Building
LAW REPORTS

BUILDING LAW REPORTS

EDITED BY

Humphrey Lloyd, M.A., LL.B. (Dub.)
one of Her Majesty's Counsel

and

Colin Reese, M.A. (Cantab)
of Gray's Inn, Barrister-at-Law

VOLUME
11

Theme

Cases of Current Interest
and from the Commonwealth

GEORGE GODWIN LIMITED
The book publishing subsidiary
of the Builder Group

First published in Great Britain by
George Godwin Limited 1979
in association with *Building*

Volume 11: ISBN 0 7114 5505 8

George Godwin Limited
The book publishing subsidiary
of the Builder Group
1-3 Pemberton Row,
Red Lion Court, Fleet Street,
London EC4P 4HL

Typeset by Inforum Ltd, Portsmouth
Printed and bound in Great Britain by
Tonbridge Printers Limited.

Building Law Reports

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

Introduction

This volume commences with three cases of topical interest and concludes with a decision of the New Zealand Court of Appeal which we consider worthy of inclusion because of the way in which it deals with important questions relating to damages.

The most recent of the topical cases is *F.G. Minter Ltd v Welsh Health Technical Services Organisation* at page 1. This decision of Mr Justice Parker is of considerable general interest because it establishes that the architect/supervising officer administering a JCT standard form of main building contract has no power to include in amounts certified under Clauses 11(6) and 24(1) (the 'direct loss and/or expense' clauses) sums designed to compensate the contractor for the financial burden arising from the fact that primary expenses will be incurred some time before certification and payment. At the time of writing it is expected that the case is to be taken on appeal to the Court of Appeal.

Andreas Leonidis v Thames Water Authority at page 16 is another decision of Mr Justice Parker dealing with a very different topic – the extent of the liability of local authorities (and other bodies such as the Defendants) to make full compensation to innocent persons who suffer damage by reason of the exercise by those authorities of their Public Health Act powers. The decision is one which should be noted especially by contractors who deal with local authorities and, by the express terms of their contracts, undertake to indemnify the employing authority against expenses, liabilities, claims etc., arising out of the carrying out of the works.

The last of the topical cases is *Independent Broadcasting Authority v EMI Electronics Ltd.* and *BICC Construction Ltd.* at page 29. This is a decision of the Court of Appeal which, we understand, is to be reviewed by the House of Lords. On its facts the case concerns the liability of the main contractors (EMI) and their sub-contractors (BIC) for the collapse of a television mast at Emley Moor. In our view the comparatively long judgment in this case is of considerable importance. A number of issues arose for decision as we have indicated in the headnote and commentary. Although the particular facts of the case are out of the ordinary certain of the decided issues are, in our view, of general application. First, the mast in question was designed by a sub-contractor whom the employer selected and specified to his chosen main contractor. The main contractor was nevertheless held impliedly to have agreed that the design would be reasonbly suitable in order to ensure that the employer would have

an effective contractual remedy against the main contractor which the main contractor could then pass on down the contractual chain to the sub-contractor. Secondly; during construction the sub-contractor wrote a letter directly to the authority to reassure them that the structure would not oscillate dangerously. The authority had become concerned because a similar mast being erected elsewhere had moved in such a way that the builders left the site and the authority's engineers left their transmitter building. The Court of Appeal held that the statement of reassurance was direct contractual warranty given by the sub-contractors. The statement of principle by Roskill L.J., is, if it is accepted by the House of Lords, of considerable significance.

The volume concludes with *Bevan Investments v Blackhall & Struthers* at page 78. This is a decision of the New Zealand Court of Appeal and, as such, is not a 'binding' authority. Such decisions may be cited and relied upon as being of 'persuasive' authority and it is our view that this particular decision is one which should be followed. In 7 BLR 35 we included the decision of Mr Justice Oliver in *Bradford v Defroberville and Lange* which concerned the principles for assessment of damages where there was a breach of a covenant to build a wall. The learned judge there made certain observations about the date at which damages for defective building works should be assessed which seemed to us entirely right and sensible in their approach. In *Bevan Investments*, the New Zealand Court of Appeal considered (amongst other things) the same sort of point at rather greater length. Their conclusions were similar – that damages might properly be calculated by reference to the cost of necessary remedial works at the date of the trial if it was not unreasonable in all the circumstances for the Plaintiff to have postponed the carrying out of the works (ie no breach of the duty to mitigate had occurred) or if it had been forseeable when the contract was made that in the event of a breach requiring the remedial works in questions to be carried out the Plaintiff would be unable to undetake them before judgment.

Contents

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

F. G. MINTER Ltd v WELSH HEALTH TECHNICAL SERVICES ORGANISATION

24th May 1979 *Queen's Bench Division*

Parker J

The claimants were the main contractors employed to construct the University Hospital of Wales (second phase) Teaching Hospital. The main contract was substantially in the 1963 edition of the RIBA Standard Form of Building Contract Local Authorities edition with quantities. The claimants employed Drake and Scull Engineering Ltd ('Drake and Scull') as their nominated sub-contractors for the electrical and mechanical services. The sub-contract was in the NFBTE/FASS/CASEC standard form for use where the sub-contractor was nominated under the 1963 edition of the RIBA form of main contract.

Clause 11(6) of the main contract provided:

'If upon written application being made to him by the Contractor, the Architect/Supervising Officer is of the opinion that an authorised variation or the execution by the Contractor of work for which a provisional sum is included in the Contract Bills (other than work for which a tender made under Clause 27(g) of the conditions has been accepted) has involved the Contractor in direct loss and/or expense for which he would not be reimbursed by payment in respect of a valuation made in accordance with the rules contained in Clause 11(4) and if the said application is made within 21 days of the loss or expense having been incurred, then the Architect/Supervising Officer shall either himself ascertain or shall instruct the Quantity Surveyor to ascertain the amount of such loss or expense. Any amount from time to time so ascertained shall be added to the Contract Sum, and if an Interim Certificate is issued after the date of ascertainment any such amount shall be added to the amount which would otherwise be stated as due in such Certificate'.

Clause 24(1) of the main contract provided:

'If upon written application being made to him by the Contractor the Architect/Supervising Officer is of the opinion that the Contractor has been involved in direct loss and/or expense for which he would not be reimbursed by a payment made under any other provision of this Contract by reason of the regular progress of the Works or of any part thereof having been materially affected by:

(a) The Contractor not having received in due time necessary instructions, drawings, details or levels from the Architect/Supervising Officer for which he specifically applied in writing on a date which having regard to the Date for Completion stated in the Appendix to these Conditions or to any extension of time then fixed . . . was neither unreasonably distant from nor unreasonably close to the date on which it was necessary for him to receive the same . . .

and if the written application is made within 21 days of it becoming apparent that the progress of the Works or any part thereof has been affected as aforesaid, then the Architect/Supervising Officer shall either himself ascertain or shall instruct the Quantity Surveyor to ascertain the amount of such loss and/or expense. Any amount from time to time as ascertained shall be added to the Contract Sum, and if an Interim Certificate is issued after the date of ascertainment any such amount shall be added to the amount which would otherwise be stated as due in such Certificate.'

By the express terms of the sub-contract Drake and Scull were similarly entitled to recover amounts of 'direct loss and/or expense' and the claimants were obliged at Drake and Scull's request and cost to obtain for them any benefits of the main contract so far as the same were applicable to the sub-contract works.

During the course of the contract a number of variations were made to the works some of which were variations to Drake and Scull's sub-contract works. Further, the regular progress of the works as a whole and of Drake and Scull's sub-contract works was materially affected by lack of necessary instructions, drawings, details or levels.

Claims were made under clauses 11(6) and 24(1)(a). The claimants and Drake and Scull were ultimately paid amounts in respect of direct loss and/or expense in which they had been involved. The amounts paid were challenged as insufficient, the basis of the challenge being that because they had not been certified and paid until long after the time when the claimants or Drake and Scull had been involved in loss or expense the sums certified ought to have included amounts in respect of the loss and/or expense, in which they had been involved either by way of finance changes and/or being stood out of their money for such long periods. The respondents contended that interest or finance charges were not part of the amounts of direct loss and/or expense to which the claimants were properly entitled.

The dispute was referred to arbitration. After the exchange of pleadings the arbitrator, at the request of the parties, stated a Consultative Case for the opinion of the High Court on the matter of principle. The question raised in the consultative case was:

'Whether upon the true construction of the Building Contract dated 25 April 1966 between the Claimants and the Respondents' pre-

decessors the amounts which have been certified and by which the Contract Sum has been adjusted

(i) either (in the case of the Claimants) by virtue of Clauses 11(6) and/or 24(1) of the Conditions of Contract (to reimburse the Claimants' direct loss and/or expenses of the kinds therein referred to which have been sustained by them). Or

(ii) in the case of Drake & Scull either by virtue of the said Clauses or by virtue of Clause 30(5)(c) of the Main Contract Conditions and Clauses 8(c), 10 and 12 of the Conditions of the Sub-Contract dated 6 November 1970 between the Claimants and Drake & Scull (to reimburse direct loss and/or expense of the kinds therein referred to which have been sustained by Drake & Scull).

should also include any sum in which the Claimants and/or Drake & Scull may have been involved by way of finance charges upon the amounts otherwise certified and paid or payable thereunder and/or being stood out of their money (if established) for any of the following periods:

(a) between the loss and/or expense being incurred and the making of a written application for reimbursement of the same;

(b) during the ascertainment of the amount of the same; and/or

(c) between the time of such ascertainment and the issue of the certificate including the amount thereby ascertained.

For the purposes of that case, the respondents admitted that the periods of time referred to in heads (a) and (b) above were substantial and that the periods of time referred to under head (c) above were not *de minimis*.

HELD

1. The answer to the question raised in the case was 'no' in respect of each of the three periods mentioned.

H. J. Lloyd QC appeared for the claimants instructed by Bristows Cooke and Carpmael.
A. Grant appeared for the respondents instructed by Griffith Davies (Legal Adviser to the Welsh Office).

Commentary:

At the outset, it should be stated that the views expressed in this commentary are those of the editor who was not involved in the presentation of this case as counsel at first instance. At the time of writing it is expected that this case is to be taken on appeal to the Court of Appeal.

The decision is of general importance. It establishes that the architect/supervising officer has no power to include in amounts certified under clauses 11(6) and 24(1) sums designed to compensate

the contractor for the 'financial burden' arising from the fact that the expenses have been incurred some time before certification and payment.

In this case clause 11(6) of the standard form had been amended to require the contractor to submit the necessary written applications within a period of 21 days of the loss or expense having been incurred. (Clause 11(6)) or of it becoming apparent that the regular progress of the Works or some part thereof had been affected by one of the specified matters (Clause 24(1)). That alteration had no bearing upon the point arising for the decision of the court and the case is the first authority on the meaning of clauses 11(6) and 24(1) of the standard form of building contract.

The judge dealt separately with each of the three time periods:

> (a) the time between the loss and/or expense being incurred and the making of a written application for reimbursement of the same;
> (b) during the ascertainment of the amount of the loss and/or expense;
> (c) between the time of such ascertainment and the issue of the certificate including the amount thereby ascertained

and his reasons for rejecting the contractor's claim to be entitled to compensation for the 'financial burden' appear clearly on pages 12 to 14.

If this decision is accepted as having correctly construed clauses 11(6) and 24(1) then it would seem to follow that only rarely was this particular contractor entitled to recover sums under clause 24(1) in respect of the cost of the delayed completion of the whole or some part of the contract works. The judge emphasised that the direct loss and/or expense which the architect was required to ascertain was a loss which had been incurred. Costs which would, but only in the future, be incurred because of delayed completion would therefore seem not to form part of the direct loss and/or expense for which this contractor was entitled to reimbursement. If that view is correct then, in general, this contractor was unable to recover as part of the direct loss and/or expense 'prolongation costs' when the delayed completion had been caused by one or more of the matters specified in clause 24(1). However, since those were matters under the control of the employer or of the architect acting as agent of the employer, involving the employer in breaches of the express or implied terms of the contract, then recovery of prolongation costs might possibly have been made as damages for breach of contract. It would appear that the position of the contractor might not have been quite so difficult if the wording of the standard form had not been altered to require written notice to be given 'within 21 days' instead of 'within a reason-

able time'. If written notice for the purposes of clause 24(1) is required only within a reasonable time of it becoming apparent that progress has been delayed then, it is submitted, a judge or arbitrator might properly take the view that it was not unreasonable to delay giving that notice until the whole or the affected part thereof had been practically completed so that the required extension of time and the amount of prolongation costs incurred had become known.

The position under clause 11(6) would appear to be somewhat different. Here, written application was not required until after the direct loss and expense had been incurred. Accordingly, if the execution of varied work delayed the completion of the contract work, and if it is accepted that prolongation costs were a direct loss or expense thereby occasioned (arguably these might be 'indirect') it would seem that a number of written applications for reimbursement of such costs would be required in respect of each (at most) 21 day period by which the contract period was thereby extended. Here again, had the standard form not been amended and had the written notice been required to be given within a reasonable time of the loss and/or expense being incurred, it is submitted that a judge or arbitrator might properly take the view that it was not unreasonable to delay giving the written notice until after the period of extension had been ascertained and the cost thereof been incurred.

The other matter arising out of the judgment which deserves particular note is the intimation given by Parker J that an architect who failed to ascertain the amount of direct loss and/or expense within a reasonable time after application had been made might be personally liable to the contractor in damages the measure of which would appear to be the amount of the 'financial burden' caused by the delay in ascertainment beyond the allowable 'reasonable time'. If, of course, the architect had, within a reasonable time requested the quantity surveyor to ascertain the amount of such loss and/or expense then by the same reasoning the contractor might claim damages from the quantity surveyor if he delayed unreasonably in ascertaining the amount of the reimbursable direct loss and/or expense.

On the general question of the responsibilities of architects to contractors in respect of loss caused by negligent certification see 4 BLR pages 16 and 17.

F. G. MINTER Ltd v WELSH HEALTH TECHNICAL SERVICES ORGANISATION

24 May 1979 *Queen's Bench Division*

Parker J

PARKER J: By a contract under seal dated 25 April 1966 between the claimants and the respondents' predecessors, the claimants undertook the construction of the University Hospital of Wales (second phase) Teaching Hospital for a contract sum of £12,959,258. This contract ('the main contract') was basically in a form which is sanctioned by a number of organisations concerned in the building industry and is the successor to what used to be known as the RIBA form. There were, however, as is usual, certain typed amendments. Drake and Scull Engineering Ltd (Drake & Scull) were nominated sub-contractors in respect of mechanical and electrical services. The sub-contract between that company and the claimants was dated 6 November 1970.

Clause 11 of the main contract provided for variations and for the expenditure of prime cost and provisional sums. So far as immediately material it provides:

> '11(4) . . . The valuation of authorised variations and of work executed by the Contractor for which a provisional sum is included in the Contract Bills (other than work for which a tender has been accepted as aforesaid) unless otherwise agreed shall be made in accordance with the following rules:—
>
> (a) The prices in the Contract Bills shall determine the valuation of work of similar character executed under similar conditions as work priced therein;
>
> (b) The said prices, where work is not of a similar character or executed under similar conditions as aforesaid, shall be the basis of prices for the same so far as may be reasonable, failing which a fair valuation thereof shall be made;
>
> (c) Where work cannot properly be measured and valued the Contractor shall be allowed day-work rates on the prices prevailing when such work is carried out (unless otherwise provided in the Contract Bills);

(i) at the rates, if any, inserted by the Contractor in the Contract Bills or in the Form of Tender; . . .

'11(5) Effect shall be given to the measurement and valuation of authorised variations under sub-clause (4) of this Condition in Interim Certificates and by adjustment of the Contract Sum; and effect shall be given to the measurement and valuation of work for which a provisional sum is included in the Contract Bills under the said sub-clause in Interim Certificates and by adjustment of the Contract Sum in accordance with Clause 30(5)(c) of these Conditions.

(6) If upon written application being made to him by the Contractor, the Architect/Supervising Officer is of the opinion that an authorised variation or the execution by the Contractor of work for which a provisional sum is included in the Contract Bills (other than work for which a tender made under clause 27(g) of these conditions has been accepted) has involved the Contractor in direct loss and/or expense for which he would not be reimbursed by payment in respect of a valuation made in accordance with the rules contained in sub-clause (4) of this Condition and if the said application is made within 21 days of the loss or expenses having been incurred, then the Architect/Supervising Officer shall either himself ascertain or shall instruct the Quantity Surveyor to ascertain the amount of such loss or expense. Any amount from time to time so ascertained shall be added to the Contract Sum, and if an Interim Certificate is issued after the date of ascertainment any such amount shall be added to the amount which would otherwise be stated as due in such Certificate.'

Clause 13 provided:

'The Contract Sum shall not be adjusted or altered in any way whatsoever otherwise than in accordance with the express provisions of these Conditions and subject to clause 12(2) of these Conditions any error whether of arithmetic or not in the computation of the Contract Sum shall be deemed to have been accepted by the parties hereto.'

Interim certificates were to be provided monthly and were to be honoured by the respondents within 14 days from their issue.

Clause 24 provided for loss and expense to the contractor due to disturbance of the regular progress of the work by a number of events. The material parts are:

'24(1) If upon writen application being made to him by the Contractor the Architect/Supervising Officer is of the opinion that the Contractor has been involved in direct loss and/or expense for which he would not be reimbursed by a payment

made under any other provision in this Contract by reason of the regular progress of the Works or of any part thereof having been materially affected by',

and the various events are then set out:

'and if the written application is made within 21 days of it becoming apparent that the progress of the Works or of any part thereof has been affected as aforesaid, then the Architect/Supervising Officer shall either himself ascertain or shall instruct the Quantity Surveyor to ascertain the amount of such loss and/or expense. Any amount from time to time so ascertained shall be added to the Contract Sum, and if an Interim Certificate is issued after the date of ascertainment any such amount shall be added to the amount which would otherwise be stated as due in such Certificate.

(2) The provisions of this Condition are without prejudice to any other rights and remedies which the Contractor may possess'.

During the course of the contract a number of variations were made both in the main contract works and the sub-contract works and the regular progress of both the main contract and the sub-contract works was materially affected by one or more of the specified events.

The variations were duly valued and paid. Claims were also put in under clauses 11(6) and 24(1) and amounts were paid in respect thereof which amounts are not questioned save in one respect, as to which there was a dispute which was referred to the arbitration of Mr Leslie W. M. Alexander under clause 35 of the contract. The arbitrator gave directions for pleadings and upon these directions having been complied with was requested by the parties to, and agreed to, state a Consultative Case for the opinion of the court. That Consultative Case is now before me for determination.

In paragraph 7 of the Points of Claim the claimants allege in relation to the sums paid under clauses 11(6) and 24(1):

'In virtually every case these amounts were not certified and paid until long after the last date upon which the Claimants and/or Drake & Scull were involved in loss or expense but the Claimants and/or Drake & Scull were not even then, nor have they been, paid anything in respect of the loss and expense in which they were involved either by way of finance charges and/or being stood out of their money for such long periods. On a proper interpretation of the Contract and/or sub-contract (as the case may be) such loss and/or expense ought to have been ascertained and certified by the Architect and paid to the Claimants and/or Drake & Scull.'

They claimed a declaration that they were entitled to have included in the amounts certified under the relevant clauses loss or expense in which they had been involved between the times when the loss and/or expense for which they have now been paid arose and the time when the payments were made.

The respondents pleaded by paragraphs 5 and 6 of the Points of Defence:

> 'As to paragraph 7 of the Points of Claim it is admitted that in respect of each and every such item of loss or expense time elapsed (i) between the loss or expense being incurred and the Claimants making written application for the reimbursement of the same, (ii) in the ascertainment of the amount thereof, (iii) between such ascertainment and the issue of a certificate including the amount thereby ascertained and (iv) between the issue of such certificate and its payment (but no admission is made as to the timetable of events set out in annexes 2 and 3 to the Points of Claim). The Respondents further admit that they have not paid or reimbursed to the Claimants interest or finance charges on any such items of loss and expense in respect of any of the said periods of time. Save as aforesaid paragraph 7 of the Points of Claim is denied.
> 6. The Respondents will contend that such interest or finance charges are not direct loss or expense within the meaning of clauses 11(6) or 24(1) of the said conditions and that the Claimants are not entitled to the relief prayed for in the Points of Claim or any relief.'

The question raised in the Consultative Case for decision of the court is:

> 'Whether upon the true construction of the Building Contract dated 25 April 1966 between the Claimants and the Respondents' predecessors the amounts which have been certified and by which the Contract Sum has been adjusted.
> (i) either (in the case of the Claimants) by virtue of Clauses 11(6) and/or 24(1) of the Conditions of Contract (to reimburse the Claimants' direct loss and/or expenses of the kinds therein referred to which have been sustained by them) or
> (ii) in the case of Drake & Scull either by virtue of the said Clauses or by virtue of Clause 30(5)(c) of the Main Contract Conditions and Clauses 8(c), 10 and 12 of the Conditions of the Sub-contract dated 6 November 1970 between the Claimants and Drake & Scull (to reimburse direct loss and/or expense of the kinds therein referred to which have been sustained by Drake & Scull)
> should also include any sum in which the Claimants and/or Drake

& Scull may have been involved by way of finance charges upon the amounts otherwise certified and paid or payable thereunder and/or being stood out of their money (if established) for any of the following periods:
(a) between the loss and/or expense being incurred and the making of a written application for reimbursement of the same;
(b) during the ascertainment of the amount of the same; and/or
(c) between the time of such ascertainment and the issue of the certificate including the amount thereby ascertained.'

For the purposes of this case, the respondents admit that the periods of time referred to in heads (a) and (b) above were substantial and the periods of time referred to under head (c) above were not *de minimis*.

It will be observed from the foregoing that despite the pleading, which takes the claim up to time of payment, the Consultative Case raises matters only up to the time of certification of the primary amounts. This is because the claimants now accept that they can have no claim in respect of the period between certification and payment.

For the purposes of illustrating the problem I was referred to two examples in Annex II to the points of claim which sets out certain details of the financial burden allegedly suffered directly by the claimants. Annex III gives similar details in respect of financial burden allegedly suffered by Drake & Scull. I was not referred to any items in this Annex, for it was accepted by both parties that, if and to the extent that claims are sustainable, in respect of loss and expense of the nature alleged suffered by the claimants, so too are claims for loss and expense of a like nature suffered by Drake & Scull.

For the purpose of examining the points raised it is convenient to consider a case where, either as a result of a variation or as a result of the regular progress of the work being interrupted by a specified event, the claimants are left with expensive hired machinery standing idle for a period of some months during which they have to continue to pay hire charges, and where this situation involves them not only in the payments being unmatched by receipts under the contract for work done by it but also in the necessity of paying interest on an extended overdraft made necessary by the fact that the machinery is not, for the period, generating any returns.

In such a case the hire in respect of the idle machinery would not, in the case of a variation, be recoverable as an item in the valuation of the variation but would clearly be recoverable as a direct loss under clause 11(6). Equally clearly, if the machinery was idle due to the interruption of the regular progress of the work by a specified event, the hire during the period would not be recoverable under