Republic of the Philippines
Supreme Court
Manila

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WILFREDO V. LAPITAN
Division Clerk of Court
Third Division
SEP 06 2017

THIRD DIVISION

KA KUEN CHUA, doing business under the name and style KA KUEN CHUA ARCHITECTURAL,
Petitioner,

- versus -

COLORITE MARKETING CORPORATION,
Respondent.

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COLORITE MARKETING CORPORATION,
Petitioner,

- versus -

KA KUEN CHUA, doing business under the name and style KA KUEN CHUA ARCHITECTURAL,
Respondent.

G.R. Nos. 193969-193970

G.R. Nos. 194027-194028

Present:

VELASCO, JR.,
Chairperson,
BERSAMIN,
REYES,
JARDELEZA, and
TIJAM, *JJ.*

Promulgated:

July 5, 2017

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DECISION

REYES, *J.*:

These are consolidated petitions for review on *certiorari* assailing the Decision[1] dated July 28, 2009 and Resolution[2] dated October 4, 2010 of the Court of Appeals (CA) in CA-G.R. SP Nos. 103892 and 103899, which affirmed with modifications the Final Award[3] of the Construction Industry Arbitration Commission (CIAC) dated May 27, 2008 in CIAC Case No. 32-2007.

The Facts

On November 15, 2003, Colorite Marketing Corporation (Colorite) and Architect Ka Kuen Tan Chua (Chua), doing business under the name and style "Ka Kuen Chua Architectural" (KKCA), signed a construction contract whereby the latter undertook to build a four-storey residential/commercial building for the former on a parcel of land located at St. Paul Road, corner Estrella Avenue, Makati City.[4]

The parties agreed to a full contract price of Thirty-Three Million Pesos (Php 33,000,000.00), subject, among others, to the following stipulations: a) the project will commence in seven days from the time KKCA received a notice to proceed from Colorite, and will be completed within 365 days reckoned from the seventh day after the release of the down payment;[5] b) in the event that the project is not completed on time, the amount of Php 10,000.00 for each calendar day of delay shall be paid by KKCA to Colorite;[6] c) only a maximum of 20% of slippage, or 73 calendar days of delay, is allowed, and Colorite has the right to terminate the contract if the delay exceeded the maximum number of days allowed;[7] and d) Colorite has the right to take over and complete the construction of the project, and all costs incurred thereby will be deducted from the amount due to KKCA.[8]

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1 Penned by Associate Justice Mariflor P. Punzalan Castillo, with Associate Justices Rosmari D. Carandang and Ramon M. Bato, Jr. concurring; *rollo* (G.R. Nos. 193969-70), pp. 69-110; *rollo* (G.R. Nos. 194027-28), pp. 45-86.

2 *Rollo* (G.R. Nos. 193969-70) pp. 111-113; *rollo* (G.R. Nos. 194027-28), pp. 87-89.

3 *Rollo* (G.R. Nos. 193969-70), pp. 631-654.

4 Id. at 70, 642-643.

5 *Rollo* (G.R. Nos. 194027-28), p. 107.

6 Id. at 108.

7 Id.

8 Id.

In addition to the main construction contract, the parties also agreed on complementary provisions embodied in Addendum #01[9] and Addendum #02.[10]

Thereafter, Colorite issued the *Notice to Proceed,* and paid the agreed down payment in the amount of Php 6,600,000.00 corresponding to 20% of the contract price.[11]

To undertake the excavation work, Colorite engaged the services of WE Construction Company (WCC).[12] On January 10, 2004, full-blast excavation work began.[13] However, on January 17, 2004, the excavation resulted in erosion, which caused damage to the adjacent property owned by the Hontiveros family. This prompted the latter to file a formal complaint before the City Government of Makati. In view of this development, a Hold Order was issued by the Building Officials of Makati City dated January 22, 2004 directing KKCA to *stop immediately all its excavation activities in the premises, and to immediately restore the eroded portion of the adjacent property.* The incident resulted in the delay of the project because the Hontiveros family refused to sign a waiver that was required for the lifting of the Hold Order unless their property was restored.[14]

The restoration of the Hontiveros property was completed in October 2005.[15] Notwithstanding this development, the Hontiveros family's quitclaim remained forthcoming. As a consequence, the Hold Order remained effective and the construction suspended.

After 878 days of delay, Colorite demanded from KKCA to pay damages pursuant to the contract. KKCA refused contending that: (a) the agreed completion period was suspended when the City Government of Makati issued the Hold Order; and (b) Colorite failed to pay the costs of soil protection, as well as the 70% of the restoration cost of the Hontiveros property, which allegedly formed part of the agreement.[16]

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9 *Rollo* (G.R. Nos. 193969-70), pp. 192-194.
10 Id. at 195.
11 Id. at 70.
12 Id. at 646.
13 Id. at 633.
14 Id.; *rollo* (G.R. Nos. 194027-28), pp. 46-47.
15 *Rollo* (G.R. Nos. 193969-70), pp. 257-258.
16 *Rollo* (G.R. Nos. 194027-28), p. 47.

The dispute impelled Colorite to file the instant claim before the CIAC.[17] According to Colorite, reckoning from the date the down payment was made less the seven-day interval before KKCA commenced its work, and the 73 calendar days allowed slippage, the project should have been completed on March 5, 2005.[18] Hence, from March 6, 2005 up to the commencement of the action on July 31, 2007, the project was already delayed for 878 days. This renders KKCA liable to Colorite for payment of liquidated damages in the amount of Eight Million, Seven Hundred Eighty Thousand Pesos (Php 8,780,000.00), plus Ten Thousand Pesos (Php 10,000.00) per additional day of delay until the project is completed.[19]

In addition to its claim for liquidated damages, Colorite also asserted that upon its completion, the building will have a total leasable area of 1,320.12 square meters. Computed at a minimum monthly rental of Php 350.00 per sq m, the building should generate a total of Php 460,189.00 lease income per month.[20]

Accordingly, Colorite prayed for the following: (a) liquidated damages in the amount of Php 8,780,000.00; (b) loss of rental earnings in the amount of Php 13,345,481.00; (c) Php 500,000.00 attorney's fees; and, (d) litigation expenses in the amount of Php 300,000.00.[21]

In his Answer,[22] Chua asserted the following:

a) He is capable[,] competent and duly licensed to undertake the project in accordance with the plans and specifications but [his liability cannot] extend to the excavation works[,] which were not undertaken by KKCA but by a subcontractor;

b) His obligation to complete the construction of [Colorite's] residential/commercial building in 365 days reckoned from the seventh day after release of the downpayment was suspended by the stoppage of the excavation by the Makati City Building Officer[,] and by [Colorite's] failure to pay the cost of soil protection and the balance of its 70% share in the costs of restoration work of the Hontiveros property[,] which not only delayed the construction and increased its costs but rendered the performance of the contract extremely difficult;

c) On January 10, 2004, full blast excavation work in the construction project was beg[u]n by [WCC]. On January 17, 2004, substantial soil erosion occurred and caused damages to the adjacent

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17 *Rollo* (G.R. Nos. 193969-70), pp. 795-803.
18 Id. at 798.
19 Id.
20 Id. at 798-799.
21 Id. at 639, 800-801.
22 Id. at 402-421.

Hontiveros property and [on] January 27, 2004, the Makati City Building Office ordered the suspension of the excavation which lasted up to the present despite [diligent] effort on the part of [KKCA] to lift the suspension order and repair the damage to the Hontiveros property. On February 28, 2004[,] another erosion occurred causing further damage to the Hontiveros property;

d) [Colorite] agreed to share 70% in the restoration cost of the Hontiveros property [but] the remaining 30% was [KKCA's] share; as proof of [Colorite's] commitment to the new agreement[,] it paid Php150,000.00 for the boring test, but [Colorite] reneged on its undertaking to share in the restoration costs of the Hontiveros property thereby compelling [KKCA] to advance [the] costs[,] which claimant was duly notified [of] and billed[.] [H]owever, the latter refused further payment and instead offered the amount of Php800,000.00 as its donation not by way of sharing;

e) [KKCA] denied the claim of [Colorite] for rental income loss in the sum of Php13,345,481.00 as without basis and purely speculative; [KKCA] further denied [Colorite's] claim for liquidated damages in the sum of Php8,780,000.00 because the period of construction was deemed suspended with the suspension of the excavation by [Colorite's] failure to pay its share in the soil protection and restoration costs of the Hontiveros property; [and]

f) On its counterclaims[,] [KKCA] claimed for soil protection installed in the sum of Php1,324,340.64, soil protection for the unexcavated portion in the sum of Php3,583,872.00, design fee in the sum of Php2,310,000.00, ECC permit in the sum of Php50,000.00, balance of 70% share in the restoration of Hontiveros property in the sum of Php1,777,011.00; cost of maintaining the project site in the sum of Php2,047,269.00, moral damages for Php500,000.00, exemplary damages for Php500,000.00 and attorney's fees for Php500,000.00.[23]

Ruling of the CIAC

On May 27, 2008, the CIAC rendered its Final Award.[24] It ruled as follows:

On the basis of the evidence submitted by the parties the Arbitral Tribunal finds and so holds:

[COLORITE]:

1. [Colorite] is entitled to its claim for liquidated damages but only for 50% thereof (Php8,780,000.00) or for the sum of Php4,390,000.00 because it is equally responsible for the delay; [and]

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23 Id. at 632-633.
24 Id. at 631-654.

> 2. [Colorite] is not entitled to recover its other claims for loss of rental earnings, attorney's fees and litigation expenses.
>
> [KKCA]:
>
> 1. [KKCA] is entitled to his claim for soil protection works but only for the sum of Php552,840.60 but cannot recover his claim for soil protection works for the unexcavated portion;
> 2. [KKCA] is entitled to recover [its] claim for design fee in the sum of Php2,310,000.00;
> 3. [KKCA] is not entitled to [its] claim for recovery of ECC permit fee inasmuch as there is evidence [that] it was paid by [Colorite];
> 4. [KKCA] is entitled to [its] claim for restoration costs but only for the sum of Php523,579.20, which is 50% of [its] proven total claim of Php1,047,157.40;
> 5. [KKCA] is entitled to [its] claim for recovery of the costs of maintaining the project site but only for the sum of Php313,684.32[,] which is 50% of [its] total proven costs of Php627,368.64, inasmuch as the costs are part of the restoration costs of the Hontiveros property;
> 6. [KKCA] is not entitled to [its] claim for moral and exemplary damages and for attorney's fees; [and]
> 7. The parties shall bear their respective arbitration costs.[25]

Not satisfied with the CIAC award, both parties filed their respective petitions for review before the CA.

Ruling of the CA

On July 28, 2009, the CA promulgated the assailed Decision[26] affirming with modifications the Final Award of CIAC. The *fallo* of the CA decision reads:

> **WHEREFORE**, in view of the foregoing, the instant **PETITION** is partially **GRANTED**. The assailed Final Award dated May 27, 2008 of the [CIAC] in CIAC Case No. 32-2007 is **AFFIRMED** with **MODIFICATIONS**.
>
> Accordingly, the assailed Award is hereby **AFFIRMED** with respect to the following:
>
> FOR COLORITE:
>
> 1. Colorite is entitled to its claim for liquidated damages but only for 50% of Php8,780,000.00 or for the sum of Php4,390,000.00.

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25 Id. at 652-653.

26 Id. at 69-110; *rollo* (G.R. Nos. 194027-28), pp. 45-86.

2. Colorite is not entitled to loss of rental earnings, attorney's fees and litigation/arbitration expenses.

FOR KKCA:

1. KKCA is entitled to its claim for soil protection works but only in the amount of Php552,840.60.
2. KKCA is entitled to its claim for design fee in the amount of Php2,310,000.00.
3. KKCA is not entitled to its claim for increase in the price of construction materials, moral and exemplary damages, attorney's fees and litigation/arbitration costs.

In addition, the Final Award is **MODIFIED** with respect to the following:

FOR COLORITE:

1. Colorite is hereby ordered to pay KKCA the amount of Php550,000.00 (Php700,000.00 less P150,000.00 which it already advanced) as part of its share in the restoration costs of the Hontiveros property;
2. Colorite is ordered to share 50% in the total maintenance costs (Php2,047,268.75) or a total amount of Php1,023,634.30.
3. Colorite is ordered to reimburse KKCA the amount paid by the latter for the ECC permit in the amount of Php50,000.00.
4. In satisfying Colorite's obligations, the necessary deductions should be made from its down payment of Php6,600,000.00 as may be appropriate.

FOR KKCA:

1. KKCA is directed to finish the subject construction project subject to the necessary adjustments in the contract price;
2. KKCA is enjoined to secure the quitclaim from the Hontiveros family and the lift order from the city government of Makati in order for the construction project to proceed.

SO ORDERED.[27]

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[27] *Rollo* (G.R. Nos. 193969-70), pp. 108-109; *rollo* (G.R. Nos. 194027-28), pp. 84-85.

According to the CA, the construction contract shows that Colorite was indeed liable for the payment of the design fee, it being not really included in the summary of the bid proposal, which itemized all the works that KKCA proposed to perform.[28] On the other hand, soil protection and excavation works were deemed included in the KKCA's scope of work; hence, expenses for said items should be deemed as necessarily contained in the agreed contract cost and no separate computation and payment for the same is necessary.[29] Nevertheless, the CA adjudged that KKCA is entitled to its claim for soil protection works in the amount proved by the evidence presented, and the same shall be deducted from the total down payment already made.[30]

As further found by the CA, the original construction contract categorically states that Colorite shall be held free from any liability arising from damages to third parties; thereupon, only KKCA should be made to bear the costs of the restoration of the Hontiveros property.[31] However, the CA maintained that said stipulation was deemed superseded when the parties agreed that Colorite will share in the cost of restoration of the Hontiveros property (*restoration agreement*). Due to this fact, and because of Colorite's contributory negligence owing to its failure to deliver the share it promised amounting to Php700,000.00, it is partly to blame for the protracted delay of the project.[32] Accordingly, Colorite was adjudged as only entitled to 50% of the liquidated damages it is claiming or Php4,390,000.00.[33] For the same reason, Colorite was also held liable to 50% of the total maintenance cost amounting to Php2,047,268.75.[34]

The CA ruled that the parties were both at fault, but were not in bad faith. Consequently, neither party is entitled to moral damages, exemplary damages, arbitration costs and attorney's fees.[35]

Anent the Environment Compliance Certificate (ECC) Fee, the CA ruled that Colorite should reimburse KKCA, because payment for the same was advanced by the latter in the name of the former.[36]

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28 *Rollo* (G.R. Nos. 193969-70), p. 99; *rollo* (G.R. Nos. 194027-28), p. 75.
29 *Rollo* (G.R. Nos. 193969-70), pp. 80-81; *rollo* (G.R. Nos. 194027-28), pp. 56-57.
30 *Rollo* (G.R. Nos. 193969-70), pp. 82-83; *rollo* (G.R. Nos. 194027-28), pp. 58-59.
31 *Rollo* (G.R. Nos. 193969-70), p. 85; *rollo* (G.R. Nos. 194027-28), p. 61.
32 *Rollo* (G.R. Nos. 193969-70), pp. 85-90; *rollo* (G.R. Nos. 194027-28), pp. 61-66.
33 *Rollo* (G.R. Nos. 193969-70), pp. 104-105; *rollo* (G.R. Nos. 194027-28), pp. 80-81.
34 *Rollo* (G.R. Nos. 193969-70), p. 96; *rollo* (G.R. Nos. 194027-28), p. 72.
35 *Rollo* (G.R. Nos. 193969-70), pp. 105-108; *rollo* (G.R. Nos. 194027-28), pp. 81-84.
36 *Rollo* (G.R. Nos. 193969-70), pp. 99-100; *rollo* (G.R. Nos. 194027-28), pp. 75-76.

Dissatisfied, both parties filed their respective motions for reconsideration. However, both motions were denied by the CA per Resolution[37] dated October 4, 2010.

The parties filed before the Court their respective petitions[38] under Rule 45 of the Rules of Court. Since the instant petitions assail the same CA decision, both petitions were consolidated per Resolution[39] dated December 15, 2010.

According to Colorite, the CA erred in:

a) not awarding Colorite full liquidated damages and in ordering the adjustment of the contract price;

b) ruling that Colorite is not entitled to loss of rentals and attorney's fees;

c) ruling that Colorite is liable to share in the restoration costs of the Hontiveros property and maintenance costs of the project;

d) ruling that Colorite is liable to pay the costs of design fee and ECC permit; and

e) ruling that KKCA is entitled to its claim for soil protection works.[40]

For its part, KKCA asserts that the CA erred in:

a) finding that excavation and soil protection works are included in KKCA's responsibilities and should be deemed included in the Contractor's Scope of Work indicated in the contract;

b) directing KKCA to finish the subject construction project;

c) ruling that KKCA is enjoined to secure the quitclaim from the Hontiveros family, and the lift order from the City Government of Makati so that the construction project can proceed;

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37 *Rollo* (G.R. Nos. 193969-70), pp. 111-113; *rollo* (G.R. Nos. 194027-28), pp. 87-89.
38 *Rollo* (G.R. Nos. 193969-70), pp. 10-67; *rollo* (G.R. Nos. 194027-28), pp. 11-43.
39 *Rollo* (G.R. Nos. 194027-28), pp. 123-124.
40 Id. at 31.

d) awarding Colorite liquidated damages in the amount of Php 4,390,000.00;

e) ruling that Colorite is liable only for the amount of Php 700,000.00 and not 70% of the costs for the restoration of the Hontiveros property;

f) ruling that KKCA was only able to prove the amount of Php 552,840.64 as cost for soil protection works;

g) ruling that Colorite is liable only for 50% of the cost of maintaining the project site; and

h) not holding Colorite liable for moral damages, exemplary damages, attorney's fees, arbitration fees, and other costs of suit.[41]

Ruling of the Court

As a general rule, a petition for review on *certiorari* under Rule 45 is limited to questions of law. However, this rule admits of certain exceptions; among them is when the findings of the CA conflict with those of the court *a quo*,[42] as in this case. Thus, a review of the evidence on record is warranted.

The instant controversy arose from the delay in the completion of the construction project.

According to the CIAC, the issuance of the Hold Order was the immediate cause of the delay.[43] However, there is no denying that said Hold Order would not have been issued if not for the complaint instituted by the Hontiveros family after their property was damaged by the erosion. Thus, it is material to determine what caused the erosion, and who should be blamed therefore.

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41 *Rollo* (G.R. Nos. 193969-70), pp. 38-39.

42 *Geraldine Michelle B. Fallarme and Andrea Martinez-Gacos v. San Juan de Dios Educational Foundation, Inc., Chona M. Hernandez, Valeriano Alejandro III, Sister Conception Gabatino, D.C., and Sister Josefina Quiachon, D.C.*, G.R. Nos. 190015 & 190019, September 14, 2016; *Da Jose, et al. v. Angeles, et al.*, 720 Phil. 451, 462 (2013); *Sampaguita Auto Transport Corp. v. NLRC, et al.*, 702 Phil. 701, 709 (2013).

43 *Rollo* (G.R. Nos. 193969-70), p. 645.

The records further show that the restoration of the Hontiveros property was already completed in October 2005. In spite of this, the construction remained suspended. The instant case was instituted on July 31, 2007, or 24 months from the time the Hontiveros property was restored.

There are two principal questions to be resolved herein, to wit: (a) what factor or factors contributed to the project's prolonged delay?; and (b) what are the parties' respective participation, if any, in the delay?

Moreover, the resolution of this case also rests upon an examination of the parties' contractual relationship embodied in the main construction contract, Addendum #01 and Addendum #02, and the alleged agreement entered into by the parties where Colorite will contribute Php 700,000.00 in the restoration of the Hontiveros property.

KKCA is at fault for the erosion, which damaged the Hontiveros property

The CIAC found that the parties are both to blame for the erosion, which damaged the Hontiveros property; hence, they should equally share the restoration cost of the same and bear the consequences of the project's delay.[44]

According to the CIAC:

> The actual cause of the delay is the failure by the parties to realize and admit that they are both to blame for the erosion the excavation had caused to the adjacent Hontiveros property and therefore are to share equally the expenses of restoring said property.
>
> The excavation was done by [WCC] that was engaged by [Colorite] and it was done without the correct and adequate soil protection for which reason it caused erosion to the adjacent Hontiveros property. [Colorite] assumed responsibility for the defective excavation of its contractor when it did not hold [WCC] accountable and was present in the various meetings with [KKCA], the Hontiveros family[,] and Makati Building Official regarding the restoration of the Hontiveros property and it is estopped to deny it. Estoppel precludes one from denying or asserting by his own deed or representative any contrary to that established as the truth in the legal contemplation (**R-11 Builders Inc. v. CIAC G.R. No. 152545 & 165687, Nov. 15, 2007**). But [KKCA] is equally to blame

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44 Id.

> because erosion occurred on January 20, 2007[45] (sic) after full blast excavation started on January 17, 2007[46] (sic) after excavation was added to its scope of work on December 15, 2003 (Exh. R-11), which placed under its supervision the excavation works of the sub-contractor. x x x.[47] (Emphasis in the original)

On the basis of estoppel, the CIAC concluded that Colorite was also at fault considering that it attended the various meetings regarding the restoration of the Hontiveros property; and it did not attribute any fault on WCC. To this, the Court cannot agree.

Colorite was present in the various meetings with KKCA, the Hontiveros family, and Makati building official regarding the restoration of the Hontiveros property. However, such fact, by itself, should not be taken against Colorite. As the owner of a project involving a substantial amount of financial investment, it is but normal for Colorite to show extraordinary interest in the resolution of an issue that posed a problem to the project's completion. Colorite's mere presence in the meetings does not amount to conduct and/or representation that it has, in fact, assumed an obligation. The principle of estoppel was, thus, erroneously applied.

Secondly, the CIAC maintained that WCC was at fault for the defective excavation. According to the CIAC:

> In the construction industry[,] soil protection is part of excavation works inasmuch as it is necessary in order to prevent erosion. The sub-contractor, [WCC], the company contracted by [Colorite] to do the excavation work for the basement and foundation of the building before the contract and Addendum #01 were signed by the parties, is duty bound to provide correct and adequate soil protection to avoid erosion. [Colorite] failed to establish that its sub-contractor did soil protection work and if it did[,] it was [not] adequate or properly done. On the contrary, what happened was that after its initial full blast excavation works[,] the wall of the excavated basement adjacent [to] the Hontiveros property collapsed.[48]

The CIAC concluded that by not holding WCC accountable, Colorite, thereby, condoned its actions and assumed its liabilities. As such, WCC's liability in the resulting damage to the Hontiveros property should be borne by Colorite. To this, the Court once again disagrees. For one, WCC was

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45 Should be January 17, 2004; id. at 633.
46 Should be January 10, 2004; id.
47 Id. at 645-646.
48 Id. at 647.

not an employee of Colorite within the contemplation of Article 2180,[49] in relation to Article 2176,[50] of the Civil Code as to make the latter liable for the damages caused by the former. Further, the fact that it was Colorite, which contracted WCC to do the excavation works, is of no moment. It is beyond dispute that the parties expressly agreed that all excavation works are included in KKCA's scope of work, as the general contractor of the project. Paragraph 21 of Addendum #01 is clear on this point. It reads:

> 21. **All excavation works as required for, should be included on the scope of works of the Contractor.** Disregard Pre-Bid Minutes Item II-G at Page 3.
> **NOTE**: Corresponding cost to be paid to the contractor based on sub-contractor's cost.[51] (Emphasis ours)

In view of the said stipulation, WCC was placed under KKCA's supervision and control.

Notably, in its Answer to Colorite's Complaint before the CIAC, KKCA never asserted that WCC should be blamed for the erosion. Although KKCA intimated that *substantial soil erosion occurred on January 17, 2004 after WCC commenced with the full blast excavation on January 10, 2004,*[52] the said statement only redounds against WCC's liability and negates KKCA's assertion that *there were already erosions prior to the commencement of its undertaking.*[53] Note that KKCA commenced performance of its undertakings on December 22, 2003, or seven days after the signing of the contract on December 15, 2003.

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[49] Art. 2180. The obligation imposed by Article 2176 is demandable not only for one's own acts or omissions, but also for those of persons for whom one is responsible.

The father and, in case of his death or incapacity, the mother, are responsible for the damages caused by the minor children who live in their company.

Guardians are liable for damages caused by the minors or incapacitated persons who are under their authority and live in their company.

The owners and managers of an establishment or enterprise are likewise responsible for damages caused by their employees in the service of the branches in which the latter are employed or on the occasion of their functions.

Employers shall be liable for the damages caused by their employees and household helpers acting within the scope of their assigned tasks, even though the former are not engaged in any business or industry.

The State is responsible in like manner when it acts through a special agent; but not when the damage has been caused by the official to whom the task done properly pertains, in which case what is provided in Article 2176 shall be applicable.

Lastly, teachers or heads of establishments of arts and trades shall be liable for damages caused by their pupils and students or apprentices, so long as they remain in their custody.

The responsibility treated of in this article shall cease when the persons herein mentioned prove that they observed all the diligence of a good father of a family to prevent damage.

[50] Art. 2176. Whoever by act or omission causes damage to another, there being fault or negligence, is obliged to pay for the damage done. Such fault or negligence, if there is no pre-existing contractual relation between the parties, is called a quasi-delict and is governed by the provisions of this Chapter.

[51] *Rollo* (G.R. Nos. 193969-70), p. 193.

[52] Id. at 633.

[53] Id. at 334.

Therefore, by January 10, 2004, KKCA was already in full control of the project for 19 days. Within such period, KKCA should have already installed, or was in the process of installing soil protection measures to ensure safe excavation pursuant to its contractual obligation under paragraph 33 of Addendum #01.

Luis T. Reyes, KKCA's consultant[54] tasked to supervise the excavation, testified that no soil protection measure was installed prior to the erosion. It was only after the erosion took place that KKCA installed remedial measures to avert aggravation but to no avail. Hence, the services of soil protection specialists, *Pearl and Jade*, were called upon. Thus:

> Archt. L. T. Reyes (Respondent):
> Actually[,] we have performed the remedial measures on that. We have installed the warmest and plastering, so that we can contain the erosion.
>
> Atty. B. G. Fajardo (Arbitrator):
> Yeah[,] before this warmest, this remedial measure was done[,] there were prior erosions. There were a remedial measure because erosion took place, is that correct?
>
> Archt. L. T. Reyes (Respondent):
> Yes. There is an erosion, there [were] erosion[s].
>
> Atty. B. G. Fajardo (Arbitrator):
> **That's why precisely, after you did a remedial measures after the erosion took place in January 2004, is that correct?**
>
> Archt. L. T. Reyes (Respondent):
> 2004?
>
> Atty. B. G. Fajardo (Arbitrator):
> Yes.
>
> Archt. L. T. Reyes (Respondent):
> **Yes, sir.**
>
> Atty. B. G. Fajardo (Arbitrator):
> Then of course after you made a remedial measure[,] you [were] continuous[ly] supervising the excavation, is that correct?
>
> Archt. L. T. Reyes (Respondent):
> Excuse me[,] sir.

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54 Id. at 194.

Atty. B. G. Fajardo (Arbitrator):

You just follow me, in January, okay, you took over this revision of the excavation work. Now during the work, excavation works [which] you supervise[d] because of the addendum[,] there was an erosion in January 2004, is that correct?

Archt. L. T. Reyes (Respondent):

Yes[,] sir.

Atty. B. G. Fajardo (Arbitrator):

After the erosion, you did the remedial measures?

Archt. L. T. Reyes (Respondent):

Yes[,] sir.

Atty. B. G. Fajardo (Arbitrator):

Okay. Now…

Archt. L. T. Reyes (Respondent):

They do continuously…

Atty. B. G. Fajardo (Arbitrator):

Just answer me, just answer then go ahead. You did the remedial measures, okay. Then the excavation works continued then there was another erosion. So you abide again [by] the remedial measures, that's my point. In other words, you perform[ed] duties attendant to your work as contractor in the excavation works in the basement.

Archt. L. T. Reyes (Respondent):

Excuse me, sir. We do remedial measure continuously not only when there is erosion. We continuously put a (unintelligible) and subsequently during that time[,] we consulted a foundation specialist which [is] Pearl and Jade. We do not attack the problem when there is a problem. We attack it before the problem occurs.

Atty. B. G. Fajardo (Arbitrator):

Yeah, that is correct. That should be the ideal thing. **But you did the remedial measures in January after the erosion took place in January, is that correct?**

Archt. L. T. Reyes (Respondent):

Yes.

Atty. B. G. Fajardo (Arbitrator):

Okay. That's true, **you did the remedial measures because [erosion] already took place. And it[']s good that you continued making a remedial measure, but the fact is there was a prior erosion before you did the remedial measures. And you continued [with] this[.] [D]espite your remedial measure[,] another erosion took place in February 2004, is that correct?**

Archt. L. T. Reyes (Respondent):
It's correct.[55] (Emphasis ours)

As found by the CIAC:

> [E]rosion occurred on January 20, 2007[56] (sic) after full blast excavation started on January 17, 2007[57] (sic) after excavation was added to its scope of work on December 15, 2003 (Exh. R-11) which placed under its supervision the excavation works of the sub-contractor. Plainly, when [KKCA] accepted excavation as an additional work to the scope of the contract[,] it became part of its contractual obligations under the contract. x x x [KKCA] showed [it] felt answerable for the erosion when it voluntarily took measures to contain the erosion after it happened. (Affidavit of Luis T. Reyes) [KKCA] did not have the competence to do soil protection itself or supervise its being done by the sub-contractor and hid this deficiency, consequently, failing to address the problem immediately until the erosion took place. The soil protection it did immediately after the initial erosion was not adequate as further erosion was evident which compelled [KKCA] to engage the services of a foundation specialist, Pearl and Jade[,] in order to improve the soil protection methodology. (Affidavit of Luis T. Reyes) x x x.[58]

In its petition before the Court, KKCA imputes negligence on the part of WCC,[59] but fails to specifically mention how. Nothing was asserted to point out how the erosion occurred due to WCC's action or inaction.

In any event, pursuant to paragraph 21 of Addendum #01, any fault or negligence committed by WCC after KKCA commenced performance of its undertakings per contract provisions should be attributed to the latter.[60]

Attempting to be relieved from liability, KKCA pointed out that: (a) it was Colorite which selected WCC to do the excavation works; (b) WCC's services was engaged before the construction contract was signed; and (c) WCC already started with excavation works on November 19, 2003.[61] KKCA cannot now claim that it was unaware of the foregoing circumstances before it signed the contract. In the proceedings before the CIAC, Chua categorically admitted that when he signed the contract, he already knew that excavation was going on in the area.[62] In spite of such knowledge, he freely and voluntarily signed and assented to the Addendum. Thus:

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55 Id. at 278-281.
56 Should be January 17, 2004; id. at 633.
57 Should be January 10, 2004; id.
58 Id. at 646.
59 Id. at 50.
60 Id. at 193.
61 Id. at 42
62 Id. at 335.

Atty. B. G. Fajardo (Arbitrator):

x x x. **Now when you sign[ed] the addendum, you sign[ed] it freely, without duress, is that correct?** You signed it without duress[,] you signed it freely?

Archt. K. K. Chua (respondent):

Yes.[63]

x x x x

Atty. B. G. Fajardo (Arbitrator):

No, **but you know when you sign[ed] the contract on December 15, 2003, you already knew that there were excavations there.**

Archt. K. K. Chua (Respondent):

Yes, we do sir.[64] (Emphasis ours)

Indeed, KKCA cannot deny its contractual obligation to ensure that excavation works were properly done. It is settled that the law does not relieve a party from the effects of an unwise, foolish, or disastrous contract, entered into with all the required formalities and with full awareness of what he was doing, and courts have no power to relieve parties from obligations voluntarily assumed, simply because their contracts turned out to be disastrous deals or unwise investments. *Volenti non fit injuria.*[65]

The CA was correct when it found that pursuant to paragraph 33 of Addendum #01, and the pertinent provision of Article XIII of the Main Construction Contract, KKCA assumed the responsibility of ensuring that properties adjacent to the project are protected from erosion and settlement.[66] Said contractual provisions read:

Paragraph 33 of Addendum #01 states:

33. The Contractor to provide, erect and maintain all necessary bracing, shoring, planking, etc.[,] as required to protect the adjoining property against settlement and damages. Adequate dewatering equipments (sic) and pumps to be provided. The Contractor has the prerogative to choose what type of methodology that he would use for the project but he [has] to make sure that [it] will protect the adjacent properties against erosion and settlement.[67]

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63 Id. at 274.

64 Id. at 335.

65 *Sanchez v. The Hon. CA*, 345 Phil. 155, 190-191 (1997).

66 *Rollo* (G.R. Nos. 194027-28), p. 53.

67 *Rollo* (G.R. Nos. 193969-70), p. 194.

Article XIII of the Main Construction Contract:

> The OWNER shall be held free and harmless from any liability arising from claims of third parties arising from the construction such as[,] but not limited to wages, pay, compensation for injury or death to laborers, SSS premiums, adjoining property settlement, etc.[,] all of which shall be for the account of the CONTRACTOR.[68]

The factors which delayed the project's completion

From the date the Notice to Proceed was issued, less the seven-day interval before KKCA commenced its work and the 73-calendar days allowed slippage, the project should have been finished on March 5, 2005. The restoration of the Hontiveros property was completed in October 2005. Yet, to date, the construction remained suspended.

According to KKCA, the delay of the project was not only due to the Hold Order issued by the City Government of Makati. It claims that the discontinuance of the project was also due to Colorite's failure to pay for soil protection cost and the balance of its 70% share in the restoration cost of the Hontiveros property.[69]

While the CIAC agreed with KKCA that soil protection work should be for the account of Colorite, the said tribunal failed to consider the parties' agreement that Colorite would share in the restoration of the Hontiveros property as found by the CA.[70]

Soil protection is within the contractor's scope of work; hence, deemed included in the contract price

In claiming that it is entitled to be reimbursed for the cost spent for soil protection, KKCA firmly argued that excavation and soil protection works were not part of its responsibilities.[71] KKCA pointed out that: (a) Colorite hired WCC to do excavation works; (b) Addendum #01 was not included during the discussion on the contents of the Construction Contract;

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68 *Rollo* (G.R. Nos. 194027-28), p. 111.
69 *Rollo* (G.R. Nos. 193969-70), pp. 632-633.
70 Id. at 647.
71 Id. at 40.

and (c) KKCA's Summary of Bid Proposal states that excavation works shall not form part of its scope of work.[72] The pertinent part of the Summary of Bid Proposal reads:

> "*We (or I) make this proposal with full knowledge of the kind, quantity, and quality of the Articles and services required and if the proposal is accepted,* ***undersigned*** *(KKCA)* ***agrees to enter into formal agreement and mobilize and start after the excavation work by the other contractor.***"[73] (Emphasis ours)

The Court cannot sanction KKCA's stance. What is material is that KKCA agreed to the stipulations contained in Addendum #01, which, among others, placed excavation and soil protection works within its scope of undertakings. Neither does it matter that the stipulations in Addendum #01 and Addendum #02 were not included in the discussion on the contents of the main Construction Contract as long as the concerned party was not deprived of ample time to study them. In any event, it was established that KKCA's consent to the provisions of Addendum #01 and Addendum #02 was not vitiated.

Anent the stated provision of the Summary Bid Proposal, it was rendered ineffective when KKCA unqualifiedly agreed to the provisions of Addendum #01.

At the onset of their contractual relationship, Colorite engaged KKCA to render architectural services. Eventually, Colorite approved a project scheme submitted by KKCA proposing a four-storey residential building. However, Colorite also requested KKCA to conduct and supervise the bidding process for the project.

On September 24, 2003, the pre-bid conference was held.[74] In the Minutes[75] of the said conference, the matter on how excavation and soil protection works shall be performed was discussed under item II, paragraph (g)[76] thereof. Accordingly, the totality of excavation work was divided into two levels, each with corresponding soil protection measure. The first level covers the depth, which extends from the natural grade-line down to the basement level, and which was to be undertaken by an excavation sub-contractor. On the other hand, the second level covering the depth beginning from the basement level down to the required column foundation height and other trimming works are to be done by the General

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72 Id. at 41-42.
73 Id. at 42.
74 Id. at 14.
75 Id. at 166-170.
76 Id. at 168.

Contractor. Item II, paragraph (g) of the pre-bid conference minutes of meeting reads:

> g) KKCA advised all the Bidders that excavation works from the natural grade line up to the Basement level shall be done by separate Excavation Contractor. However, excavation works from the Basement level up to the required column foundation height and other trimming works shall be included under the Contract of the General Contractor.
>
> Furthermore, all safety requirements needed during the General excavation works shall be included under the Contract of the Excavation Contractor. However, any safety requirements needed during the excavation works of the column footing foundation shall be included under the Contract of the General Contractor.[77]

In spite of the presence of interested bidders, Colorite decided to secure the services of KKCA as the project's general contractor.[78] KKCA agreed, and was asked to submit a formal *Summary of Bid Proposal*.[79] As pointed out above, and pursuant to item II, paragraph (g) of the pre-bid conference minutes of meeting, the summary of bid proposal pertinently stated that KKCA shall **mobilize and start after the excavation works are performed by the excavation sub-contractor.**

However, when the parties met on December 15, 2003 for the signing of the contract, Colorite presented Addendum #01 and Addendum #02. As already discussed, paragraph 21 of Addendum #01 included all excavation works within the scope of works of the general contractor, while paragraph 33 of Addendum #01 stipulates that the general contractor shall be responsible for soil protection works, *i.e., provide, erect and maintain all necessary bracing, shoring, planking, etc., as required to protect the adjoining property against settlement and damages, and to make sure that the methodology to be used will protect the adjacent properties against erosion and settlement.*

The provisions of paragraphs 21 and 33 of Addendum #01 are clear and unambiguous:

> 21. All excavation works as required for, should be included on the scope of works of the Contractor. Disregard Pre-Bid Minutes Item II-G at Page 3.

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77 Id.
78 Id. at 14-15.
79 Id. at 172-183.

> **NOTE**: Corresponding cost to be paid to the contractor based on sub-contractor's cost.[80]
>
> 33. The Contractor to provide, erect and maintain all necessary bracing, shoring, planking, etc. as required to protect the adjoining property against settlement and damages. Adequate dewatering equipments (sic) and pumps to be provided. The Contractor has the prerogative to choose what type of methodology that he would use for the project but he have (sic) to make sure that they will protect the adjacent properties against erosion and settlement.[81]

Article 1370 of the Civil Code in part states that "if the terms of a contract are clear and leave no doubt upon the intention of the contracting parties, the literal meaning of its stipulations shall control."

As worded, paragraph 21 is only concerned with excavation works, and no other. Paragraph 21 provides that all excavation works are within the scope of works of KKCA but it does not oblige KKCA to directly perform the same as it admits the employment of excavation sub-contractors, albeit for the account of Colorite. On the other hand, paragraph 33 explicitly makes soil protection works, and the installation of adequate dewatering equipment and pumps as KKCA's direct contractual obligation. While soil protection works and adequate dewatering system have distinct purposes, they are similar since both are continuing necessities while the foundation and the basement are not yet secured. It was thus logical that both items were placed under the general contractor's direct responsibilities under paragraph 33.

In *Rizal Commercial Banking Corporation v. Teodoro G. Bernardino*,[82] the Court is emphatic that:

> The rule is that where the language of a contract is plain and unambiguous, its meaning should be determined without reference to extrinsic facts or aids. The intention of the parties must be gathered from that language, and from that language alone. Stated differently, where the language of a written contract is clear and unambiguous, the contract must be taken to mean that which, on its face, it purports to mean, unless some good reason can be assigned to show that the words used should be understood in a different sense. Courts cannot make for the parties better or more equitable agreements than they themselves have been satisfied to make, or rewrite contracts because they operate harshly or inequitably as to one of the parties, or alter them for the benefit of one party and to the detriment of the other, or by construction, relieve one of the parties from

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80 Id. at 193.
81 Id. at 194.
82 G.R. No. 183947, September 21, 2016.

terms which he voluntarily consented to, or impose on him those which he did not.[83] (Emphasis in the original deleted)

There was no agreement that Colorite has to share in the restoration of the Hontiveros property.

The CA stated that the parties agreed for Colorite to contribute Php 700,000.00 in the restoration of the Hontiveros property. The CA also held that the provision in the main contract which states that "*the owner shall be held free and harmless from any liability arising from claims of third parties arising from the construction*"[84] was effectively superseded thereby. Thus, owing to Colorite's failure to deliver the said amount, the CA ruled that Colorite was partly to be blamed for the delay of the project. Accordingly, Colorite was adjudged as only entitled to 50% of the liquidated damages it is claiming. For the same reason, Colorite was also held liable of 50% of the total maintenance cost.

According to the CA:

> It can thus be seen that despite its earlier commitment to contribute P700,000.00 for restoration costs, Colorite failed to pay the said amount. This Court holds that while Colorite cannot be held accountable for 70% of the restoration costs **in the absence of a clear agreement to this effect,** it should nonetheless be directed to fulfill its obligation to pay P700,000.00. x x x.
>
> x x x [A]**lthough their contract states that KKCA should be held liable for expenses pertaining to such damage, the subsequent acts of the parties, specifically Colorite's undertaking to contribute P700,000.00 to the restoration costs, effectively superseded the said terms of the contract, and should now be made the governing law between the parties**. Article 1159 of the Civil Code supports this conclusion, when it provides that "(o)bligations arising from contracts have the force of law between the contracting parties and should be complied with in good faith." Moreover, Article 1315 of the same Code provides that "(c)ontracts are perfected by mere consent, and from that moment the parties are bound not only to the fulfillment of what has been expressly stipulated but also to all the consequences which, according to their nature, may be in keeping with good faith, usage and law." When Colorite thus bound itself to share in the restoration cost by paying P700,000.00, this effectively became the contract between the parties with regard to this matter. **While at first, there appeared to be a confusion as to the exact amount because KKCA was insisting on a 70-30**

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83 Id., citing *Bautista v. CA*, 379 Phil. 386, 399 (2000).

84 *Rollo* (G.R. Nos. 194027-28), p. 111.

> **sharing, it has been established that KKCA also eventually demanded P700,000.00 from Colorite, thereby showing that at that point, there was already an agreement as to the amount that should be delivered by Colorite.** It may be said, therefore, that a binding agreement has been perfected between the parties insofar as the restoration cost is concerned, and they should be bound by it regardless of who should be blamed, if any for the erosion. x x x.
>
> x x x x
>
> x x x We are convinced that the parties' incapability to perform what was incumbent upon them was not attended by bad faith. **On the part of Colorite, its failure to advance P700,000.00 as part of its share in the restoration cost was due to a breakdown in the negotiation process which occurred when KKCA was insisting on a 70-30 sharing.** Although We maintain that Colorite was still at fault when it failed to give the promised P700,000.00 when KKCA was already demanding the same, it cannot be said that such refusal was tainted by bad faith. **Instead, it was more a case of a breakdown in the negotiation process, or a deadlock which the parties were not able to overcome due to their adherence to their respective positions.** x x x.[85] (Emphasis ours)

As can be deduced from the foregoing, it is not clear that the parties really agreed on whether Colorite was to contribute Php 700,000.00 or 70% of the restoration cost. The CA's conclusion arose from KKCA's demand of Php 700,000.00 from Colorite. The CA regarded the same as KKCA's acceptance of Colorite's purported offer.

KKCA insists that the CA erred in ruling that Colorite is liable only for the amount of Php 700,000.00 and not 70% of the subject restoration cost.[86]

Absent any showing that the minds of the parties did meet on an essential term of the purported contract, *i.e.*, whether Colorite should contribute Php 700,000.00 or 70% of the total cost, it appears that no subsequent and definitive agreement or contract was perfected between the parties on this regard. In the case of *Pen v. Julian*,[87] the Court instructed that **the perfection of a contract entails that the parties should agree on every point of a proposition - otherwise, there is no contract at all.**[88]

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85 Id. at 64-66, 82.

86 *Rollo* (G.R. Nos. 193969-70), pp. 39, 57.

87 G.R. No. 160408, January 11, 2016, 778 SCRA 56.

88 Id. at 67-68, citing *Moreno, Jr. v. Private Management Office*, 537 Phil. 280, 288 (2006).

As found by the CIAC, aside from the bare assertions of Chua, no other evidence was offered to sufficiently prove that an agreement to share in the restoration cost of the Hontiveros property was perfected between the parties. Thus:

> The Arbitral Tribunal is not convinced that there was an agreement by the parties on the sharing of expenses for the restoration of the Hontiveros property. [Colorite] denied there was such an agreement (during the ocular inspection of Project Site) and the alleged written agreement presented by [KKCA] was not signed by the parties. (Exh. R-19) [KKCA] mentioned several names whose presence supposedly witnessed [Colorite's] agreeing to the 70%-30% sharing in the restoration expenses but failed to present any at the hearing in order to support his contention. (Affidavit of Ka Kuen Tan Chua, Item 37)[89]

KKCA is under obligation to secure the quitclaim of the Hontiveros family and the lifting of the Hold Order issued by the City Government of Makati

There are other factors which hinder the continuation of the project; to wit: (a) the need to secure the Hontiveros family's quitclaim; and (b) the lifting of the Hold Order issued by the City Government of Makati. Verily, without the quitclaim from the Hontiveros, the Hold Order will not be lifted. With the Hold Order still in effect, no amount of settlement between the parties can push the project to proceed.

According to the CA, as it is KKCA's obligation to complete the project, then it should also be tasked to perform whatever is necessary for the purpose, and this includes securing the Hontiveros family's quitclaim and the lifting of the City Government of Makati's Hold Order.[90] For its part, however, KKCA is adamant in its position that excavation and soil protection works are not its responsibilities; hence, the lifting of the Hold Order should not be assigned to it.[91]

The Court now holds that KKCA is under the obligation to secure the quitclaim from the Hontiveros family and to work for the lifting of the Hold Order. This obligation is deemed written in Article XIII of the construction contract, which reads:

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89 *Rollo* (G.R. Nos. 193969-70), p. 647.
90 *Rollo* (G.R. Nos. 194027-28), p. 80.
91 *Rollo* (G.R. Nos. 193969-70), pp. 47-49.

> **The owner shall be held free and harmless from any liability arising from claims of third parties** arising from the construction such as but not limited to wages, pay, compensation for injury or death to laborers, SSS premiums, adjoining property settlement, etc. all of which shall be for the account of the CONTRACTOR.[92] (Emphasis ours)

By express provision of Article 1315 of the Civil Code, **the parties are bound not only to the fulfilment of what has been expressly stipulated but also to all the consequences which, according to their nature, may be in keeping with good faith, usage and law.**

Without a doubt, Article XIII was stipulated to secure Colorite from any liability arising from third-party claims. Needless to say, the security under contemplation is necessarily anchored on Colorite's interest in the completion of the project. In expressly anticipating the probability of causing damages to adjacent properties, the stipulation comprehends as well as the resolution of legal issues, which may arise incidental to the construction project.

The records show that KKCA was remiss in its obligation to secure the quitclaim from the Hontiveros family and work for the lifting of the City Government of Makati's Hold Order. In spite of the fact that the Hontiveros property has already been restored, it appears that KKCA did not bother to secure the needed quitclaim or even a certificate of completion from the contractor of the subject rehabilitation. This can be gleaned from the following excerpt of the CIAC hearing:

> Atty. A. H. Habitan (Counsel-Claimant):
> So, you see now that the Hontiveros property, the damage portion was finally restored...
>
> Archt. K. K. Chua (Respondent):
> Yes sir.
>
> Atty. A. H. Habitan (Counsel-Claimant):
> When was that, the date of completion of restoration?
>
> Archt. K. K. Chua (Respondent):
> The target date of completion as stated here is sometime of October 2005.
>
> Atty. A. H. Habitan (Counsel-Claimant):
> 2005, and you were able to accomplish it within the target date.
>
> Archt. K. K. Chua (Respondent):
> They did the JSV Group.

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92 *Rollo* (G.R. Nos. 194027-28), p. 111.

Atty. A. H. Habitan (Counsel-Claimant):
And also the contractor which is the JSV Contract Services was fully paid by you?

Archt. K. K. Chua (Respondent):
Yes sir.

Atty. A. H. Habitan (Counsel-Claimant):
Now at the time you handle the full payment, did you not require them to issue you a certification of the completion of the Hontiveros property?

Archt. K. K. Chua (Respondent):
We did follow [them up] for that.

x x x x

Atty. A. H. Habitan (Counsel-Claimant):
How about from Hontiveros, did you not try also to get a certification of completion of the restoration or what you claim as [quit]claim?

Archt. K. K. Chua (Respondent):
No, because the ETCOR, the construction manager appointed by them and the City Hall committed to do so.

x x x x

Atty. A. H. Habitan (Counsel-Claimant):
x x x After so many follow ups and you were not given [a certification/quitclaim] did you not consult a lawyer what legal action could be done against this three entities, ETCOR, JSV Contract Services and Hontiveros family.

Archt. K. K. Chua (Respondent):
No, I did not.

Atty. A. H. Habitan (Counsel-Claimant):
Did it not occur to your mind that this certifications or [quit]claim could be a basis for you to present it to the Building Official so that the Hold Order will be entirely lifted?

Archt. K. K. Chua (Respondent):
During that time it's more in my mind the obligation with the owner which is [to] settle their share. Because of that.

Atty. B. G. Fajardo (Arbitrator):
You did not answer my question. My question is, if you give the certification either from ETCOR, from JSV Contract Services, or from the Hontiveros family that the restoration of the damaged portion of their property was completed, you can present this to the building officials so that the hold order will be lifted.

Archt. K. K. Chua (Respondent):
We did follow up regularly at their office and sometime through phone, that [quit]claim you are saying.

x x x x

Atty. A. H. Habitan (Counsel-Claimant):
Did [it] not occur to your mind that you ultimately will be liable to the owner for not completing the project within this five times (sic)?

Archt. K. K. Chua (Respondent):
No I don't think so because of their...is the negligence of the Hontiveros and the ETCOR. It's not my negligence.

x x x x

Atty. A. H. Habitan (Counsel-Claimant):
You did not consult your lawyer what action, legal action should be...

Archt. K. K. Chua (Respondent):
I did not.

Atty. A. H. Habitan (Counsel-Claimant):
You did not?

Archt. K. K. Chua (Respondent):
I did not.[93]

It also appears that even if Colorite took it upon itself to secure the quitclaim, and work for the lifting of the Hold Order, there was no guarantee that the project will be continued. As shown by the following, KKCA was adamant on its position that unless Colorite delivers the amount corresponding to 70% of the restoration cost of the Hontiveros property, the project will not continue. Thus:

Atty. M. Somera (Counsel-Respondent):
Archt. Chua, you said that there was no [quit]claim or you were not been able to secure the [quit]claim...

Archt. K. K. Chua (Respondent):
Yes ma'am.

Atty. M. Somera (Counsel-Respondent):
Have you secure the [quit]claim would you have to continue the project?

Archt. K. K. Chua (Respondent):
I would have, and...

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93 *Rollo* (G.R. Nos. 193969-70), pp. 257-262.

Atty. M. Somera (Counsel-Respondent):
When you have secure the [quit]claim, you have to continue the construction.

Archt. K. K. Chua (Respondent):
If I will be settled with the sharing of the 70-30.

x x x x

Atty. M. Somera (Counsel-Respondent):
If you were able to secure that [quit]claim but you were not paid, would you still have to continue with the project?

Archt. K. K. Chua (Respondent):
I won't.

Atty. M. Somera (Counsel-Respondent):
Why not?

Archt. K. K. Chua (Respondent):
Because that's part of our agreement the 70-30, I have shoulder[ed] so much expenses. It's so hard to bear with that, and owner has [breached] its contract, and its obligation and its commitment.[94]

KKCA is guilty of negligence

The Court cannot find any justification behind KKCA's failure to insure that damages shall not arise as a result of the excavation. KKCA employed soil protection only after erosion had already taken place. Indeed, KKCA's failure to provide sufficient soil protection measures caused the erosion and was the proximate cause which set in motion the chain of events resulting to the project's delay.

KKCA represented itself as capable, competent and duly licensed to undertake the project. Thus, it is but reasonable to assume that KKCA knows the importance of soil protection in excavations and the degree of the risks involved in the absence of such protective measures. However, considering that Colorite never imputed bad faith on the part of KKCA, and in the absence of proof that the breach was attended by deliberate intent, the same can only be regarded as simple negligence.[95]

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94 Id. at 269-271.

95 *See* Tolentino, A., Commentaries and Jurisprudence on the Civil Code of the Philippines, Vol. IV, p. 111.

Colorite is equally at fault for the protracted delay of the project

While all the foregoing easily points to the conclusion that KKCA is solely to be blamed for the delay of the project, the Court, however, finds that Colorite is also at fault. From the moment it became apparent that KKCA paid no heed to Colorite's demand to complete the project, the latter also began contributing to its delay.

Despite KKCA's firm stance, the project need not actually be delayed for too long. Other than KKCA's fault, the delay can likewise be avoided. For one, while KKCA is under contractual obligation to secure the lifting of the Hold Order, there is, however, nothing which prohibits Colorite from doing it.

Under Article V, paragraph (b)[96] of the construction contract, Colorite has the right to terminate the contract and carry out the completion of the project in the event that the delay exceeds the maximum allowable number of days of delay. However, Colorite opted to continue to bind KKCA in the contract.

While it may be that Colorite is acting within its right, the Court cannot find justification behind the former's inaction. Colorite asserts that it should be awarded compensatory damages for unrealized profit amounting to Php 460,189.00 a month owing to the alleged great demand for leasable residential/commercial units in the area. However, Colorite's inaction weighs against the sincerity of its claim. Certainly, it does not appear to be in keeping with good sense that Colorite, on its part, did not act to secure the lifting of the Hold Order.

The law, under Article 19 of the Civil Code, provides that "[e]very person must, in the exercise of his rights and in the performance of his duties, act with justice, give everyone his due, and observe honesty and good faith."

Article 19 of the Civil Code prescribes a primordial limitation on all rights by setting certain standards that must be observed in the exercise thereof. Accordingly, when it becomes manifest that one's right is exercised in bad faith for the sole intent of prejudicing another, an abuse of a right exists.[97] However, abuse of a right must, of course, be proven since bad

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96 *Rollo* (G.R. Nos. 194027-28), p. 108.

97 *Diaz v. Encanto,* G.R. No. 171303, January 20, 2016, 781 SCRA 231, 245.

faith cannot be presumed, and nothing was presented here to establish the same.

The Court finds that in continuing to bind KKCA in the contract, Colorite was not impelled by good intentions. Article 2203 of the Civil Code is explicit that:

> The party suffering loss or injury must exercise the diligence of a good father of a family to minimize the damages resulting from the act or omission in question.

This codal rule clearly obligates the injured party to undertake measures that will alleviate and not aggravate his condition after the infliction of the injury, and places upon him the burden of explaining why he could not do so.[98]

Thus, in the case of *Lasam v. Smith,*[99] the Court held that it was correct to fix the recoverable damages to Php 1,254.10, and not to charge the defendant with the full expense of medical treatment amounting to Php 7,832.80 considering that it was plaintiff's refusal to submit to an operation, which spawned the ensuing series of infections and which required constant and expensive treatment for several years.

Verily, common human experience dictates that under similar circumstances, anybody in the predicament of Colorite would have opted to exercise its right to terminate the contract the moment it became apparent that the contractor would not lift a finger to finish the project. Colorite should have pursued the completion of the project by another contractor to minimize injury upon itself, without prejudice, however, to the prosecution of its cause of action against KKCA.

On claims of Damages

Colorite prays that KKCA be directed to pay exemplary damages, attorney's fees, compensation for lost earnings, litigation expenses, and liquidated damages. For its part, KKCA prays that Colorite be adjudged liable for moral damages for the latter's bad faith in deliberately causing delay in the project and refusal to cooperate, attorney's fees, exemplary damages, arbitration fees and cost of suit.[100]

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98 *Velasco v. Manila Electric Company, et al.*, 148-B Phil. 204, 218-219 (1971).
99 45 Phil. 657 (1924).
100 *Rollo* (G.R. No. 193969-70), pp. 62-64.

Since KKCA cannot be regarded to be in bad faith, the Court is left with no basis for awarding exemplary damages in favor of Colorite. In contracts and quasi-contracts, the award of exemplary damages connotes that the defendant acted in a wanton, fraudulent, reckless, oppressive, or malevolent manner.[101] As the case provides no basis consistent with any of the grounds provided under Article 2208[102] of the Civil Code for awarding attorney's fees and litigation cost, they cannot be awarded.

The same evenly applies to KKCA's claim. While the Court does not find sense in Colorite's failure to exercise its right to terminate its contract with KKCA, it, however, does not equate to a finding of bad faith. At any rate, KKCA did not impute bad faith against Colorite upon this issue. KKCA imputed bad faith against Colorite for insisting that excavation and soil protection works are its responsibilities, and for refusing to comply with the alleged sharing agreement in the restoration of the Hontiveros property. Since the Court does not subscribe to KKCA's assertions, its claim for moral damages proved to be without any basis.

Anent Colorite's claim for compensation for lost earnings, the Court agrees with the tribunals below that it cannot be awarded for want of sufficient basis. It assumes the nature of actual or compensatory damages, and such form of damages can only be awarded upon proof of the value of the loss suffered, or that of profits which failed to be obtained.[103] As propounded by the CA, "[t]he only basis relied upon by Colorite in claiming this item is the allegation that the subject property could have been rented at Php 460,189.00 a month. There is, however, no showing that actual lease agreements exist so as to make the loss of rentals factual and not speculative."[104]

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101 CIVIL CODE OF THE PHILIPPINES, Article 2232.

102 Art. 2208. In the absence of stipulation, attorney's fees and expenses of litigation, other than judicial costs, cannot be recovered, except:

(1) When exemplary damages are awarded;

(2) When the defendant's act or omission has compelled the plaintiff to litigate with third persons or to incur expenses to protect his interest;

(3) In criminal cases of malicious prosecution against the plaintiff;

(4) In case of a clearly unfounded civil action or proceeding against the plaintiff;

(5) Where the defendant acted in gross and evident bad faith in refusing to satisfy the plaintiff's plainly valid, just and demandable claim;

(6) In actions for legal support;

(7) In actions for the recovery of wages of household helpers, laborers and skilled workers;

(8) In actions for indemnity under workmen's compensation and employer's liability laws;

(9) In a separate civil action to recover civil liability arising from a crime;

(10) When at least double judicial costs are awarded;

(11) In any other case where the court deems it just and equitable that attorney's fees and expenses of litigation should be recovered.

In all cases, the attorney's fees and expenses of litigation must be reasonable.

103 CIVIL CODE OF THE PHILIPPINES, Articles 2199 and 2200; *Kabisig Real Wealth Dev., Inc. and Fernando C. Tio v. Young Builders Corp.*, G.R. No. 212375, January 25, 2017.

104 *Rollo* (G.R. Nos. 194027-28), p. 72.

Respecting Colorite's claim for liquidated damages, the Court does not find any reason to deny them.

Under Article V[105] of the construction contract, payment of liquidated damages was expressly stipulated in case of delay, *viz.*:

> A. Time being of the essence of this Agreement and the CONTRACTOR'S acknowledgment that the OWNER will suffer loss by the delay or failure of the CONTRACTOR to have the work completed in all parts within the time stipulated in Article IV, **the CONTRACTOR hereby expressly covenants and agree to pay the OWNER liquidated damages in the amount of TEN THOUSAND PESOS (P 10,000.00) for each calendar day of delay (Sundays, and legal holidays included) until final completion and acceptance** by the OWNER, **the said payment to be made as liquidated damages, and not by way of penalty."**[106] (Emphasis ours)

Further, the fact of KKCA's delay in the performance of its obligation is well established. Nevertheless, it is also true that the delay would not have been that long had Colorite opted to exercise its right to take over the project.

Article 2226[107] of the Civil Code allows the parties to a contract to stipulate on liquidated damages to be paid in case of breach. It is attached to an obligation in order to insure performance and has a double function: (1) to provide for liquidated damages; and (2) to strengthen the coercive force of the obligation by the threat of greater responsibility in the event of breach. As a general rule, contracts constitute the law between the parties, and they are bound by its stipulations. For as long as they are not contrary to law, morals, good customs, public order or public policy, the contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient.[108]

By definition, liquidated damages are a penalty, meant to impress upon defaulting obligors the graver consequences of their own culpability. Liquidated damages must necessarily make non-compliance *more*

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105 Id. at 108.

106 Id.

107 Article 2226. Liquidated damages are those agreed upon by the parties to a contract, to be paid in case of breach thereof.

108 *ACS Development & Property Managers, Inc. v. Montaire Realty and Development Corporation*, G.R. No. 195552, April 18, 2016, citing *Philippine Charter Insurance Corporation v. Petroleum Distributors & Services Corporation*, 686 Phil. 154, 164-165 (2012).

cumbersome than compliance. Otherwise, contracts might as well make no threat of a penalty at all.[109]

Thus, the fact that Article V, paragraph (a) of the construction contract provides that the stipulated liquidated damages was not meant to penalize the contractor for the delay, but in order to compensate the owner for the loss it may suffer brought about by the delay is inconsequential; it does not operate to remove the stipulation's character as a penal clause.[110] Neither does it require that the loss suffered be proved. "Liquidated damages are identical to penalty, so far as legal results are concerned. In either case, the injured party need not prove the damages suffered by him."[111]

Reckoning from March 6, 2005, as the first day of delay up to this writing, the project has been delayed for more than 12 years. Under Article V, paragraph (d), the contract allows justifiable cause or reason for delay, such as the occurrence of *coup d'etat*, general strike, typhoon, earthquake, shortage of lubricant or diesel fuel, or other civil disturbances that will directly affect the performance schedule. However, upon the occurrence of a justifiable cause, the contractor is required to submit a written request for time extension; otherwise, the original schedule shall stand. Whether or not the damaging and rehabilitation of the Hontiveros property would constitute, or would be accepted by the parties as justifiable cause or reason for delay has become inconsequential since no written request for time extension was submitted.

Applying the stipulated daily rate, the totality of recoverable liquidated damages shall amount to more than a staggering Php 43,800,000.00,[112] which sum even surpasses the total contract price. This cannot be decreed without running afoul of the spirit and express letters of the law. Under Article 2227 of the Civil Code, "[l]iquidated damages, whether intended as an indemnity or a penalty, shall be equitably reduced if they are iniquitous or unconscionable." Moreover, the fact that KKCA was not able to perform substantial amount of work on the project is immaterial because it is also expressly provided under Article 1229 of the Civil Code that, "[e]ven if there has been no performance, the penalty may also be reduced by the courts if it is iniquitous or unconscionable."

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109 *Philippine Economic Zone Authority v. PILHINO Sales Corporation*, G.R. No. 185765, September 28, 2016.

110 *See H.L. Carlos Construction, Inc. v. Marina Properties Corp.*, 466 Phil. 182 (2004).

111 Tolentino, A., Commentaries and Jurisprudence on the Civil Code of the Philippines, Vol. V, p. 662.

112 Amount of liquidated damages for 12 years at the rate of Php 10,000.00 per day.

In view of the foregoing, and considering Colorite's own inaction which contributed to the delay of the project, the Court deems that the amount of liquidated damages, which can be equitably awarded to Colorite should be that corresponding to the period beginning on March 6, 2005 to October 2005, *the date when the rehabilitation of the Hontiveros property was completed* – plus, a period of six months covering October 31, 2005 to April 30, 2006 *representing the sufficient time within which Colorite should have determined whether the project should continue under the original construction contract, or whether the contract should be terminated and the project taken over.* The period within which the project shall be completed by another contractor in the event that the original contract was terminated shall not be considered in the computation of the period of delay pursuant to the Court's ruling in *WERR Corporation International v. Highlands Prime Inc.*[113] Accordingly, the amount of liquidated damages shall be Php 4,210,000.00 corresponding to the total of 421 days beginning March 6, 2005 up to April 30, 2006.

Moreover, as the parties have been locked in a prolonged legal battle since July 2007, equity demands that no interest shall be awarded on said amount prior to the finality of this Decision - lest the intention of the law, as expressed in Articles 2227 and 1229 of the Civil Code, be defeated.

KKCA is ordered to finish the project. The parties are to share in the increase in the construction cost over and above the contract price.

The CA and the CIAC agree that: (a) KKCA should see the project to its completion; (b) the escalation clause[114] of the construction contract should apply only during and within the contract period; and (c) for the purpose of completing the project, it is but proper that necessary adjustments in the contract price be made to accommodate increase in the prices of materials after the contract period. However, while the CIAC contends that the parties should evenly shoulder the necessary price adjustment on a fifty-fifty basis, the CA's decision is silent on this point.

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113 G.R. No. 187543 and G.R. No. 187580, February 8, 2017.

114 Article X – Escalation Clause
It is agreed that the contract price is already fixed and will not be subjected to escalation in case of increase in the cost of taxes, licenses, permit, fees, materials, including labor escalation. Labor escalation if mandated by law should be shouldered by the CONTRACTOR.
NOTE: If the value of 1US$ reaches Php 58.00, then the OWNER will provide cash advances to the CONTRACTOR to be mutually agreed upon.; *rollo* (G.R. Nos. 194027-28), p. 111.

For its part, KKCA asserts that it should be released from the obligation of completing the project because the working relationship between the parties has become so strained; hence, the construction project is best to be performed by another contractor.[115] KKCA also argues that to compel it to finish the project is violative of the constitutional guarantee against involuntary servitude.[116]

The Court cannot sanction KKCA's argument. Both the doctrine of strained relations and the policy against involuntary servitude are concepts, which only apply to situations where one is in the service of another, respectively, by virtue of an employment contract or by force or compulsion. They cannot apply in reciprocal contracts such as contracts for a piece of work, lest we run afoul with the principle of autonomy and obligatory nature of contracts evenly guaranteed under Article III, Section 10[117] of the Constitution. If KKCA truly believes that it has lawful basis to withdraw from the contract and/or be released therefrom, it should have filed an action for rescission.

The Court agrees that KKCA should finish the project. The contract subsists, and by all legal measure, the parties should comply with their contractual obligations. For the same reason, the Court does not share the disquisition of the tribunals below that the escalation clause of the contract should apply only during and "within the contract period," and that for the purpose of completing the project, necessary adjustments in the contract price must be made to accommodate increase in the cost of materials and/or labor "after the contract period."

As the contract continues to be in effect, every stipulation contained therein should, in principle, be held as controlling. Thus, the contract price should remain per agreement of the parties. This has to be for there is nothing in the contract which provides that any of its provisions will only be effective within the stipulated period of completion. In fact, the contract even contemplated the possibility of delay, and as stipulated, it was without prejudice to the effectivity of the escalation clause.

Owing to the length of time that the project was delayed, the Court agrees that the original contract price will not suffice anymore to cover the cost of completing the project. However, the Court cannot adjust the contract price because it has no authority to rewrite contracts even to foster equity.

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115 *Rollo* (G.R. Nos. 193969-70), p. 45.

116 Id. at 46.

117 Section 10. No law impairing the obligation of contracts shall be passed.

KKCA breached its obligation in failing to provide sufficient soil protection measures, and this was the proximate cause of the delay. In a number of cases, the Court maintained that it is fundamental in the law on damages that the one injured by a breach of contract, or by a wrongful or negligent act or omission shall have a fair and just compensation commensurate to the loss sustained as a consequence of the defendant's act.[118]

In building contracts, it has been held that the measure of damages for breach is the amount expended by the owner in completing the project and in correcting defects.[119] Hence, the increase in the amount necessary to finish the project, over and above the contract price, should be charged against KKCA as imposable damages. By legal definition, such damages are in the nature of actual or compensatory damages.

True, in order to legally award actual damages, the same must be duly proven.[120] In a number of cases,[121] the Court emphasized that except in those cases where the law authorizes the imposition of punitive or exemplary damages, a party claiming damages must establish by competent evidence the amount of such damages.

Here, the additional amount for the completion of the project remains unquantifiable. Nevertheless, on principle, it can be awarded because said amount is a necessary incident in the completion of the project. Verily, considering the length of time that the project was delayed, the fact of increase in the construction cost above the contract price is beyond proof, and the utilization of said amount is an absolute certainty as long as Colorite remains intent on seeing the project through.

Quite similar to the issue at hand, in the case of *Baylen Corporation v. CA,*[122] the Court awarded actual damages in the amount of Php 603,160.00 representing the increase in construction cost. Said amount was adjudged in consideration of the commissioner's report and not because it was proven as the amount of actual loss. Indeed, there was no way of proving the actual

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118 *Alvarez v. People of the Philippines*, 692 Phil. 89 (2012); *Llorente, Jr. v. Sandiganbayan*, 350 Phil. 820, 838 (1998); Nolledo, Civil Code of the Philippines, 10th ed., Vol. V, p. 927; and Gonzales-Decano, Notes on Torts and Damages, 1992 ed., pp. 141 and 144.

119 *Marker v. Garcia*, 5 Phil. 557, 559 (1906); *See* also Tolentino, Arturo M., Commentaries and Jurisprudence on the Civil Code of the Philippines, Vol. V, p. 642.

120 Art. 2199. Except as provided by law or by stipulation, one is entitled to an adequate compensation only for such pecuniary loss suffered by him as he has duly proved. Such compensation is referred to as actual or compensatory damages.

121 *Choa Tek Hee v. Philippine Publishing Co.*, 34 Phil. 447 (1916); *Algarra v. Sandejas*, 27 Phil. 284 (1914); *Marker v. Garcia*, supra note 119.

122 240 Phil. 461 (1987).

amount of increase in construction cost, for as in this case, the project in said case was yet to be completed.

However, considering that Colorite is also to be blamed for the delay of the project, it would be unjust to rule that KKCA should shoulder the entire amount as it will be tantamount to unjust enrichment on the part of Colorite. Thus, the parties should commonly share the amount of the increase in construction cost.

However, as previously discussed, Colorite's fault or inaction was determined to have begun on May 1, 2006. Hence, Colorite cannot be regarded as at fault for the first year of delay.

Under the circumstances, the Court deems that a sharing of the increase in the construction cost at the ratio of 40% for Colorite and 60% for KKCA is equitable.

On the basis of the same reasoning, the amount spent for maintenance cost up to April 30, 2006 shall be for the sole account of KKCA. Maintenance cost spent from May 1, 2006 onward shall be equally shared by the parties.

Respecting the issues on whether Colorite is liable for the payment of Design Fee and ECC Permit, the Court agrees with the findings of the tribunals below. Accordingly, the Court sees no reason to disturb the same. In addition thereto, however, said liabilities shall earn legal interest at the rate of six percent (6%) *per annum* from finality of this Decision until fully paid.

WHEREFORE, the Decision and Resolution of the Court of Appeals, dated July 28, 2009 and October 4, 2010, respectively, in CA-G.R. SP Nos. 103892 and 103899, are **AFFIRMED** with **MODIFICATIONS.**

The Decision of the Court of Appeals dated July 28, 2009 is **AFFIRMED** with respect to the following:

1. Colorite is not entitled to loss of rental earnings, attorney's fees and litigation/arbitration expenses;
2. KKCA is not entitled to its claim for moral and exemplary damages, attorney's fees and litigation/arbitration costs; and

3. KKCA is enjoined to secure the quitclaim from the Hontiveros family and lift the Hold Order from the City Government of Makati in order for the construction project to proceed.

The assailed decision is **MODIFIED,** as follows:

1. Colorite is not liable to share in the restoration cost of the Hontiveros property;
2. Colorite is entitled to its claim for liquidated damages in the total amount of Php 4,210,000.00, plus legal interest at the rate of six percent (6%) *per annum* from finality of this Decision until fully paid;
3. Colorite is ordered to reimburse KKCA the amount paid by KKCA for the Environment Compliance Certificate permit in the amount of Php 50,000.00, plus six percent (6%) interest *per annum* from finality of this Decision until fully paid;
4. KKCA is entitled to its claim for design fee in the amount of Php 2,310,000.00, plus six percent (6%) interest *per annum* from finality of this Decision until fully paid;
5. KKCA is not entitled to its claim for soil protection works;
6. KKCA to shoulder the amount spent for maintenance costs up to April 30, 2006. The amount spent for maintenance cost from May 1, 2006 onward shall be equally shared by the parties; and
7. KKCA is directed to finish the subject construction project. The increase in the cost of construction, or such amount pertaining to the difference between what it will actually cost to finish the project and the contract price shall be shared by the parties: 40% of which shall be shouldered by Colorite, and 60% for the account of KKCA.

SO ORDERED.

BIENVENIDO L. REYES
Associate Justice

WE CONCUR:

PRESBITERO J. VELASCO, JR.
Associate Justice
Chairperson

LUCAS P. BERSAMIN
Associate Justice

FRANCIS H. JARDELEZA
Associate Justice

NOEL GIMENEZ TIJAM
Associate Justice

ATTESTATION

I attest that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

PRESBITERO J. VELASCO, JR.
Associate Justice
Chairperson

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution and the Division Chairperson's Attestation, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

MARIA LOURDES P. A. SERENO
Chief Justice

CERTIFIED TRUE COPY
WILFREDO V. LAPITAN
Division Clerk of Court
Third Division

SEP 06 2017