BUILDING LAW REPORTS

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Theme

Sub-contracts

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Volumes published in 1976

1. Set-off and Claims for Damages for Delay
2. Set-off and Damages for Defects
3. Liability and Limitation

1977

4. Obligations and Duties of the Professional Man
5. Civil Engineering Contracts
6. Indemnities

1978

7. Cases on the JCT Form of Contract
8. Contracts of Employment
9. Cases on Contracts in General

1979

10. Professional Duties and Copyright
11. Cases of Current Interest and from the Commonwealth
12. Cases of Current Interest and from the Commonwealth

1980

13. Cases of Current Interest and from the Commonwealth
14. Sub-contracts

Introduction

We have taken "sub-contracts" as our theme for this volume. The basic concept of sub-contracting is easily explained *ie* a person who has contracted to do something arranges for some part or parts of his contractual obligations to be performed on his behalf by another person, but the potential legal difficulties involved are many and various. When dealing with the substantial sub-contracts which are now commonplace in the industry, most of those difficulties could be avoided if, as a general rule, more attention was given to the preparation of sub-contract documents with the following objectives:

(i) to ensure that the obligations undertaken by the sub-contractor to the main contractor are entirely consistent with those which the main contractor has undertaken to the employer and the sub-contractor agrees appropriately to indemnify the main contractor against the consequences of failure to discharge the obligations or the occurrence of risks assumed by him;

(ii) to plan for the sub-contract works to be undertaken at such times and in such sequence as will facilitate (if not secure) the completion of the main contract works as a whole in due time:

(iii) to deal expressly and clearly with responsibility for such design as the sub-contractor may in fact have undertaken.

(The second and third objectives are no more than illustrations of the first objective but their practical importance justifies them being mentioned specifically.)

The cases included in this volume demonstrate problems which often arise when sub-contracts are concluded by the sending of an Order document which may refer, but only in general terms, to a recognised standard form of contract. Such loose incorporation is, we suggest, better avoided.

The first two cases included in this volume should be considered together. Both concerned the liability of a main contractor for a

nominated sub-contractor's design. In *Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd.* at page 1 the House of Lords considered the liability of main contractors (EMI) and sub-contractors (BIC) for the collapse of a television mast which had been designed by BIC. The judgment of the Court of Appeal was reported in (1979) 11 BLR 29 and we now include the unanimous decision of the House of Lords which dismissed EMI/BIC's appeal and allowed the cross-appeal brought by the IBA on the issue of negligence. Having concluded that BIC's design had been negligently prepared the House of Lords did not need to decide the legally much more difficult and interesting contractual issues which arose on the appeal. Nevertheless the observations of their Lordships, in particular those of Lord Scarman at page 47, as to the nature and extent of the design obligation which BIC had sub-contractually undertaken to EMI and which EMI had undertaken to ITA under the main contract, are clear, unequivocal and, quite certainly, of very considerable "persuasive authority" for future cases. The other notable feature of the decision is the complete rejection of that part of the Court of Appeal's judgment where a statement of reassurance as to the design issued by the sub-contractor during the course of the work was held to have been a contractual warranty.

During the hearing before the House of Lords reference was made to the comparatively recent decision of the Irish Courts in the case of *Norta Wallpapers (Ireland) Ltd v John Sisk & Sons (Dublin) Ltd.* We include it at page 49. If the facts in *IBA v EMI* were rather special those which were before the Irish Courts were altogether commonplace. To contrast the two decisions is helpful. In each case the application of essentially the same basic legal principles produces a quite different result.

From design we turn to the ownership of materials delivered to site by a sub-contractor. The case of *Dawber Williamson Roofing Ltd v Humberside County Council* at page 70 is another recently decided case. It demonstrates that employers (or those acting for them) would be well advised carefully to check the terms of sub-contracts pursuant to which the main contractor seeks to acquire ownership of goods delivered to site, but as yet not incorporated as part of the works, before including their value in an interim certificate.

Simplex Concrete Piles Ltd v Borough of St Pancras at page 80 shows the problems which can arise where a departure from the specified work has been expressly authorised by or on behalf of the employer in circumstances where, *prima facie*, the contractor is in breach of contract.

Modern Building Wales Limited v Limmer and Trinidad Co Ltd at page 101 deals with the incorporation of detailed standard conditions by means of general descriptive words included on the face of an Order. The case should be considered together with *Brightside Kilpatrick Engineering Services v Mitchell Construction (1973) Ltd* which may be found at (1975) 1 BLR 64 and also with the general observations of the House of Lords on incorporation of standard terms and conditions into contracts which appear in *Smith v South Wales Switchgear Co Ltd* (1978) 8 BLR 1 (our commentary on that aspect of the case appears on pages 3 to 4).

Finally, we have included a case recently decided by the Court of Appeal. *M. Harrison & Co (Leeds) Ltd v Leeds City Council* at page 118 demonstrates clearly the sort of problems which can arise where the conditions upon which a proposed nominated sub-contractor is prepared to undertake work in conflict with the programming requirements of the main contractor. The particular facts of the case were somewhat unusual but, as an illustration of the type of problem which could perhaps have been avoided by a closer attention to the detail of sub-contractual documentation at an earlier stage, it is instructive. The case also provides a link with the theme planned for the next volume — "Arbitration".

Contents

Index prepared by Darryl Royce, BA, of Gray's Inn, Barrister-at-Law

INDEPENDENT BROADCASTING AUTHORITY v EMI ELECTRONICS Ltd and BICC CONSTRUCTION Ltd

15 May 1980 *House of Lords*

Viscount Dilhorne, Lord Salmon, Lord Edmund-Davies, Lord Fraser of Tullybelton, Lord Scarman

This case concerns the liability of the first defendants ("EMI") who were main contractors and the second defendants ("BIC") who were nominated sub-contractors for the collapse of an aerial mast which was the property of the plaintiffs' predecessors, the Independent Television Authority ("ITA"). The mast which collapsed was 1,250ft high and erected on Emley Moor in Yorkshire. It was one of a group of three cylindrical masts which were designed and constructed between 1962 and 1966.

The three masts were in fact designed by BIC pursuant to a request made to them by ITA. Thereafter EMI were engaged by ITA as main contractors for the work in respect of the mast, aerials and feeder system and they were instructed to engage BIC as nominated sub-contractors for the design, supply and erection of the mast.

The first mast to be erected was not the Emley Moor mast but one of its sister masts at Winter Hill. When the Winter Hill mast had been constructed up to a height of 851 ft it began to oscillate violently with the result that workmen evacuated the site. After this incident ITA wrote directly to BIC suggesting that the behaviour of the mast should be the subject of investigation in order that the design data could be confirmed. In reply BIC wrote on 11 November 1964 reassuring ITA that they were,

> "...well satisfied that the structures will not oscillate dangerously...".

Having received this assurance ITA took no further action and work proceeded.

On 28 November 1966 ITA accepted the completed Emley Moor mast. On 19 March 1969 it broke and collapsed. From 16 to 19 March 1969 the weather had been very cold. There had been thick fog, snow and freezing rain which produced a condition of glazed frost. The evidence was that such weather conditions were to be expected on average once in every three or four years.

ITA thereafter brought proceedings against EMI claiming damages for breach of contract and negligence and also against BIC claiming damages for negligence and for breach of warranty and negligent mis-statement. As a result of the claims made against them EMI claimed over against BIC.

At the trial O'Connor J found that the cause of the collapse of the mast was a tension fracture of a flange in a leg of the 6 ft 6 ins lattice at 1,027 ft and that the failure of that leg was caused primarily by vortex shedding and, to a lesser extent, by asymmetric ice loading. He held that ITA's claims against EMI in negligence failed but its claim for breach of contract succeeded. He held that BIC were negligent in the design of the mast and that they were liable as claimed in respect of the letter of 11 November 1964. He also held BIC liable to EMI by virtue of the sub-contract.

BIC appealed to the Court of Appeal against the findings of liability against them. The decision of the Court of Appeal is fully reported in (1979) 11 BLR 29. The Court of Appeal dismissed the appeal holding (a) that upon the proper interpretation of the main contract and of the sub-contract EMI and BIC were each liable to design, supply and erect a mast which would be reasonably fit for its purpose, which this mast was not because it could not withstand what were foreseeable weather conditions for the area in which it was erected and (b) that the assurance which was given by BIC in their letter of 11 November 1964 that none of the masts would oscillate dangerously was contractually binding. The Court of Appeal concluded, contrary to the judgment of O'Connor J, that BIC were not liable in negligence to ITA.

The Court of Appeal refused BIC leave to appeal to the House of Lords but the appeal committee granted leave to BIC to appeal and leave to ITA to cross-appeal. Before the House of Lords BIC did not seek to argue that any liability for breach of contract was extinguished or limited by any contractual term. Two issues were raised on BIC's appeal, namely:

"(1) Whether, by reason of the main contract EMI incurred any

(and if so what) obligation to ITA in respect of design.

(2) Whether the assurance given in the letter dated 11 November 1964 constituted a contractual warranty enforceable by ITA against BIC."

By the cross-appeal ITA contended that the finding of negligence which O'Connor J had made against BIC should be restored.

***HELD**: dismissing BIC's appeal and allowing IBA's cross-appeal*

1. O'Connor J had properly concluded that BIC had negligently failed to consider the possible effects of asymmetric ice loading on the stays in conjunction with the effects of vortex shedding.

2. BIC admittedly owed a duty of care to ITA in regard to the assurance contained in the letter dated 11 November 1964; it automatically followed from the finding of negligence (stated in 1 above) that the assurance had been negligently given and, accordingly, since ITA had relied upon that assurance, BIC were liable in damages on the principle established in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

3. The assurance given in the letter dated 11 November 1964 was not a contractual warranty because there was no evidence that, at the time when it was given, either party intended the creation of a contractual undertaking — *Heilbert Symons & Co v Buckleton* [1913] AC 30 considered.

4. Although EMI took no part in the design of the mast, in the light of express terms of their accepted tender, EMI contractually accepted responsibility for the design of the mast. As to the extent of the responsibility EMI accepted it undoubtedly encompassed responsibility to ITA for the negligence of BIC so that, in the light of the finding of negligence (stated in 1 above) it was not necessary to consider whether under the main contract EMI had impliedly undertaken to supply a mast which was reasonably fit for its purpose and whether under the sub-contract BIC had undertaken a similar obligation to EMI but, *per* Viscount Dilhorne (with whom Lord Salmon agreed):

"... I would myself have been surprised if it had been concluded that they had not done so"

per Lord Fraser of Tullybelton.

"... It is now well recognised that in a building contract for work and materials a term is normally implied that the main contractor will accept responsibility to his employer for materials provided by nominated sub-contractors. The reason for the presumption is the practical convenience of having a chain of contractual liability from the employer to the main contractor and from the main contractor to the sub-contractor — see *Young & Marten Ltd v McManus Childs Ltd.* [1969] 1 AC 454, (1978) 9 BLR 77 ....the principle that was applied in *Young & Marten Ltd* in respect of materials, ought in my opinion to be applied here in respect of the complete structure, including its design. Although EMI had no specialist knowledge of mast design, and although IBA knew that and did not rely on their skill to any extent for the design, I see nothing unreasonable in holding that EMI are responsible to IBA for the design seeing that they can in turn recover from BIC who did the actual designing. On the other hand it would seem to be very improbable that IBA would have entered into a contract of this magnitude and this degree of risk without providing for some right of recourse against the principal contractor or the sub-contractors for defects of design."

per Lord Scarman:

"... The extent of the obligation is, of course, to be determined as a matter of construction of the contract. But, in the absence of a clear, contractual indication to the contrary, I see no reason why one who in the course of his business contracts to design, supply, and erect a television aerial mast is not under an obligation to ensure that it is reasonably fit for the purpose for which he knows it is intended to be used. The Court of Appeal held that this was the contractual obligation in this case, and I agree with them. The critical question of fact is whether he for whom the mast was designed relied upon the skill of the supplier (*ie* his or his sub-contractor's skill) to design and supply a mast fit for the known purpose for which it was required."

Charles Sparrow QC, Harvey McGregor QC and Michael Crane appeared for BIC instructed by Wilkinson Kimber and Staddon.
David Kemp QC, Richard Havery QC and Stephen Richards appeared for the IBA instructed by Allen and Overy.

Commentary

Once the House of Lords decided that O'Connor J had rightly concluded that BIC had failed to exercise the care and skill of an ordinarily competent structural engineer when designing the mast it was possible for the case to be decided on what were (legally speaking) extremely straightforward grounds: it had always been common ground that, as the designers of the mast, BIC had owed a duty of care to ITA and that the standard of care was that of an ordinarily competent structural engineer undertaking work of that sort. Accordingly, once breach of that duty was established the contentious legal issues concerning the extent of EMI's contractual liability (as main contractors) to ITA in respect of the design which had been undertaken by BIC (who, contractually, were nominated sub-contractors) and the legal effect of the unequivocal assurance given by BIC in their letter dated 11 November 1964, did not necessarily have to be decided. The Court of Appeal had concluded that O'Connor J had been wrong to hold that BIC had been negligent and, in consequence, had been forced to consider and decide those legal questions.

Our commentary on the Court of Appeal's decision appears in (1979) 11 BLR 29 at pp. 31 to 37. We stated that the most interesting part of the Court of Appeal's decision was the acceptance of the argument advanced on behalf of the IBA that the assurance which BIC had given in their letter dated 11 November 1964 that they were

"well satisfied that the structures will not oscillate dangerously"

was something which had contractual effect as between the nominated sub-contractor who gave it and the employer to whom it was given. As we indicated in our commentary that part of the Court of Appeal's decision had potentially important consequences for the construction industry. Its importance now is purely historical; it was but a transient heresy which failed to take root and which has had to defer to a clear reaffirmation of strictly orthodox legal analysis. Representations or assurances will only be categorised as warranties (*ie* given contractual effect) in relation to anticipated or existing contracts if the proper inference to be drawn from the statement made and the circumstances in which it was made is that the parties intended that there should be contractual liability in respect of the accuracy of the statement. Viscount Dilhorne dealt with the issue thus (see p. 22 & 23):

"O'Connor J held that by the assurance BIC promised that the masts would not oscillate dangerously, that there was ample consideration for the promise and that there was a contract which was broken. The Court of Appeal agreed with him. So the assurance given by Mr Mears in response to Mr Robson's letter coupled with the forbearance to take further action was held to amount to a contract, not a warranty collateral to the contract entered into a year or so before the building of the Emley Moor mast.

If this is right, then it would seem to me to follow that any representation, whether made innocently, negligently or fraudulently, which is intended to be acted on and which is acted on creates a contractual relationship. I do not think that this can be right .....

Although in this case that alleged warranty was not given at the time of the making of the main contract and so was not collateral to that contract, it still is essential to justify the conclusion that a legally binding contract has been made, to show clearly that each party had an *animus contrahendi*. In the present case I can find nothing which can by any possibility be taken as evidence that Mr Robson when he wrote his letter on the 20th October or thereafter had any intention of entering into a contract or that Mr Mears when he gave the assurance had any intention of undertaking a contractual obligation."

It should be noted that if the ITA had sought and obtained from BIC an assurance that the masts would not oscillate dangerously prior to the making of the main contract with EMI then it would have been very strongly arguable that such an assurance would have taken effect as a collateral contract. ITA could then have argued that but for the assurance BIC would not have been nominated as sub-contractors to design and build the mast.

The practical significance of BIC's avoiding contractual liability in respect of their assurance was, of course, extremely limited. Once it was accepted that the mast had been negligently designed then it automatically followed that the assurance was negligently given. In view of the now well established principle established by the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, BIC had never denied that their assurance was a statement of the type which would give rise to liability at common law.

In our view by far the most significant aspect of this decision is the absolutely clear indication given by Viscount Dilhorne (with whom Lord Salmon agreed), Lord Fraser of Tullybelton and Lord Scarman that contractors and sub-contractors who undertake to design the whole or part of the structures which they intend to erect will normally be taken to have accepted an unqualified liability in respect

of design. Their duty is to be equated not with that of a professional adviser engaged by the employer (*ie* a duty to exercise all proper professional care and skill but with no guarantee of success) but with that of a seller of goods; the duty is to achieve a design which is reasonably suited to the purpose made known to the designing contractor or sub-contractor. If that contractor or sub-contractor doubts his ability to succeed then, if he wishes to do so, he is free to attempt to negotiate some more limited form of liability. Lord Scarman puts the matter most clearly (see p.47 & 48):

"The extent of the obligation is, of course, to be determined as a matter of construction of the contract. But, in the absence of a clear, contractual indication to the contrary, I see no reason why one who in the course of his business contracts to design, supply, and erect a television aerial mast is not under an obligation to ensure that it is reasonably fit for the purpose for which he knows it is intended to be used. The Court of Appeal held that this was the contractual obligation in this case, and I agree with them. The critical question of fact is whether he for whom the mast was designed relied upon the skill of the supplier (*ie* his or his sub-contractor's skill) to design and supply a mast fit for the known purpose for which it was required.

Counsel for the appellants, however, submitted that, where a design, as in this case, requires the exercise of a professional skill, the obligation is no more than to exercise the care and skill of the ordinarily competent member of the profession. Although it might be negligence to-day for a constructional engineer not to realise the danger to a cylindrical mast of the combined forces of vortex shedding (with lock-on) and asymmetric ice loading of the stays, he submitted that it could not have been negligence before the collapse of this mast: for the danger was not then appreciated by the profession. For the purpose of the argument, I will assume (contrary to my view) that there was no negligence in the design of the mast, in that the profession was at that time unaware of the danger. However, I do not accept that the design obligation of the supplier of an article is to be equated with the obligation of a professional man in the practice of his profession. In *Samuels v Davis* [1943] KB 526, the Court of Appeal held that, where a dentist undertakes for reward to make a denture for a patient, it is an implied term of the contract that the denture will be reasonably fit for its intended purpose. I would quote two passages from the judgment of du Parcq LJ. At p.529 he said (omitting immaterial words):

> "...if someone goes to a professional man... and says: 'Will you make me something which will fit a particular part of my body?'... and the professional gentleman says: 'Yes,' without qualification, he is then warranting that when he has made the article it will fit the part of the body in question."

And at p.530 he added:

> "If a dentist takes out a tooth or a surgeon removes an appendix, he is bound to take reasonable care and to show such skill as may be expected from a qualified practitioner. The case is entirely different where a chattel is ultimately to be delivered."

I believe the distinction drawn by du Parcq LJ to be a sound one. In the absence of any term (express or to be implied) negativing the obligation, one who contracts to design an article for a purpose made known to him undertakes that the design is reasonably fit for the purpose. Such a design obligation is consistent with the statutory law regulating the sale of goods: see Sale of Goods Act 1893, the original s.14, and its modern substitution enacted by s.3, Supply of Goods (Implied Terms) Act 1973."

This statement of the law is entirely consistent with the approach which was adopted in *Young & Marten Ltd v McManus Childs Ltd* [1969] 1 AC 454, (1978) 9 BLR 77 and reference should be made to our more detailed consideration of the underlying principles which is to be found on pp.33 to 35 of Volume 11 in our commentary on the Court of Appeal's decision.

Finally it should be noted that the House of Lords was referred to the Irish Case of *Norta Wallpapers Ltd v John Sisk Ltd* [1978] IR 114 which we have included in this volume. In that case a nominated sub-contractor had designed the superstructure of a factory building and the court was then asked to decide to what extent the main contractor was liable to the employer in respect of the sub-contractor's defective design. Viscount Dilhorne at p.25 and Lord Fraser of Tullybelton at p.45 dealt expressly with the *Norta Case* and explained, we would submit, clearly and convincingly why its facts materially differed from those of the present case so that EMI had but John Sisk Ltd had not accepted liability for the design of the sub-contractor.

INDEPENDENT BROADCASTING AUTHORITY v EMI ELECTRONICS Ltd and BICC CONSTRUCTION Ltd

15 May 1980 *House of Lords*

Viscount Dilhorne, Lord Salmon,
Lord Edmund-Davies,
Lord Fraser of Tullybelton,
Lord Scarman

VISCOUNT DILHORNE: My Lords, on 19 March 1969 the television mast at Emley Moor in Yorkshire belonging to the Independent Television Authority ("ITA") collapsed and fell to the ground, broken in many pieces with its base broken away from the concrete foundation on which it rested. It was a mast nearly a quarter of a mile in height with a diameter at its base of only 9 ft. Its collapse was attributed to the mast breaking 1,027 ft from the ground. ITA sued their main contractors, Electrical and Musical Industries Ltd ("EMI") for damages for breach of contract in respect of three contracts, one in relation to a mast at Winter Hill in Lancashire, one in relation to the Emley Moor mast and one in relation to a mast at Belmont in Lincolnshire.

Each mast had been designed and constructed by British Insulated Callender's Construction Co Ltd ("BIC"). In this appeal we are only concerned with liability in respect of the Emley Moor mast. It was not alleged that there was any defect in workmanship or in the materials used. It was said that the design was faulty and that under their contract with ITA, EMI were liable for that. If they were liable to ITA, EMI claimed to be indemnified against that liability by BIC who had no contractual relationship with EMI.

ITA also claimed damages from BIC for negligence for breach of warranty and for a negligent statement which they say was made to them.

In 1958, EMI tendered to ITA for the erection of a television mast at Mendlesham in East Anglia and their tender was accepted on the