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VOLUME
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Theme
Cases on Contracts in general

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Introduction

The first current case which we have selected is related to the theme of this volume – the general law of contract as it applies to construction contracts. In *Constable Hart and Peter Lind* (page 1 of this volume) the courts considered the effect of a provision which made a sub-contractor's rates and prices valid only for a fixed period since they had to determine the basis of remuneration after the expiry of that period. This is a problem which frequently arises in practice and the judgments of a deputy High Court judge and the Court of Appeal are instructive.

The next recent case, *Sika Contracts v Gill,* (page 11) is concerned with the liability of an engineer to a contractor in circumstances in which the contractor was unaware that the engineer was acting as an agent in commissioning work. Both this case and the preceeding case are, so far as we are aware, unreported elsewhere.

The main body of cases on the theme of the volume begins with a decision on an important topic – letters of intent. The judgment in *Turriff Construction Ltd v Regalia Knitting Mills* was delivered in 1971 but we believe that this is the first occasion on which it has been printed in full (page 20).

Although it is some 10 years since the Misrepresentation Act 1967 came into force there are relatively few reported decisions on its application. *Howard Marine & Dredging Ltd v Ogdens (Excavations) Ltd* is a very recent decision of the Court of Appeal which needs to be read carefully by anybody concerned with inviting of submitting tenders for contracts or sub-contracts (page 34).

From cases which are primarily concerned with negotiations prior to conclusion of a contract, we turn to four cases which show how the courts approach the interpretation of contracts. *Trollope & Colls Ltd v North-West Metropolitan Regional Hospital Board* (page 60) was a decision of the House of Lords in 1973 which provided a modern illustration (particularly apposite to building contracts) of when terms will and will not be implied contracts. *Young & Marten v McManus Childs* is a leading case in which the House of Lords held that there is ordinarily to be implied a term that the work and materials will not only be of good quality but also suitable for their purpose unless the circumstances surrounding the making of the contract otherwise warrant (page 77).

Davis & Co (Wines) Ltd v Afa-Minerva (EMI) Ltd (page 99) dealt with the terms of a contract for a burglar alarm system and certain *(obiter)* dicta of Judge Fay QC may be of value in considering the balance of quality and suitability with price. Finally (at page 113) we have included *Austins (Menswear) Ltd v Wathes (Western) Ltd* an important decision of the Court of Appeal on the application of exclusion clauses. In that case the installation, whilst in accordance with the contractual specification could not be operated lawfully. It was held that such an unlawful operation constituted a fundamental breach of contract sufficient to avoid the effect of the exclusion clause.

H.J.LL.
C.R.

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(Sitting as a Deputy Judge of the High Court)

28 June 1978 — *Court of Appeal*

Lord Diplock and Viscount Dilhorne

Constable Hart & Co Ltd were claimants in an arbitration to which Peter Lind & Co Ltd were the respondents. On 5 October 1975 the claimants had as sub-contractors entered into a sub-contract with the respondents for the surfacing of the Kingsteignton-Newton Abbot By-pass. The sub-contract was in the FCEC standard form and incorporated the claimants' quotations of 19 January 1973 which had provided:

> 'The above quotations will remain Fixed Priced until 3 June 1975; any work carried out after this date to be negotiated.'

The respondents' purchase order (which was also incorporated in the sub-contract) provided:

> 'Price fixed until 3 June 1975 – £434,732 29p less 5 per cent discount.'

The sub-contract works were not completed by 3 June 1975. No agreement was reached thereafter on the terms upon which the claimants were to be paid for work carried out after 3 June 1975 and the claimants were said to have repudiated the sub-contract. The disputes between the claimants and the respondents were referred to an arbitrator. By agreement the arbitrator stated a consultative case for the opinion of the High Court pursuant to section 21(1)(a) of the Arbitration Act 1950 on the following issues:

1. Whether a contract was concluded between the parties.
2. Whether the parties are bound by the said contract in respect of any work carried out by the claimants after 3 June 1975 unless the price for such work was negotiated.
3. Whether upon its true construction the sub-contract was subject to the implied term that the rates for the work to be carried out after 3 June 1975 would be reasonable rates.

The claimants contended for the implied term put forward in the consultative case. The respondents contended that the sub-contractors were to be paid a reasonable sum for work done after 3 June 1975 which would reimburse the claimants for the amount of any increased cost to them in

completing the sub-contract works the burden of which the claimants would not have sustained.

Sir Douglas Frank QC (sitting as a deputy judge) held that each of the three questions should be answered in the affirmative. The respondents, Peter Lind & Co Ltd, appealed.

HELD: dismissing the appeal:

1. That a contract was concluded between the parties.
2. That the parties were not bound by the said contract in respect of any work carried out by the claimants after 3 June 1975 unless the price for such work was negotiated.
3. The sub-contract was subject to the implied term that the rates for work to be carried out after 3 June 1975 would be reasonable rates, since, applying the 'officious bystander test' the simplest term to be implied was one which would substitute for the price in the quotations a reasonable price after 3 June 1975, in the light of the change in prices which had by then taken place.

[*Note*: The judgments delivered in the Court of Appeal are clearer if read with the judgment appealed from and the latter is therefore printed first at page 4; the judgments of the Court of Appeal are to be found at page 7.]

Donald Keating, QC and John Dyson appeared throughout for Constable Hart & Co Ltd, instructed by Alastair Thompson & Partners.
Anthony Butcher, QC and Nicholas Dennys appeared throughout for Peter Lind & Co Ltd, instructed by Simmons & Simmons.

Commentary

In retrospect it is perhaps a pity that all the judgments did not rehearse the many arguments that must have been advanced in what Sir Douglas Frank, QC, found to be 'a very difficult case' and one which raises a common problem: what happens in the period of inflation to a contract for which the price has been fixed for a limited period? The conclusions reached on the facts of this case are of course helpful if similar cases arise. They seem to support the following propositions:

(a) That the courts will not regard the fact that rates or prices are good only for a fixed period as terminating the contractual relationship after the expiry of that period where the parties continue to negotiate; the terms of the contract would presumably then survive to govern the relationship of the parties in that period;
(b) That it is not open to either party to contend that the work after the expiry of the fixed price period should be valued as if no contract had ever been entered into;
(c) That a reasonable price is not to be tied simply to the recovery of additional cost that would not have been incurred but may (or, perhaps, should) be fixed by reference to actual cost plus reasonable profit.

On the facts of this case the sub-contractor was not apparently at fault in failing to complete the sub-contract works within the original period. Presumably he was entitled to an extension of time under clause 6 of the FCEC form. The effect of the decision in this case (leaving questions of repudiation aside) is that a contractor might well have to pay a sub-

contractor a sum which might approach (or even be greater than) the sum which would otherwise have been payable as damages for breach of an implied obligation to permit the sub-contractor to complete within the original period – an obligation which itself is difficult to imply having regard to the existence and terms of clause 6. The choice of words in expressing the limitations of the 'fixed price' may therefore be important.

The contractor's formulation of the basis for compensation was no doubt intended to avoid this result. Where however the sub-contractor has been partly (or even wholly) to blame for the prolongation beyond the fixed price period the contractor's formulation becomes more attractive since it goes some way to ensuring that the sub-contractor would not benefit from his default. It is not at first sight easy to devise a satisfactory implied term to meet such circumstances which would satisfy the test of the officious bystander:

> '*Prima facie* that which in any contract is left to be implied and need not be expressed in something so obvious that it goes without saying; so that, if while the parties were making their bargain an officious bystander was to suggest some express provision for it in their agreement, they would testily suppress him with a "Oh, of course".'

(per Mackinnon LJ in *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206 at 227, echoing Scrutton LJ in *Reigate v Union Manufacturing Co (Ramsbottom)* [1918] 1 KB 592 at 685.) What tends to be forgotten is that the courts are concerned to determine *the presumed intention of the parties as at the date of the contract*, and not a later date; they are also not concerned with what the parties *ought* to have agreed but what they would almost certainly have agreed; on this point another case in this volume is instructive: *Trollope & Colls Ltd v North-West Metropolitan Regional Hospital Board* (at page 60) and also reported [1973] 1 WLR 601; [1973] 2 All ER 260.

CONSTABLE HART & Co Ltd and PETER LIND & Co Ltd

24 April 1978

Queen's Bench Division

Sir Douglas Frank QC
(Sitting as a Deputy Judge of the High Court)

SIR DOUGLAS FRANK: This is a special case stated for the decision of the court pursuant to section 21(1)(a) of the Arbitration Act 1950 and arises from a contract made between the respondents as main contractors and the claimants as sub-contractors for the construction of the Kingsteignton-Newton Abbot by-pass.

On 19 January 1973 the claimants submitted a quotation in the form of priced bills of quantity for the surfacing of the road. By a letter dated 8 June the claimants confirmed their quotations which had a total value of £434,732 29p, subject to a 5 per cent discount, and stated:

> 'The above Quotations will remain Fixed Price until 3 June 1975; any work carried out after this date to be negotiated.'

On 5 October the respondents accepted that quotation by sending a purchase order to supply labour, plant, materials and supervision to carry out construction from top of sub-base up to and including wearing course and in accordance with the ICE form of contract which was attached and all documents referred to therein. There then appeared these words:

> 'Price fixed until 3 June 1975 – £434,732 29p less 5 per cent discount.'

The ICE standard form of sub-contract was accepted on 5 October and it was expressly provided that the two documents to which I have just referred form part of the contract.

In the event, through no fault on the part of the claimants, the work was not completed by 3 June 1975 and continued until November 1975 when the claimants repudiated the contract and even by then I am told that only about 20 per cent of the work had been done. The reason why the contract was repudiated was that the parties were unable to agree on the terms upon which the claimants were to be paid for work carried out after 3 June. The matter was referred to arbitration and the arbitrator directed that issues concerning the work done after 3 June 1975 should be determined as preliminary issues. Following a hearing the matter was referred to the court as a consultative case as agreed by the parties.

The main issue I have to decide is what has to be implied in the contract

to determine the payment or payments to be made for work carried out after 3 June 1975. The claimants contend that there was a term to be implied that the rates for work to be carried out after that date would be reasonable rates. The respondents, on the other hand, contend that they would in making payments to the claimants under clause 15 (5) of the sub-contract, reimburse to the claimants the amount of any increase in the cost to them of completing the sub-contract works, the burden of which they would not have sustained had the sub-contract works been completed by 3 June 1975, but otherwise under circumstances similar to those of their actual completion. Put shortly, clause 15 (5) provides that the contractor in settling the final account shall pay to the sub-contractor the contract price together with any other sums that may become due, less any sums already paid.

Mr Keating, for the claimants, submitted that where parties have agreed that building work be carried out and have concluded a contract but where the price has not been agreed for part of the work, the law implies that a reasonable sum be paid. He referred me to *Foley v Classique Coaches Ltd* [1934] 2 KB1, *F. & G. Sykes (Wessex) Ltd v Fine Fare Ltd* [1967] 1 LlLRep 53, *Liverpool City Council v Irwin* [1977] AC 239. However, those cases only go to establish the proposition that where a contract is silent as to the price, the court, in order to save the contract, will say that there is an implied term that the price is to be a reasonable price. They do not assist in determining a formula for a reasonable price or in the case where there is more than one possible formula, for ascertaining a price. He also referred to *Shell UK Ltd v Lostock Garage Ltd* [1976] 1 WLR 1187, and in particular to Lord Denning's two broad categories of implied terms. It was accepted by him and by Mr Butcher for the respondents that this case falls within the second category, that is, it is not of common occurrence and that the implication is based on an imputed intention by the parties from their actual circumstances. These are what he described as the 'officious bystander' type of case, and in such cases a term is not to be implied on the ground that it would be reasonable but only when it is necessary and can be formulated with sufficient degree of precision. Therefore the question I have to decide is what advice would have been given by an officious bystander, albeit one with experience of civil engineering contracts, to and accepted by the parties had they applied their minds to the term which should have been incorporated in the contract.

I think this is a very difficult case, not least because of the imprecision of the questions asked and the different meanings given by the parties to the word 'reasonable'. Thus, although it was contended in terms by the claimant that the rates for the work to be carried out after 3 June would be reasonable rates, that contention is denied by the respondents, and yet Mr Butcher accepts that what has to be paid must be reasonable. Thus he drew a distinction between what is reasonable and reasonable rates. In answer to a question put by me he made this alternative submission:

'Under clause 15 (5) the claimants will receive an additional reason-

able sum calculated having regard to any additional costs, losses or expenses sustained by reason of the fact that the carrying out of the sub-contract works had extended beyond 3 June 1975.'

Mr Butcher said that the words in the letter of 8 June 1973 'any works carried out after this date to be negotiated' are too uncertain to be given any meaning unless there is a yardstick by which they are to be agreed, and therefore one is led back to the implied term. That term, he said, must be determined in the light of the expressed terms. He emphasised that this is a lump sum contract, that is, at a fixed price for defined works, and that is the price referred to in clause 5. He pointed out that the contract provides for the valuation of variations in the work at specified rates and there is no similar provision for additional cost for work carried out after 3 June 1975 and so it can only be paid for as an additional sum under sub-clause (5) of clause 15. Thus there is no means of paying for the additional cost other than as an additional sum without modifying the price and that, he argued, cannot be done.

One difficulty I find with Mr Butcher's argument is that it seems to me only to go to the time at which the additional payment is to be made and not to the method of its quantification. I think I must go back to June 1973 to see what was in the minds of the parties and I may here say that although Mr Butcher contended to the contrary, I find that the words 'any work carried out after this date to be negotiated' were embodied in the contract. It is clear that the claimants in arriving at their quotation had done so on the footing that the work would be completed by about 3 June 1975. Indeed, the period of completion specified in the contract was approximately 75 per cent of the main carriageway to be constructed in 1974, and the remainder in 1975. It is also clear that they had quoted on the basis of their priced bills and that their quotation had been accepted on that basis, and their quotation was expressed to form part of the contract. Thus, that the quotation was based on the priced bills and on the footing that the price would hold good until 3 June 1975 was recognised by both parties. It seems to me to follow naturally that had the parties then been asked the basis for payment after that date they would have replied that appropriate adjustments either up or down would have to be made to the prices in the bills and I think that it was when the claimants referred to the work to be negotiated they meant that there would have to be negotiations for the adjustment of the prices in the bills. This is a matter mainly of impression from the documents and all the surrounding circumstances. I do not think that the fact that the price is defined in the contract vitiates this conclusion. It seems to me that the terms of the letter of 8 June 1973 are broad enough to include adjustment of the price as defined and that is the conclusion I have reached.

I think further that one difficulty which stands in the way of Mr Butcher's alternative submissions is that he cannot state with precision what would be taken into account in arriving at an additional sum, *eg,* what items of overheads although he seemed to include overheads subject to proof. That much certainly was not clear until it arose in the course of argument.

Accordingly I now turn to answer the specific questions for the decision of the court:

1. Whether a contract was concluded between the parties – Yes.
2. Whether the parties are bound by the said contract in respect of any work carried out by the claimants after 3 June 1975 unless the price for such work was negotiated – Yes.
3. Whether upon its true construction the sub-contract was subject to the implied term that the rates for the work to be carried out after 3 June 1975 would be reasonable rates – Yes.

Under the circumstances, the other questions do not arise.

28 June 1978 *Court of Appeal*

Lord Diplock and
Viscount Dilhorne

LORD DIPLOCK: We need not trouble you, Mr Keating.

This is an appeal from an Order of Sir Douglas Frank, QC sitting as a deputy judge of the Queen's Bench Division answering questions arising in the course of a reference by an arbitrator. The questions which were submitted to the learned judge in the case stated boil down to questions as to construction of a contract entered into between the appellants, who were big contractors under a main contract, and Constable Hart & Co Ltd, who were sub-contractors.

The contract was for the purpose of constructing a by-pass somewhere down in Devonshire, and the sub-contract was on the printed ICE

sub-contract form. The dispute arises out of a very few words in the letter which accompanied the quotation for the sub-contract, and those very few words are these:

> 'The above quotations' (it was a fixed amount quotation of £434,000-odd) 'will remain Fixed Price until 3 June 1975; any work carried out after this date to be negotiated.'

The ICE standard form of contract which was used provided in its printed conditions for fixed rates and prices and no provision for variation of those prices, though it did contain the ordinary clause about variations in the contract work, and it is perhaps not unsignificant that in condition 9 it provides that:

> 'The value of all authorised variations shall be ascertained by reference to the rates and prices (if any), specified in this Sub-contract for the like or analogous work, but if there are no such rates and prices, or if they are not applicable, then such value shall be such as is fair and reasonable in all the circumstances.'

In the event the work, which was expected to be completed in the course of 1974 and 1975 – three-quarters of it in the first year and the remainder in the second – was not in fact completed by 3 June 1975. Disputes then arose between the parties on a number of matters, and among them was the question: at what rates were the claimants to be paid after 3 June 1975?

That was one of the matters which went to the arbitrator, and he stated a case on three questions of law. Those were, first, whether a contract was concluded between the parties, and the second:

> 'If the answer to question (i) is yes, whether the parties were bound by the said contract in respect of any work carried out by the claimants after 3 June 1975 unless the price for such work was negotiated,'

and (iii) asked the question: If the answer to the second question were Yes, what was the implied term as to the prices to be paid after 3 June 1975?

The learned deputy judge said, I think quite rightly, that this is very much a question of impression, and I must confess that my impression has been exactly the same as his. The actual words about 'any work carried out after this date to be negotiated' are too vague to fix any prices payable after that date. The learned judge, applying the officious bystander test, said that in his view had the parties then – that is to say at the making of the contract – been asked the basis for payment after that date, they would have replied that appropriate adjustments either up or down would have to be made in the prices in the bills, and he thought that it was when the claimants referred to the price 'to be negotiated' they meant there would have to be negotiations for the adjustment of the prices in the bills.

The rival contentions as to the nature of the adjustment are broadly these: The claimants said that the appropriate rates would be reasonable rates, and that was the implication from the contract. The respondents, on the other hand, said that if a term were to be implied it should be that should the carrying out of sub-contract works extend beyond 3 June 1975, then the respondents would, in making a payment to the claimants under clause 15(5) of the sub-contract, reimburse to the claimants the amount of any increase to the cost to them completing the sub-contract works the burden of which they would not have sustained had the sub-contract works been completed by 3 June 1975, but otherwise under circumstances similar to those of their actual completion.

When one reads that it sounds a pretty complicated implied term. The purpose of it is, of course, this, that reasonable rates may include a profit element, whereas the alternative term is designed to exclude this. It also has some minor purpose in relation to other issues in the case.

The foundation of it is this: Clause 15(1) provides that the value of the work done shall be calculated in accordance with the rates and prices, if any, specified in the contract, or otherwise the price. Clause 15(5) provides that within three months after the end of the contract the contractor shall pay to the sub-contractor the price, together with any other sums that may have become due to the sub-contractor under the sub-contract.

What Mr Butcher has urged upon this court, as he urged upon the learned judge, is that it puts the least strain upon the printed words of the contract if what they are entitled to after 3 June 1975, is treated as an additional sum under 15(5).

It seems to me, as it seemed to the learned judge, that when one is amending, as one must, the printed clause to fit in with the written provisions which I have already read, the simplest way of doing it is to substitute for the price in the quotations a reasonable price after 3 June 1975, in the light of the change in prices which had by then taken place.

I therefore would think that the learned judge was perfectly right in answering the questions as he did. The first question: Yes, there was a contract between the parties; the second, that:

> 'The parties were bound by the said contract in respect of any work carried out by the claimants after 3 June 1975;'

and the third that:

> 'The sub-contract was subject to the implied terms that the rates for the work to be carried out after 3 June 1975, would be reasonable rates.'

I would dismiss the appeal.

VISCOUNT DILHORNE: I agree. I would only desire to add a very few words. The letter of 8 June, to which my Lord has referred, formed part of the sub-contract, being one of the documents scheduled to the printed

contract and stated to form part of that sub-contract. It therefore has to be construed with that sub-contract, and I do not think that any substance should be given to the contention that because the printed form of the sub-contract was dated later than the letter, one can disregard the wording to which my Lord has referred:

> 'The above quotations will remain Fixed Price until 3 June 1975; any work carried out after this date to be negotiated.'

One has to read those together. It being a fixed price contract, one would not expect to find any provision in the printed form for variation of that price. There is, of course, provision made for variation of the work to be done and for consequent adjustments in price.

Reading the two together, it seems to me clear that the fixed price was only intended to endure until 3 June 1975. The letter then went on to provide that any work carried out after that date was to be negotiated. Negotiations did take place, but they did not result in an agreement. Hence this litigation.

Clause 15 of the contract seems to me to provide machinery for payment from time to time of the sub-contractor and not for anything else; and, reading the two documents together, I think the construction put by the learned judge upon them and their effect in the circumstances of this case was right, and I agree that the appeal should be dismissed, with costs.

SIKA CONTRACTS Ltd v B L GILL and CLOSEGLEN PROPERTIES Ltd

18 April 1978 *Queen's Bench Division*

Kerr J

The plaintiffs were contractors who were invited by the first defendant – a chartered civil engineer – to submit a quotation for repairing some concrete beams at premises which were owned by the second defendants. The plaintiffs duly submitted a written quotation to the first defendant. The quotation was accepted by a letter from the first defendant but the first defendant did not then or at any previous time inform the plaintiffs that he was acting on behalf of the second defendants or as an agent.

The work was done and invoices were rendered to the first defendant who then wrote to the plaintiffs stating for the first time that he was acting as an agent having been instructed to accept the quotation by architects who in turn were acting on behalf of the second defendants.

The plaintiffs commenced proceedings against both the first and the second defendants to recover £1,628 24p which was the agreed price of their work. By agreement the action was stayed on terms that the second defendants should pay a sum to the plaintiffs in full satisfaction of their claim. That sum was not however paid and the second defendants went into liquidation. The plaintiffs therefore continued the proceedings against the first defendant.

HELD:

1. Since the contract had been signed by the first defendant in his own name without qualification he was deemed to have contracted personally unless a contrary intention appeared from the contract itself.
2. Reference to the first defendant's qualification as a chartered civil engineer did not exclude his personal liability.
3. The first defendant was therefore liable to the plaintiffs for the sum claimed by them.

David Eady appeared for the plaintiffs, instructed by Herbert Oppenheimer, Nathan & Vandyk.
Mark Batchelor appeared for the first defendant, instructed by Swepstone, Walsh & Son, agents for Sidney G. Brown & Son.

Commentary

The outcome of this little case brings home vividly the consequences to an engineer, architect or surveyor (and others) of less than punctilious observance of the laws of agency. It is of course fair to point out that in practice most contractors would probably not pursue the 'agent' if the true client could pay – but that was not so here. As Kerr J said at page 18: