BUILDING LAW REPORTS

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VOLUME
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Theme

Arbitration

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Building Law Reports

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Introduction

The Arbitration Act 1979 brought renewed interest in arbitration (which is the theme of this Volume) as a means of settling disputes. Arbitration agreements have of course long formed part of contracts for works of a building or civil engineering nature as well as being incorporated in contracts for professional services. The 1979 Act will undoubtedly affect arbitrations in the construction industry. In this Volume we are however primarily concerned with cases whose relevance and value are not likely to be affected by the 1979 Act and which highlight some of the difficulties facing those concerned with arbitration and with the choice of whether to proceed in the Courts or by way of arbitration. So far as the construction industry is concerned, the 1979 Act did not of itself make arbitration any more attractive. The impact of the 1979 Act will be considered in a later Volume once sufficient cases have emerged. However in this Volume we have included (at page 118) *Mondial Trading Co GmbH v Gill & Duffus Zuckerhandelsgesellschaft mbH,* a decision of Robert Goff J which sets out guidelines affecting the right of appeal conferred by the 1979 Act from arbitrators' awards.

This Volume however begins with a case of current interest: *Henry Boot Construction Ltd v Central Lancashire New Town Development Corporation*, which itself arose from an award made in the form of a Special Case by an arbitrator. It is concerned with the familiar problem of whether "statutory undertakers" were "artists, tradesmen or others engaged by the Employer" for the purposes of Clause 23(h) and Clause 24(1)(d) of the 1963 edition of the Standard Form of Building Contract.

In selecting cases relating to the theme of "arbitration" we decided not to include authorities that were already well-known but to have cases that developed or illustrated established principles. *Dew v Tarmac Construction Limited* (at page 22) shows that the existence of an arbitration agreement if disavowed may not later be relied on by a person seeking to have recourse to arbitration in the face of proceedings commenced in the Courts. In *Berkshire Senior Citizens Housing Association v McCarthy E. Fitt Ltd* (at page 27) the principles found in the well-known case of *Taunton-Collins v Cromie* [1964] 1WLR 633 were applied: where there is a risk that recourse to arbitration will lead to the possibility of conflicting findings between different tribunals, the proceedings are best left in the Courts.

There then follow cases which illustrate the extent to which the Courts will intervene to avoid injustice being done in an arbitration, primarily by the use of the powers conferred by the Arbitration Act 1950 to remove an arbitrator or to set an award aside on the grounds

that the arbitrator misconducted himself or the proceedings. "Misconduct" as used in relation to arbitrations "sometimes refers to conduct which the ordinary man in the street would call reprehensible and, indeed, misconduct, and in other cases to conduct which is only misconduct in the eyes of the law and in no way reflects adversely upon the *bona fides* or care or conscientiousness or fair-mindedness of the arbitral tribunal in question" — per Mocatta J in *Gunter Henck v Andre & Cie SA* [1970] 1 Lloyd's Rep. 235 at p. 242.

Pratt v Swanmore Builders Ltd (at page 37 of this Volume) is a case of potential practical importance. It demonstrates that parties having resort to arbitration are entitled to expect that the person appointed as arbitrator (in *Pratt's case* by the Institute of Arbitrators) should be skilled. In *Pratt's case* the arbitrator did not ascertain the ambit of the arbitration agreement and that mistake coupled with others led to his removal for misconduct in the course of the arbitration since the judge (Peter Pain J) held that the result was that there was no prospect of justice being done if the arbitration were to continue and that there was in all the circumstances a virtual certainty that injustice would be done to the claimant.

Similarly in *C. M. A. Maltin Engineering Ltd v J. Donne Holdings Ltd* (at page 61) Bingham J held that where the parties had decided to proceed in an arbitration without legal representation and in an informal manner but with an arbitrator who was a barrister (and, in this case also appointed by the Institute of Arbitrators) it was natural for them to rely on the expertise and experience of the arbitrator to safeguard their interests where the observance of cardinal procedural rules was concerned. The arbitrator however received a document from one party which he did not allow the other party to see. This was such a serious breach of a fundamental obligation ordinarily binding on any arbitraror that the awards made had to be set aside altogether.

In *Modern Engineering (Bristol) Ltd v C. Miskin & Son Ltd* (at page 82) an arbitrator issued an award on a matter in dispute without having given the party affected a proper opportunity of being heard. The Court of Appeal ordered that he should be removed for misconduct.

The discretion given to arbitrators in relation to the costs of a reference (under Section 18 of the Arbitration Act 1950) was considered in *Thyssen (GB) Ltd v Borough Council of Afan* (at page 98). In that case an arbitrator had not followed the ordinary principles and had made an order which the Courts would almost certainly not have made. The Court of Appeal nevertheless declined to intervene.

Similarly, in *Carlisle Place Investments Ltd v Wimpey Construction (UK) Ltd* (at page 109) the Court of Appeal also declined to interfere with an arbitrator's direction as to the manner in which a hearing was to be conducted, holding that such matters were for the arbitrator to decide providing that he observed the rules of natural justice.

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HENRY BOOT CONSTRUCTION Ltd v CENTRAL LANCASHIRE NEW TOWN DEVELOPMENT CORPORATION

18 June 1980 *Queen's Bench Division*

HH Judge Edgar Fay QC
(sitting as a deputy
High Court Judge)

The claimants were main contractors employed to erect 296 dwellings and 77 garages at Dunkirk Lane, Leyland, Lancashire for the respondents, the Central Lancashire New Town Development Corporation. The contract was substantially in the 1963 Edition of the Standard Form of Building Contract Local Authorities Edition with Quantities. The contract completion date was 20 January 1978, with liquidated damages at a rate of £7 per dwelling per week.

Clause 23 of the Contract Conditions provided as follows:

> "Upon it becoming reasonably apparent that the progress of the Works is delayed, the Contractor shall forthwith give written notice of the cause of the delay to the Architect/Supervising Officer, and if in the opinion of the Architect/Supervising Officer completion of the Works is likely to be or has been delayed beyond the Date for Completion stated in the Appendix to these Conditions .....
> .....
> (h) by delay on the part of artists, tradesmen or others engaged by the Employer in executing work not forming part of this contract .....
> (l) by a local authority or statutory undertaker in carrying out work in pursuance of its statutory obligations in relation to the Works, or in failing to carry out such work .....
> the Architect/Supervising Officer shall so soon as he is able to estimate the length of the delay beyond the date or time aforesaid make in writing a fair and reasonable extension of time for the completion of the Works."

Clause 24(1) 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 in this contract by reason of the regular progress of the Works or any part thereof having been materially affected by .....
> ..(d) delay on the part of artists, tradesmen or others engaged by the Employer in executing work not forming part of the contract, and if the written application is made within a reasonable time 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...."

The Contract Bills contained (amongst other things) provisional sums for the work to be executed by certain statutory undertakers but they also stated that such sums were "to be expended under direct order of the Central Lancashire Development Corporation".

Extensive lengths of electric, gas and water mains were required to be constructed on the estate. These services were constructed by statutory undertakers engaged under contract by the employer and they were all paid directly by the employer. There was no contract between the contractor and any of the statutory undertakers for any of the mains, and no payment was made to any undertaker or received by the contractor for the employer in respect of the work done by any undertaker.

The contractor alleged that the progress and completion of his work under the main contract had been disrupted and delayed by delay on the part of each of the relevant statutory undertakers and that he was entitled to both an extension of time under Clause 23(h) and to recover loss and/or expense pursuant to Clause 24(1)(d).

The arbitrator in accordance with s.21(1)(b) of the Arbitration Act 1950 made an interim award in the form of a Special Case seeking the opinion of the High Court on certain questions of law which were as follows:

> "1. Were the statutory undertakers engaged by the respondents to execute work 'artists, tradesmen or others engaged by

the respondent in executing work not forming part of this contract' for the purpose of Clause 23(h) and Clause 24(1)(d) and/or

2. Were the said statutory undertakers carrying out work in pursuance of their statutory obligations in relation to the Works so that delay by them would fall within Clause 23(l)?"

In his award the arbitrator answered the questions in favour of the contractor.

HELD:

1. That the answer to the first question was: Yes, because:

(a) although the statutory undertakers were neither "artists or tradesmen" their operations fell within the description of "work being done by ... others engaged by the employer"; dicta of Devlin J in *Chandris v Isbrandtsen-Moller Co Inc* [1951] 1 KB 240 at 245 *followed*;

(b) even though by Clauses 1 and 2 of the contract the contractor had apparently bound himself to carry out the works of the statutory undertakers and to be paid a sum including their value, the contract read as a whole showed that the relevant works did not form part of the Works to be undertaken by the contractor (since the provisions of the Bills of Quantities stated that the contractor was not to do such work and was to receive no payment for it).

2. That the answer to the second question was: No, since the statutory undertakers were not doing their work because statute obliged them to do so but because they had contracted with the Employer to do it.

Per curiam: If, however, without having a contract, the undertakers, using their statutory powers to fulfil their statutory obligations, have come on the scene and hindered the Works and caused delay, then the consequential loss would have been one like *force majeure* which could be laid at the door neither of the employer nor of the contractor, and so under Clause 23(l) the loss would lie where it fell.

Desmond Wright QC and Nicholas Baatz appeared for the contractor instructed by Messrs Freedmans.
Anthony May QC appeared for the employer instructed by Messrs Sharpe Pritchard & Co.

Commentary

The contractual problems arising out of delay to a contractor's operations caused positively or negatively by statutory undertakers are familiar ones. The judgment in this case should therefore be of considerable assistance in resolving them, not merely because the facts of the case are not untypical but also because the judgment provides a useful analysis of the purpose and effect of apportioning risk in a building contract. The key passage is that to be found at page 12:

> "The broad scheme of these provisions is plain. There are cases where the loss should be shared, and there are cases where it should be wholly borne by the employer. There are also cases, those cases which do not fall within either of these conditions and which are the fault of the contractor, where the loss of both parties is wholly borne by the contractor. But in the cases where the fault is not that of the contractor the scheme clearly is that in certain cases the loss is to be shared: the loss lies where it falls. But in other cases the employer has to compensate the contractor in respect of the delay, and that category, where the employer has to compensate the contractor, should, one would think, clearly be composed of cases where there is fault upon the employer or faults for which the employer can be said to bear some responsibility."

The arbitrator, one of the most experienced, had held that the contractor's claim, if established on the facts, was in law to be based on Clause 23(h) and Clause 24(1)(d) and not Clause 23(l), so that, in his view (with which Judge Fay QC in the event concurred), the contractor would in principle be entitled to both time and money (if delay and loss were proved).

In disposing of the arguments advanced on behalf of the employer Judge Fay had first to deal with whether the *ejusdem generis* rule applied. The meaning of this piece of lawyer's jargon is set out fully in the note contained in the "Glossary of Legal Terms" in the Cumulative Index to Volumes 1 to 12 of these Reports (at page 49). It refers to the manner in which a legal document should be interpreted where there is a list of specific things followed by general words. Ordinarily the general words will be treated as referring to things "of the same kind" as those specifically mentioned rather than to other things. Thus it was argued on behalf of the employer that statutory undertakers were not the same sort of thing as "artists or tradesmen" and hence could not be comprehended within the word "others".

Judge Fay, having referred to what Devlin J (as he then was) had said in *Chandris v Isbrandtsen-Moller Co Inc* [1951] 1 KB 240 at 245, held that the *ejusdem generis* rule did not apply because the contract was a commercial contract. Such contracts are frequently treated by the courts as not having been drawn up by lawyers so that, for example, those who write them cannot be expected to have had in their minds the *ejusdem generis* rule when they inserted phrases such as "artists, tradesmen or others". (Lawyers are taken to choose their words carefully — an attitude not attributed to documents not drafted by members of the legal profession!) The 1963 edition of the Standard Form of Building Contract has of course achieved notoriety among judges for its difficulties in interpretation, some of which, as this case shows, stem from the seemingly uncritical use of clauses couched in obscure, if traditional, language. As Parker J remarked in a recent case about another contract:

> "I do not suggest that this clause is a masterpiece of clarity and draftsmanship, for it plainly is not. This is not unusual when one is dealing with standard forms of contract, or indeed almost with any printed contract whatever. They are apt to be somewhat like Topsy and they just grow without anybody thinking very much about what is happening during the course of growth."

In the 1980 edition of the Standard Form the phrase "artists, tradesmen and others" no longer appears. The comparable words are now:

> "The execution of work not forming part of this contract by the Employer himself or by persons employed or otherwise engaged by the Employer as referred to in Clause 29..." (see Clauses 25.4.8.1, 26.2.4, and 28.1.3.6).

The second main argument advanced by the employer was whether or not the work executed by the statutory undertakers did or did not form part of the contract works. The issue arose because Clause 1 of the contract (and the Articles of Agreement) required the contractor to execute all the work described in the Contract Bills. The Bills however provided a strange piece of machinery (not infrequently found) whereby the works to be executed by the statutory undertakers were included in the Bills under provisional sums, but on the basis that these sums were to be expended only upon the order of the

employer and it was there clearly contemplated that the contractor would not do the work. There ought therefore to have been no difficulty in reading the contract as a whole so as to show quite plainly that the works of the statutory undertakers were not really part of the Works which the contractor had undertaken to execute. This approach ran foul of Clause 12(1) of the Contract Conditions. That clause, which has perhaps generated more problems than any other provision of the 1963 Standard Form, astonished Judge Fay. He was in good company — see the criticisms collected at 7 BLR 123 to 125 as part of our commentary on *English Industrial Estates Corporation v George Wimpey & Co Ltd.* Clause 12(1), in stating that nothing in the Bills "should override, modify or affect in any way whatsoever the application or interpretation of that which is contained in the Conditions" apparently prohibited the contract being read sensibly.

Judge Fay thought that the words to be found earlier in Clause 12(1) referring to "the quality and quantity of the work included in the Contract Bills" were wide enough for him to be able to look at the Bills and to reach the finding that the work, although formally included in the description of the Contract Works, was effectively excluded.

Finally Judge Fay rejected the argument that if provision was made for delay by statutory undertakers it was to be found in Clause 23(l) and not therefore in Clause 23(h). The arbitrator had found as a fact that the undertakers did their work by virtue of their contracts with the Development Corporation. This finding also accorded with the general scheme of apportioning risk for if the employer had entered into a contract, then it had the opportunity of providing in that contract for what was to happen if the undertakers were guilty of delay and in turn upset the progress of the works of the contractor. Judge Fay therefore answered the question posed by the arbitrator in favour of the contractor.

The 1980 edition of the JCT Form still contains the provision that "nothing contained in the Contract Bills shall override or modify the application or interpretation of that which is contained in the Articles of Agreement, the Conditions or the Appendix" (Clause 2.2.1). The problems raised by *Henry Boot's* case might, therefore, in part still arise under the 1980 edition, depending upon what was to be found in the Contract Bills. The requirements of different employers and the circumstances of different contract works alone make it necessary if not desirable, in all cases, to look at the standard conditions to see whether they are suitable for use in the project to be undertaken. It is not only natural but also convenient for alterations or modifications of the conditions to be inserted in the document which will most closely describe that project — the Contract Bills. But to do so may not achieve the result desired, having regard to Clause 2.2.1.

Consideration should therefore be given, particularly by those

acting on behalf of the employer to the deletion or modification of clauses such as Clause 2.2.1 or to the inclusion of additional conditions which might otherwise not have formed part of the contract by virtue of Clause 2.2.1.

The 1980 edition has reformulated the provisions formerly to be found in Clause 23(h) and (l) and Clause 24(1)(d) of the 1963 edition (as revised). The effect also appears to be the same as regards delay created by statutory undertakers purportedly discharging a statutory obligation: the contractor may be entitled to an extension of time (Clause 25.4.11) but not to recover loss or expense and the employer will lose any claim he might have had to liquidated damages.

HENRY BOOT CONSTRUCTION Ltd v CENTRAL LANCASHIRE NEW TOWN DEVELOPMENT CORPORATION

18 June 1980 *Queen's Bench Division*

HH Judge Edgar Fay QC
(sitting as a deputy
High Court Judge)

JUDGE FAY QC: This is a special case stated for the opinion of the court by an arbitrator under a contract for the construction of a number of houses.

The contract out of which the case arises was one whereby the then claimants, Henry Boot Construction Limited, contracted to erect 296 dwellings and 77 garages and other ancillary work at Dunkirk Lane, in Leyland in Lancashire, for the respondents below, the Central Lancashire New Town Development Corporation.

In connection with that work three statutory undertakers performed the work of laying the necessary mains for electricity, water and gas, and in paragraph 4 of the amended Points of Claim the claimants in the arbitration allege this:

> "During the execution of the Works, the claimants were disrupted and delayed by delay on the part of the North Western Electricity Board... the North West Gas Board... and the North West Water Authority...."

By reason of that delay the contractors sought the relief which they allege they are entitled to under the terms of the contract between the parties, and a dispute then arose between the parties as to the nature of the relief to which they were entitled and as to the interpretation of the relevant provisions of the contract in that regard.

That dispute was referred to the arbitration of Mr Leslie Alexander, a well-known and experienced arbitrator in construction disputes. His award in the form of a special case was dated 1 November 1979. In the course of it he found a number of facts, which he lists in nine numbered paragraphs, as follows:

> "1. The claimants were engaged by the respondents to construct the Works described in the contract
> 2. The Works were to be constructed on a large site north of Dunkirk Lane, Leyland and divided by Paradise Lane running north and south at a right angle to Dunkirk Lane
> 3. The houses and flats were constructed in the positions shown on drawings 4000 and 4001
> 4. Extensive lengths of electric, gas and water mains were required to be constructed as shown on drawing 4000
> 5. These extensive lengths of electric, gas and water mains were constructed by statutory undertakers, North Western Electricity Board ... the North West Gas Board ... and the North West Water Authority ... respectively
> 6. All three of the said statutory undertakers were engaged under contract by the respondents to construct the said mains
> 7. All three of the said statutory undertakers were paid directly by the respondents for the construction of the said mains
> 8. There was no contract between the claimants and any of the said statutory undertakers in respect of the construction of the said mains
> 9. No payment was made by the claimants to any of the said statutory undertakers in respect of the construction of the said mains nor did the claimants receive any payment from the respondents in respect of such construction work."

I may say that of course in that part of the award the work "respondents" refers to the respondents to the arbitration. The parties are *vice versa* on this hearing, and to avoid confusion I am going to avoid, if I can, the use of the word "respondent" and refer to the parties as the "employers" and the "contractors".

Now the contract, which was a part of the award, was made on a standard form, the Standard Form With Quantities for Local Authorities' Building Works (1963 Edition) July 1975 Revision published by the Joint Contracts Tribunal. That and its sister forms of contract are of course documents well known in the construction world.

Part of the contractual framework is relevant. The completion date for the contract was 20 January 1978, and the contract provided for liquidated damages in case of the completion date not being met. In the case of such delay the contractors were to pay by way of liquidated damages the sum, among other things, of £7 per week per dwelling. That is a factor to be borne in mind in considering the background of this case. Now if there is delay in the carrying out of a construction contract there is of course loss. There is in the first instance loss to both parties. To the employer, the owner, there is loss of the return upon his investment. The day when he starts getting a return by way of rent from his property is postponed and he may well have an extended period of expenditure upon supervision and the like. Equally, there is loss upon the contractor, owing to the prolongation of the period for which he has to supply matters falling within overheads as well as other expenditure, and indeed possibly idle time as well. If the delay is the fault of the contractor, then the damages for delay, the liquidated provision which I have referred to, comes into operation. He is not entitled to any relief and he has to pay the damages at £7 per week per dwelling in this instance. But if the delay is not the fault of the contractor, or he alleges that it is not, then under the terms of the contract there are two provisions which enable him to obtain relief from the loss which he otherwise would suffer.

Those provisions are Condition 23 and Condition 24 of the conditions attached to the contract. Condition 23 reads in part as follows:

> "Upon it becoming reasonably apparent that the progress of the Works is delayed, the Contractor shall forthwith give written notice of the cause of the delay to the Architect/Supervising Officer, and if in the opinion of the Architect/Supervising Officer completion of the Works is likely to be or has been delayed beyond the date for completion stated in the appendix to these conditions or beyond any extended time previously fixed under either this clause or Clause 33(1)(c) of these conditions",

and then there follow a number of paragraphs setting out matters which could cause delay, and at the conclusion of those paragraphs the condition goes on to say that if the delay is by any of those matters then

> "the Architect/Supervising Officer shall so soon as he is able