BUILDING LAW REPORTS

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EDITED BY

Humphrey Lloyd, MA, LL B (Dub)
one of Her Majesty's Counsel

and

Colin Reese, MA (Cantab)
of Gray's Inn, Barrister-at-Law

VOLUME
22

Theme

Cases of Current Interest

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Building Law Reports

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Introduction

There is no particular theme to this Volume other than that the nine cases included in it are all judgments delivered recently.

We begin with *William Hill Organisation Ltd* v *Bernard Sunley & Sons Ltd* which we think may be considered interesting primarily for what is said at the end of the judgment of the Court of Appeal, namely that a person who may owe a duty of care should not in principle be under an obligation which is greater than that created by any contract between them. The case concerned a building which was erected in the early 1960s and which was covered by a Final Certificate issued under the 1939 RIBA form (revised 1957). The judgment of the Court of Appeal was mainly concerned with disposing of the plaintiff's appeal against the rejection of the claim on the ground that the bar created by statute and by contract could not be circumvented by a plea of "fraudulent concealment". We consider that the case may also be of interest to practitioners for its examination of the practical and evidentiary difficulties facing a plaintiff who has to establish concealment.

There then follow *James Longley & Co Ltd* v *Borough of Reigate & Banstead* (at p 31) and *J Murphy & Sons Ltd* v *London Borough of Southwark* (at p 41). In the former the Court of Appeal held that under the 1963 JCT form an architect or supervising officer was not obliged to give his consent by an instruction to the determination by the contractor of the employment of a nominated sub-contractor. The decision will be relevant to contracts which make simple provision for the nomination of sub-contractors such as the FIDIC Conditions. In the latter case the judgment of Mustill J (previously reported at (1981) 18 BLR 1) was unequivocally affirmed: a main contractor seeking to recover fluctuations on labour under the JCT form has to show that the labour was directly employed by him and was not self-employed.

F G Whitley & Sons Ltd v *Clwyd County Council* (at p 48) concerned an application under the 1979 Arbitration Act for leave to appeal against the decision of an arbitrator in the form of an interim award. In allowing the contractor's appeal and refusing leave to appeal against the arbitrator's decision Donaldson LJ (as he then was) made some stimulating observations on the conduct of arbitrations. The arbitration in question was about the interpretation of a civil engineering contract and the application of the Department of Transport's Standard Method of Measurement.

Some of the problems which were not solved by the House of Lords in *Anns* v *London Borough of Merton* 5 BLR 1; [1978] AC 728 were considered by the Court of Appeal in *Acrecrest Ltd* v *W. S. Hattrell & Partners* (at p 88). It was there held that a local authority did owe a duty of care to a person who, although not the occupier of the

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premises, was the owner, and who had employed a building contractor and architect to have the premises constructed. It was further held that the fact of the employment of independent contractors such as a builder and architect did not mean that the building owner was the cause of his own loss and misfortune for the purposes of an action against the local authority under the principle established in *Anns*. The Court of Appeal also considered the nature of the duty created by the building regulations. This issue came before the Court of Appeal later in 1982 in *Worlock* v *SAWS* (at p 66). In that case the appeals of the builder and of the local authority from the decision of Woolf J (previously reported at (1981) 20 BLR 94) were each dismissed although the local authority succeeded in having its liability to contribute reduced. The case is of interest because it makes clear that the question of the application of the building regulations is primarily a matter of law and not one of "good practice"; and that it may not be the building inspector's judgment that is at stake but rather that of his employer, the local authority when the allegation of negligence is to be decided.

Perry v *Sidney Phillips & Son* (at p 120) has been included because many of the more recent cases on the principles applicable to damages were considered in the context of a claim for professional negligence and the earlier decision of the Court of Appeal in *Philips* v *Ward* [1956] 1 WLR 471; 4 BLR 142.

The Volume concludes with two cases decided at first instance. In *Re Jartay Developments Ltd* (at p 134) Nourse J had to consider whether, in the liquidation of a developer an unpaid contractor who had carried out work for the development could obtain payment indirectly by impressing a trust upon the money held for the developer by the owner so as to achieve a result similar to that reached in *Re Tout & Finch Ltd* [1954] 1 WLR 187; *Rayack Construction Ltd* v *Lampeter Meat Co Ltd* (1979) 12 BLR 30 and *Re Arthur Sanders Ltd* (1981) 17 BLR 125. Nourse J declined to give the contractor the relief sought and in so doing indicated the limitations applicable to the three cases cited above.

Finally we have included *National House-Building Council* v *Fraser* (at p 142). That case concerned the interpretation and duration of a "guarantee" given to the NHBC by directors of a building company which failed to honour its obligations under the NHBC scheme with the result that the Council had to pay the amount awarded by an arbitrator to the dissatisfied purchasers. The duration of a guarantee given in different circumstances was also considered by Mocatta J in *Nene Housing Society Ltd* v *National Westminster Bank Ltd* (1980) 16 BLR 22.

H. J. LL.

22, Old Buildings, Lincoln's Inn, London WC2A 3UJ. C. R.

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WILLIAM HILL ORGANISATION Ltd v BERNARD SUNLEY & SONS Ltd

30 July 1982 *Court of Appeal*

Cumming-Bruce and O'Connor LJJ,
Sir John Willis

On 18 March 1960 the plaintiffs (the employer) entered into a contract under seal with the defendants (the contractor) for the construction of an office block in Blackfriars Road, London. The contract incorporated the RIBA Conditions 1939 edition (revised 1957). Clause 24 of the contract conditions provided *inter alia* that:

> "(g) Unless notice in writing of a dispute or difference shall have been given ... before the final certificate has been issued the final certificate shall be conclusive evidence in any proceedings arising out of this contract (whether by arbitration under clause 26 hereof or otherwise) that the Works have been properly carried out and completed ... in accordance with the terms of this Contract save in so far as it is proved in the said proceedings that any sum mentioned in the said certificate is erroneous by reason of
>
> (i) fraud, dishonesty or fraudulent concealment relating to the Works or any part thereof or to any matter dealt with in the said certificate:
> or
>
> (ii) any defects (including any omission in the Works) which reasonable inspection or examination at any reasonable time during the course of the Works or before the issue of the said certificate would have not disclosed: ...
>
> (h) Save as aforesaid no certificate of the Architect shall of itself be conclusive evidence that any works or instructions to which it relates are in accordance with the Contract."

The building had a reinforced concrete frame with reinforced concrete walls, clad externally in part with stone, and in part with glass mosaic. The cladding was erected by nominated sub-contractors. The concrete structure was erected between May and December 1960. The cladding was fixed between January and July 1961. A Final Certificate was issued in April 1963.

Many defects in the cladding, namely corrosion of the fixings, which were defective, and the absence of compression beds, first came to light in late 1971 and early 1972. It was considered that they were isolated instances, and not grounds for suspecting more widespread defects.

In the summer of 1974 signs of movement in the cladding were observed and defective fixings exposed. Further areas were opened up, exposing similar defects, and the plaintiffs decided to remove all the cladding.

On 11 March 1975 the plaintiffs issued a writ claiming damages for breach of contract and for negligence in respect of the stone cladding. The defendants denied liability and pleaded that the plaintiffs' claim was statute barred by section 2 of the Limitation Act 1939, as practical completion took place in or before 1962 and that under clause 24(g) of the Conditions, the Final Certificate was conclusive evidence that the works were property carried out.

In reply the plaintiffs alleged that the fixings were fraudulently concealed by the defendants within the meaning of section 26(2) or section 27(b) of the Limitation Act 1939 and relied on clause 24(g), so that the Final Certificate did not operate as a contractual bar. They further contended that the defects first manifested themselves in 1972 and it was then that the plaintiffs first discovered or could reasonably have discovered them. The plaintiffs also made a claim in contract and negligence in respect of the mosaic.

The trial judge (Sir Douglas Frank QC, sitting as a deputy judge of the High Court) dismissed the plaintiffs' claim (except as to one admitted item) holding that the failure of the stone cladding was caused by defects in the fixings and the lack of provision for differential movement; that the use of defective materials and workmanship in the fixings was in breach of contract and contributed substantially to the damage; that the stone cladding defects were not fraudulently concealed because the plaintiffs had failed to discharge the burden of proof that lay on them to show that the plaintiffs' supervisors, in exercising reasonable skill, could not have been expected to have observed the defects; that accordingly the claim was statute barred. He held further that the Final Certificate barred any action in contract since none of the matters referred to in Clause 24(g) had occurred; and that no action lay in tort because there was no special relationship, all the alleged breaches arose out of the

Contract, and there was no direct or vicarious obligation upon the defendants to comply with the byelaws; that duty was on the nominated sub-contractors. He held also that the claim in respect of the mosaic failed.

The plaintiffs appealed against the dismissal of both the stone cladding and mosaic claims. The defendants served a respondents' notice specifying five further grounds.

***HELD**, dismissing the appeal:*

(1) The plaintiffs were wrong to argue that since the defendants were contractually obliged to provide their own supervision the plaintiffs were entitled to rely upon the defendants' own supervisory team and that that was sufficient to defeat a plea of fraudulent concealment.

(2) The question to be asked in relation to fraudulent concealment was: in all the circumstances were the facts such that the conscience of the defendant or the sub-contractor, for whose acts or omissions the defendant was vicariously liable, should have been affected that it was unconscionable to proceed with the work or so to cover up the defect without putting it right? Dicta of Lord Evershed MR in *Kitchen* v *Royal Air Force Association* [1958] 1 WLR 568 at 572-3 and of Edmund Davies LJ in *Applegate* v *Moss* [1971] 1 QB 406 at 414 *applied*.

Per curiam

[Counsel for the plaintiffs] submitted that whenever a builder under contract does shoddy or incompetent work, which was subsequently covered up in the due succession of building work, so that when the building was complete the bad work was hidden from view, this did not constitute fraudulent concealment within the meaning of equitable fraud. We do not accept this proposition. Simply getting on with the work after something shoddy or inadequate has been done or omitted does not necessarily give rise to a legal inference of concealment or of equitable fraud.

(3) (a) In four instances of defects it was very unlikely that the architect, engineer or clerk of works could have observed that the works were not in accordance with the drawings and it was unreasonable to expect them to have done so; most of such cases were, however, examples of casual inefficiency.

(b) None of these failures, either individually or in conjunction, were such as to lead to an inference that the act of proceeding with the building programme without correcting or disclosing that the drawings had not been strictly complied with was unconscionable.

(c) In relation to all the other defects—the support fixings to the

method used therefor, and the uneven face of the concrete — there was no concealment at all.

(4) It was unnecessary to consider the questions of causation of damage. However, on the evidence, even if the bad workmanship contributed to the movement, it had become necessary to remove all the cladding as a result of the lack of expansion joints.

(5) The mosaic claim failed because the contract did not require the external concrete to be hacked, because the work was carried out in accordance with practice at the time and the architect must have seen what was being done.

(6) The contract itself circumscribed the boundaries of the defendants' duty in tort and defined its content. There was no pleaded allegation of any fact which added to or modified the defendants' contractual duty. Accordingly, it was not open to the plaintiffs to disregard those clauses of the contract which provided for the conclusive effect of the Final Certificate but to claim a remedy for breaches which were only ascertainable by reference to the contract itself. (Dictum of Lord Roskill in *Junior Books Ltd* v *Veitchi Company Ltd* 21 BLR 66 at 90; [1982] 3 WLR 477 at 494-5 applied.)

Mark Myers QC and Christopher Thomas (of whom the latter did not appear below) appeared on behalf of the appellants, instructed by Titmuss, Sainer & Webb
David Kemp QC, Nicholas Padfield and R Neill appeared on behalf of the respondents, instructed by McKenna & Co

Commentary
In this case the plaintiffs had to surmount two principal hurdles in order to succeed. First, they had to establish that their claim was not barred, by statute or by contract. For this purpose they relied on a plea of "fraudulent concealment" which, if successful, would not only enable their claim for breach of contract to succeed notwithstanding the expiry of the limitation period of 6 years under Section 2 of the Limitation Act 1939 (now Section 5 of the Limitation Act 1980) but would also enable them to defeat the defendants' reliance on the Final Certificate which had been issued in the early 1960s, soon after completion of the work. The effect of such final certificate has been considered by the House of Lords in two cases (one, incidentally, involving the same defendant as this case): *East Ham Corporation* v *Bernard Sunley & Sons Ltd* [1966] AC 466 and (concerning the later RIBA form in its original 1963 edition): *P & M Kaye Ltd* v *Hosier & Dickinson Ltd* [1972] 1 WLR 146.

Secondly, the plaintiffs pleaded a case in negligence and relied on

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the law in the state that many thought it to be prior to the decision of the House of Lords in *Pirelli* v *Oscar Faber* 21 BLR 99; [1983] 2 WLR 6, namely that it was only necessary to establish that the defects could not reasonably have been discovered at a date earlier than 6 years prior to the issue of the writ so that their claim would not then be statute-barred. This case was drawn to our attention by Mr David Kemp QC primarily for what the Court of Appeal said on the nature of such a claim for negligence. The plaintiffs' case in negligence would now fail on the facts in the light of *Pirelli* v *Oscar Faber*. It seemed to us, however, that there might also be considerable interest in the reasoning of the Court of Appeal on the issue of "fraudulent concealment" and it was therefore worthwhile reporting the case in full.

The course initially taken by the plaintiffs, viz not to call any witness with any direct knowledge of the manner in which the building had been constructed, was not perhaps in itself unusual, since such evidence is not always available after a long period of time, or may not be readily available to the plaintiff, especially where most of the obvious witnesses are probably already committed to another party to the proceedings. What was unusual and what led to pressure from the trial judge was a persistence in a policy not to call such witnesses even though that evidence was available and had apparently been known to be available to the plaintiff's solicitors. It is clear from the judgment of the Court of Appeal that where a plaintiff alleges "fraudulent concealment" (and, we may suppose, also the plea of "deliberate concealment" which takes its place by virtue of Section 32 of the Limitation Act 1980) it is to be expected that a plaintiff will have made every endeavour to trace and to call every competent and compellable witness who can give relevant evidence as to whether, and if so how, the defects of which complaint is made escaped the eye of any supervisor responsible for ensuring that the work (or lack of it) did not go uncorrected — or at least where the supervisor was employed on behalf of the plaintiff or his predecessor in title (as to which see *Pirelli* v *Oscar Faber*). This may in certain circumstances mean that an "itching palm" comes to light (see Lord Denning MR in *Lewisham* v *Leslie & Co Ltd* (1978) 12 BLR 22 at 28).

The Court of Appeal in its judgment made it clear that *fraudulent* concealment was not established simply by showing that the contractor covered up the defective work and thereby concealed it as he continued to carry out the work in faulty compliance with the contract:

> "Mr Myers submitted that, whenever a builder under contract did shoddy or incompetent work, which was covered up in the due succession of the building construction work, so that when the building was complete the bad work was hidden from view,

> such facts constituted fraudulent concealment within the meaning of the well-known line of cases on equitable fraud. We do not accept this proposition. Simply getting on with the work after something shoddy or inadequate has been done or omitted does not necessarily give rise to a legal inference of concealment or of equitable fraud. As Edmund-Davies LJ (as he then was) put it in *Applegate* v *Moss* [1971] 1 QB 406 at 414:
>
> > 'It is a truism that not every breach of contract arising from a defect in the quality of materials or workmanship would justify a finding of fraud. But some breaches can be so fundamental that, if deliberately and knowingly committed, they properly give rise to an inference of fraud by the party in breach. Furthermore, the special relationship between the parties may facilitate such a finding.'"

There may of course be circumstances in which the contractor will be guilty of fraudulent or deliberate concealment when all that took place was "getting on with the work". However, we think that it is likely that in the majority of cases that act will also have to be accompanied by some other evidence of concealment from the eyes of the supervisor or from the plaintiff himself. Section 32 of the Limitation Act 1980 may in practice be applied in the same way since the use of the term "deliberate" may be read as requiring something approaching a conscious or reckless (and not merely negligent) decision to conceal a fact relevant to the plaintiff's right of action going on with the work when there can be no doubt whatsoever that what has been done ought not to be left in the state it is may constitute deliberate concealment; similarly going on with the work and covering up the symptoms or evidence of an existing defect may constitute deliberate concealment — and this of course could take place after completion of the works, such as where advice is sought on signs of distress or failure.

The second point decided by the appeal is the more important and loses nothing by having been shortly stated in the judgment (at p 29 below). Ever since Lord Wilberforce said, cryptically, in *Anns* v *London Borough of Merton* (5 BLR 1 at 21; [1978] AC 728 at 759) that, where the builder was a defendant, one must have regard to the terms of the contract, there has been considerable doubt about the extent to which the plaintiff might in practice be better served by claiming damages for negligence rather than for breach of contract where there had been negligent performance of the contract (to which the plaintiff was himself a party). If the necessary proximity of the relationship between the plaintiff and the defendant arises, and arises only, from the contract made by the defendant which itself

regulated the extent of the supposed duty of care owed to the plaintiff, it seems difficult not to formulate the defendant's duty of care to the plaintiff by reference to the duties actually assumed rather than to any duty which might have been but which was not assumed. Thus a sub-contractor who lays flooring may be in a good position to warn others that the surface on which the floor is to be laid is not suitable for his purpose and might therefore ordinarily be negligent in not giving such a warning where appropriate: but if by the sub-contract the sub-contractor expressly disclaims responsibility for the suitability of the surface and no further circumstances arise which might reinstate (as it were) the "ordinary" duty, then why should the sub-contractor not be able successfully to defend an action brought against him alleging negligence in failing to give the warning? As the Court of Appeal said in *William Hill*, the sub-contractor should not be "entitled to claim a remedy in tort which is wider than the obligation assumed by [it] under [its] contract".

Similarly, as in the *William Hill* case itself, where a defendant contracts with the plaintiff on the footing that his liability for breach of contract or the damages flowing from any breach will be limited (in time or extent) there is considerable force in the argument that thereafter his duty to the plaintiff (if not to others) is to take reasonable care only to avoid causing the injury or damage for which he has accepted liability under the contract, and no more. Some of the cases referred to in our Commentary on *H W Nevill (Sunblest) Ltd* v *William Press & Sons Ltd* (1981) 20 BLR 78 at 82 must now be read subject to the decision in *William Hill* as we there suggested.

WILLIAM HILL ORGANISATION Ltd v BERNARD SUNLEY & SONS Ltd

30 July 1982 *Court of Appeal*

Cumming-Bruce and O'Connor LJJ and Sir John Willis

CUMMING-BRUCE LJ: This is the judgment of the court. Sir John Willis cannot be present today.

On 18 March 1960 the plaintiffs (appellants in this court) entered into a contract under seal with the defendants (respondents on appeal) for the construction of a building with a front upon the east side of Blackfriars Road. The contract recited that the employer had caused drawings and bills of quantities showing and describing the work to be done to be prepared by or under the direction of Kenneth Anns and Partners, his architect, and that drawings numbered therein and bills of quantities had been signed by the parties. It was agreed that the defendants would, upon and subject to the conditions annexed, execute and complete the works shown upon the drawing and described by or referred to in the bills of quantities and conditions. Kenneth Anns and Partners were nominated architect for the purpose of the contract. The annexed conditions were on the RIBA form of Agreement and Schedule of Conditions of Building Contract 1939 (Revised 1957).

The building was constructed with a reinforced concrete frame with reinforced concrete walls. It was given an external face of stone cladding, and the lower two storeys of the west elevation of the building were to be clad in glass mosaic for the whole of its length. The contract did not refer to the stone cladding or mosaic, nor was the cladding or mosaic shown on any of the contract drawings. The bills of quantities provided for cladding as follows:

> "*Stone Facings*
>
> The Portland and Reconstructed Stone facings will be fixed completely by the Stonework Contractor after the concrete walling has been erected and abbey slots have been measured for this purpose. General Contractors to unload, sort, stack

and protect the stone and hoist and distribute it in the positioning required by the fixers and provide water and power for cleaning down."

Bath and Portland Stone Firms Limited (whose name was later changed to the Bath and Portland Group Limited) (for convenience called Stone Firms) were nominated as sub-contractors for this work.

Work on the erection of the concrete structure was commenced in May 1960 and probably completed in December 1960. Work upon erection and fixing of the stone cladding began on 7 January 1961 and was completed on 21 July 1961. This work was executed by the nominated sub-contractors. Clause 3 of the Conditions of Contract stipulated that the defendants should comply with all relevant bye-laws of the local authority having jurisdiction with regard to the work. The relevant bye-law was Bye-law 3 of the London Building (Constructional) Bye-laws 1952 as amended in 1957. This prescribed:

"External and Internal Cladding

(1) Any cladding to the building whether applied externally or internally shall be of such materials of such thickness and fixed and supported in such a manner as the District Surveyor may approve, having regard to the particular circumstances of the case.

(2) Where such cladding is external, any metal dowels fixings and supports of the cladding shall be of stainless steel or non-ferrous metal (aluminium or zinc); provided that other materials for dowels, fixing and supports may be used if the District Surveyor is satisfied that those fixings are adequately protected from corrosion by virtue of their position in the work."

Stone Firms prepared detailed drawings of the stonework and its fixings numbered PF/4164/1B-B4, and submitted them to the District Surveyor for his approval. In response to a request to Stone Firms by the District Surveyor, Stone Firms wrote in a letter dated 24 August 1960 enclosing further drawings incorporating amendments which had been suggested by the District Surveyor and said:

"Regarding the type of metal to be used for the fixings, we are proposing to use manganese bronze. Would you please let us have your comments on this."

There is a manuscript note on that letter made by the Assistant District Surveyor (Jenkinson) of a telephone conversation he had with one Pearce, an employee of Stone Firms. It stated:

> 'he will send in revised drawings showing (a) 1½" stone behind dowels (not to centre); (b) phosphor bronze fixings including seating angles; (c) min. angle thickness ¼".'

There was no evidence that any specification showing phosphor bronze as the material for fixings was in face sent to the District Surveyor.

In late 1971 and early 1972 upon the instructions of the plaintiffs, Messrs Water and Waters, architects, inspected the building. On their instructions Messrs Tims and Tims, stonemasons, removed defective work, and reported their findings in a letter dated 8 February 1972, annexed as Appendix A to the report of April 1980 by the Waters Jameson Partnership. They reported defects in the fixing of stones, and absence of compression beds. They also reported a displaced stone at the entrance to the Tower block due to shearing off of the bolts holding the angle bracket which supported it. At that date the inspecting architects took the view that the defective work was an isolated instance due particularly to the fact that the concrete was out of plumb at that corner, requiring special detailing of fixings which had been negligently carried out both as to materials used and as to detailing. They took the view that there was no reason to suspect at that time that fixings elsewhere were also suspect.

In summer 1974 signs of movement of the cladding were observed at the north end of the front elevation. The area was opened up down to the 8th floor level. On 22 January 1975 Waters & Partners had a site meeting attended by representatives of Stone Firms and the defendants. The fixings exposed were found to be defective both as to materials and workmanship. A selection of bolts, angles and ties were sent to metallurgists for analysis. Waters & Partners' report is at Appendix C to the Waters Jameson Report of April 1980.

On the advice of Waters & Partners, the plaintiffs opened up two further areas, accepting advice that, if similar defective fixings were found, the whole of the stonework should be opened up. In July 1976 a further section on the rear elevation was exposed and similar defects were found in the fixings. The plaintiffs then decided to remove the whole of the cladding. The report upon the defects then found, put in evidence as the Waters Jameson Report dated April 1980, classifies their findings under three heads: 1. Defects in Stone

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