in strict accordance with the contract, the several works and things therein, "hereinafter called 'the Contract Works'". It is plain, in my opinion, that in both of those clauses "the Contract Works" mean the totality of the works contracted for; yet until their completion the contractor is responsible for them from start to finish, whether under construction, during tests or in use for the council's service. Not only does the latter provision negate the notion of a piecemeal and sectional approach to the interpretation of the contract, but it also disposes, because of its clear language, of the argument for construing the last sentence in clause 10 and clause 23 by reference to considerations of equity. As stated earlier, the court cannot re-draw the parties' contract, even if it includes what appears to be a very hard bargain.

To sum up -

(a) The plain meaning of "the Works", in the last

sentence of clause 10 and in clause 23, is the totality of the works contracted for.

(b) Reviewing the factors listed above, in their cumulative effect, I am of the opinion that it does not appear that something other than the plain meaning was intended in the last sentence of clause 10 and in clause 23.

(c) The words in question, in the last sentence of clause 10 and in clause 23, must therefore be construed according to their plain meaning.

(d) It follows that Franklin A.J. was right in granting the declaratory order which is the subject of this appeal.

In the result, I would dismiss the appeal with costs, including those occasioned by the employment of two counsel.

G.N. HOLMES

JUDGE OF APPEAL.

Steyn, C.J. Concurs.