BUILDING LAW REPORTS

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VOLUME
16

Theme

Cases of Interest to Civil Engineers

GEORGE GODWIN LIMITED

First published in Great Britain 1981 by
George Godwin Limited
The book publishing subsidiary of
The Builder Group
l-3 Pemberton Row, Red Lion Court,
Fleet Street, London EC4P 4HL

Volume 16: ISBN 0 7114 5710 7

Printed and bound in Great Britain by
The Pitman Press, Bath
from composition by
Alacrity Phototypesetters,
Banwell Castle, Weston-super-Mare

Building Law Reports

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Introduction

The present economic condition of this country has sharpened people's awareness of the need promptly to collect every debt due. We may yet see again a recurrence of the type of principle of interpretation which ten years ago led to the great debate about set-off and which was given its quietus by *Modern Engineering (Bristol) Ltd v Gilbert-Ash Northern Ltd* [1974] AC 689; 1 BLR 75. Then, as now, debtors took every step open to them to resist payment. The performance of the contract by the creditor did not however always entitle the debtor to raise an actual or plausible set-off or counter-claim so as to deprive the creditor of payment. And it did not always seem just to have to pay on one contract when the creditor had let the debtor down on another contract. So the Courts had to see whether the circumstances entitled the debtor to postpone the evil day by obtaining a stay of execution of the judgment to which the creditor was entitled.

Anglian Building Products Ltd v W. & C. French (Construction) Ltd (at page 1 of this Volume) was perhaps the best known of such cases; although a decision of the Court of Appeal it was never reported and did not perhaps receive the circulation that it deserved. We now repair that omission and have included also (at page 8) another hitherto unreported decision of the Court of Appeal whose facts are virtually indistinguishable from *Anglian v French* but which sets out the principles rather more clearly: *A. B. Contractors v Flaherty Bros. Ltd.*

We were prompted to consider the inclusion of these cases by a recent decision of His Honour Judge Stabb QC in *George E. Taylor & Co Ltd v G. Percy Trentham Ltd* (at page 15) which illustrates a vain (and somewhat unusual) attempt by an employer to fend off payment of a certified sum due to a main contractor on the grounds that to do so would result in a delinquent nominated sub-contractor receiving a payment which, in the eyes of the employer, was not justified.

The next case (which at the time of writing is the subject of an appeal) is a decision of Mocatta J concerning a bond: *Nene Housing Society Ltd v National Westminster Bank Ltd* (at page 22). Although bonds are common in the construction industry there are surprisingly few cases on their interpretation. Although the bond in question had an unusual feature Mocatta J had first to determine what type of event might make the Surety (the Bank) liable to the employer, and in so doing he had, in common with others, to

consider the dicta of Lord Diplock about "temporary disconformity" not constituting a breach of contract (see *Hosier & Dickinson Ltd v P. & M. Kaye Ltd* [1972] 1 WLR 146).

Cases of interest to civil engineers — the theme of this Volume — commence with *Mander Raikes & Marshall v Severn-Trent Water Authority* (at page 34) in which Parker J had to consider the extent to which the Conditions of Model Form of Agreement 'A' issued by the Association of Consulting Engineers permitted a consulting engineer to increase his remuneration on the grounds that the estimated cost of the project (to which his fees were tied) had also increased. It is thought that the judge's views will be of interest to others.

Similarly the implications of the decision of the senior Official Referee, His Honour Judge Stabb QC, in *Mears Construction Ltd v Samuel Williams (Dagenham Docks) Ltd* (at page 49) may not be confined to those bound by the ICE Conditions. Judge Stabb had to consider whether under the ICE Conditions (4th edition) an engineer (and an arbitrator or a court) can change the valuation of a variation previously fixed in the light of events that took place since the valuation. The reasoning (that the engineer could do so) is applicable to the ICE Conditions (5th edition) and other contracts.

Finally, this Volume contains a case of considerable general value. In *Canterbury Pipe Lines Ltd v The Christchurch Drainage Board*, (at page 76) the Court of Appeal of New Zealand had to consider, amongst other things, whether, independent of any contractual authority, a contractor was in law entitled to suspend the performance of the contract temporarily when he did not receive a certificate of payment to which he was entitled. In judgments which review the authorities the Court held that he had no such entitlement under the common law (of New Zealand). The Court also considered the important question whether an Engineer's certificate had to be justified by objective or subjective standards.

22 Old Buildings *H.J. LL*
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ANGLIAN BUILDING PRODUCTS Ltd v W. & C. FRENCH (Construction) Ltd

27 March 1972 *Court of Appeal*

Lord Denning MR
Karminski and Orr LJJ

Anglian Building Products Ltd ("Anglian") supplied and delivered pre-stressed concrete beams to W. & C. French (Construction) Ltd ("French") for use in the construction of bridges which French were building over the M3, M4 and M6 motorways.

In October 1971 Anglian commenced proceedings against French for the price due in respect of the beams used on the M6 and M4 motorway bridges. French admitted liability but sought a stay of execution of the judgment on the ground that they had a cross-claim against Anglian for over £600,000 in respect of beams supplied for the M3 motorway bridges which French said were defective.

Anglian's claim against French for these beams was for £136,519.98.

Chapman J refused to grant a stay of execution of the judgment obtained by Anglian against French. French appealed.

HELD *dismissing the appeal:*

1. A stay of execution was a matter for the discretion of the Judge.
2. The Judge had not exercised his discretion on any wrong principle.
3. There were no grounds for doubting that any judgment obtained by French against Anglian would not be honoured.

Michael Chavasse QC and Graham Rose appeared on behalf of the Appellants, French, instructed by Bates, Son & Braby.
Morris Finer QC and Desmond Wright appeared on behalf of the Respondents, Anglian, instructed by Linklaters & Paines.

Commentary

Anglian Building Products v French is the first in a trilogy of cases included in this Volume all of which involve (in part at least) consideration of the question whether a stay of execution of a judgment should be granted. The other cases are *A.B. Contractors Ltd v Flaherty Bros. Ltd* (page 8) and *George E. Taylor & Co Ltd v G. Percy Trentham Ltd* (at page 15). This commentary relates to the first two cases in the trilogy.

Two Rules of the Supreme Court empower a Court to grant a stay of execution:

(1) *Order 14 rule 3(2).* On an application for summary judgment under Order 14:

"(2) The Court may by order, and subject to such conditions, if any, as may be just, stay execution of any judgment given against a defendant under this rule until after the trial of any counterclaim made or raised by the defendant in the action."

By providing that the Court "*may* ... stay execution", a discretion is conferred on the Court.

Where the counterclaim arises out of "the same subject-matter of the action and is connected with the grounds of defence, the order should not be for judgment on the claim subject to a stay of execution pending trial of the counterclaim but should be for unconditional leave to defend, even if the defendant admits the whole or part of the claim" (from the commentary in the Supreme Court Practice 1979 ("the White Book") para. 14/3-4/12A). Neither the facts of the *Anglian* case nor those in *A. B. Contractors* gave rise to any counterclaim by the relevant defendant which arose out of the subject-matter of the action or was connected with any grounds of defence to that action (not that any such grounds existed in either case).

(2) *Order 47 rule 1.* This rule also confers a discretionary power to stay the execution of a judgment. It provides:

"(1) Where a judgment is given or an order made for the payment by any person of money, and the Court is satisfied, on an application made at the time of the judgment or order, or at any time thereafter, by the judgment debtor or other party liable to execution:

(a) that there are special circumstances which render it inexpedient to enforce the judgment or order, or

(b) that the applicant is unable from any cause to pay the money,

then, notwithstanding anything in rule 2 or 3, the Court may by order stay the execution of the judgment or order by writ of *fieri facias* either absolutely or for such period and subject to such conditions as the Court thinks fit."

This rule applies to all circumstances in which a judgment has been obtained against a defendant. The provisions of Order 14 rule 3(2) are in addition to the provisions of Order 47 rule 1. It is however to be noted that the Court's discretion under Order 47 rule 1 is limited to the circumstances set out in paragraphs (a) and (b). The cases which are subject to this Commentary are not concerned with "inability to pay" but with the circumstances in which a Court may exercise its power to stay execution; if the circumstances do not warrant a stay under Order 14 rule 3(2) then they are unlikely to fall within Order 47 rule 1. The facts of the *Anglian* case and *A.B. Contractors* may, it is submitted, be considered in relation to either Order since there appears to be little practical difference between the application of Order 14 and Order 47 in such circumstances. Accordingly, does a cross-claim or counterclaim not giving rise to any right of set-off or being so closely connected with the subject-matter of the action on the grounds of any defence to that action give rise to a stay of execution? Are there, in other words, any "special circumstances" for the purposes of Order 47 arising out of the very fact that the plaintiff and defendant have contracted on more than one occasion and the performance of the contracts in question have given rise to claims by the one against the other?

Anglian Building Products indicates that in general the mere fact that a defendant has a *bona fide* counterclaim arising out of another contract with the plaintiff unconnected with the contract the subject-matter of the action will not of itself constitute a "special circumstance" justifying a stay of execution. It is possible perhaps to infer from the judgment of the Master of the Rolls that if there had been evidence that the plaintiff might have been unable to satisfy any judgment which the defendant might have obtained against him (in other words be unable to repay the defendant the amount given in his favour) then a stay might be granted. This would normally have to be established upon affidavit to the satisfaction of the Court.

A. B. Contractors Ltd v Flaherty Bros. Ltd does however provide a clear statement for one of the principles (if not perhaps the material principle) governing the exercise of discretion under Order 14 rule 3(2) and, it is submitted, also under Order 47 rule 1. Cumming-Bruce LJ summarised the case and the issues in the following words:

> "Here are two parties who first entered into Contract A, which was performed; then they entered into Contract B, which was partly performed and which gave rise to the issues pleaded in the counterclaim. Is the history that the same parties entered successively into these two contracts, performed the first and partly performed the second, such as to give rise to the sort of close connection between the two transactions — namely, the transactions on Contract A and Contract B — to make it fair and reasonable to keep the plaintiffs out of their money on a judgment which they have obtained on Contract A because, when the trial of the issues on Contract B takes place, provided that the defendants therein succeed, they may obtain judgment for a sum which will either be greater (as they allege it should be) than the sum for which judgment has been obtained, or at any rate is likely to diminish the money remaining in the hands of the plaintiffs, or the entitlement of the plaintiffs, to a very substantial degree?"

Stephenson LJ, agreeing, also said that the question was really:

> "Are these two contracts so closely linked that it would be fair and equitable to deprive the plaintiffs of the fruits of their consent judgment until the questions raised by the defendants' counterclaim have been determined?"

From the judgments it is clear that the first proposition that the defendant seeking his stay of execution must make good is: that there is a close connection or link between the dealings on the one contract and the dealings on the other. Without such a close connection it is unlikely that he will be able to obtain a stay of execution, in the absence of any other circumstances. Secondly, having established such a close connection a defendant will then have to show that it would be "fair and equitable" for there to be a stay which would, amongst other things, entail keeping the plaintiffs out of their money. Cumming-Bruce LJ doubted whether "any broad principle or test can be sensibly suggested" which was likely to apply. Each case would

have to be looked at on its own facts. For example, if a defendant could show an extremely strong case for suggesting that he was bound to get some judgment or that it was likely that he might be entitled to an interim payment on account under Order 29, then a Court might more readily stay execution of the plaintiffs' judgment. Similarly if the defendant can show that, historically, the dealings between himself and the plaintiff gave rise to a "running account" with each party expressing the respective "credits" and "debits" in the form of, say, monthly statements of net balances due, then again there might be grounds for a stay of execution. In the construction industry "contra-charges" (which in many cases are no more than claims for breaches of contract) are frequently dealt with on such a basis and, where appropriate, may justify a stay of execution.

These examples do not of course exclude other grounds for justifying a stay of execution of a sum due on one contract pending the resolution of a dispute on another contract.

Where the creditor is bankrupt or in liquidation the rules in Section 31 of the Bankruptcy Act 1914 may apply. Where that Section is applicable it is thought that a debtor (such as Flaherty Bros. or French) would be more likely to avoid having to make a payment. That Section provides:

> "Where there have been mutual credits, mutual debts or other mutual dealings, between a debtor against whom a receiving order shall be made under this Act and any other person proving or claiming to prove a debt under the receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had, at the time of giving credit to the debtor, notice of an act of bankruptcy committed by the debtor and available against him."

A number of cases establish that Section 31 puts a debtor in a better position than he would have been in had the plaintiff company been solvent: see, for example, *Rolls Razor v Cox* [1967] 1 QB 552, *National Westminster Bank Ltd v Halesowen Presswork & Assemblies Ltd* [1972] AC 785; *Re D. H. Curtis (Builders) Ltd* [1978] Ch. 162; and see also *in re Arthur Sanders Ltd*, The Times, 9 April 1981; to be included in volume 17 of Building Law Reports.

ANGLIAN BUILDING PRODUCTS Ltd v W. & C. FRENCH (Construction) Ltd

27 March 1972 *Court of Appeal*

Lord Denning MR
Karminski and Orr LJJ

LORD DENNING MR: As we all know, great motorways have been made across England lately. Much of the work has been done by W. & C. French (Construction) Ltd. The employers have employed French to make the bridges over the motorways, and French have obtained the beams for the bridges from a company called Anglian Building Products Ltd, which is a subsidiary of Ready Mixed Concrete Ltd. Amongst the motorways that French constructed were the M6 and the M4. Anglian Building Products Ltd supplied to French the beams, consisting of pre-stressed concrete units for the bridges over the motorways. The sum payable for them, payable by French to Anglian, is £88,664.79. The employers have paid French the amount for those bridges over the M6 and M4. It includes the cost of the beams, which Anglian supplied; but French have not yet paid the sum due to Anglian Building Products Ltd.

On 11 October 1971 Anglian Building Products Ltd issued a writ against French for the £88,664.75 for the M6 and M4 beams. French admit that judgment must be given for it; but French ask that the execution of it should be stayed because they say they have a cross claim. But this counterclaim does not arise out of the beams supplied for the M4 or M6 motorways. It arises out of those supplied for the M3 motorway from London to Basingstoke.

It appears that the M3 motorway was being constructed about the same time as the M4 and M6: but the beams for the bridges were of a different kind. French say that Anglian Building Products supplied beams for the M3 that were defective — so defective that they had to do a great deal of work to remedy the defects and make them fit for putting in the bridges. French say that they have been delayed and put to all sorts of expenditure. They say that they have suffered damage in a sum of over £600,000.

Anglian, in respect of the M3, have brought an action claiming the

sum due to them for the beams (pre-stressed concrete units) which they supplied under that contract. The claim of Anglian on the M3 beams is £136,519.98. They are met in that action by a cross action by French for £600,000 also on the M3. Those matters in the M3 motorway dispute have been consolidated. They will have to be sent to an Official Referee or some one to try the rights and wrongs of it; and that can be tried out there.

The question is whether the counterclaim in respect of the M3 can also be used as a ground for staying the action in respect of the M4 and M6 goods. The judge has said No; he says it is a matter which should be fought out in the M3 litigation. It should not be used to stay the judgment or the execution of the judgment in the M4 and M6 action. And now French appeal to this Court.

This matter of a stay is primarily for the discretion of the judge. I must say that I see nothing wrong in the way he has exercised his discretion. There is no doubt as to the solvency of Anglian Building Products Ltd. They are a subsidiary of Ready Mixed Concrete. If there are any damages payable on any cross claim, Ready Mixed Concrete will see that they are paid. So that there is no question that French will get their money if they are right in their counterclaim.

In those circumstances I do not see why this counterclaim on the M3 should be used to hold up payment for the work on the M4 and M6, for which, as I have said, French have actually had the money from the employers; they have actually been paid for these very units which have been delivered. I see no reason for interfering with the judge's discretion and I would dismiss the appeal.

KARMINSKI LJ: I agree.

ORR LJ: I also agree.

A. B. CONTRACTORS Ltd v FLAHERTY BROTHERS Ltd

22 February 1978 *Court of Appeal*

Stephenson, Geoffrey Lane and Cumming-Bruce LJJ

A. B. Contractors Ltd ("A.B.") contracted with Flaherty Brothers Ltd ("Flaherty") for building work on a site called Winchester Way. After that work had been completed A.B. carried out further work for Flaherty at another site at Hersden.

A.B. commenced proceedings for the work done on the Winchester Way contract. A consent judgment was entered for the plaintiffs on their Order 14 application for £12,000 with leave to the defendants to defend as to the balance. The District Registrar granted a stay of execution of the judgment pending trial of Flaherty's counterclaim relating to the Hersden contract since Flaherty alleged that their claim would result in a sum greater than the £12,000 due to A.B. and ultimately would become due to them.

On appeal by A.B., Forbes J removed the stay of execution. Flaherty appealed.

HELD *dismissing the appeal:*

1. Flaherty's counterclaim in respect of the Hersden contract did not constitute a defence to A.B.'s claim in respect of the Winchester Way contract.
2. The principle to be applied was:

> "Is the connection between the dealings of the plaintiffs and the defendants on the Winchester Way contract so connected with their dealings on the Hersden contract to make it fair and sensible to require the plaintiffs to be kept out of their money on the judgment pending the determination of the issues in dispute in relation to the Hersden contract?"

3. On the facts there was no such connection.

William Gage appeared on behalf of the Appellants, Flaherty, instructed by Peters & Peters, agents for Simon Langton & Co.
Kenneth Hamer appeared on behalf of the Respondents, A.B. Contractors, instructed by Sharpe, Pritchard & Co, agents for Whitehead, Monkton & Co.

Commentary
See our Commentary on *Anglian Building Products Ltd v W. & C. French (Construction) Ltd* at page 1 of this Volume.

A. B. CONTRACTORS Ltd v FLAHERTY BROTHERS Ltd

22 February 1978 *Court of Appeal*

Stephenson, Geoffrey Lane and Cumming-Bruce LJJ

STEPHENSON LJ: I will ask Cumming-Bruce LJ to give the first judgment.

CUMMING-BRUCE LJ: The plaintiffs are contractors who contracted with the defendants to do building work of a kind first at a building site called Winchester Way. That contract was performed and the work was completed, but a dispute arose between the plaintiffs and the defendants over the measurement or pricing of the work. In consequence, on 21 September 1976 the plaintiffs issued a writ for work done and materials supplied by which they then claimed £15,198.25, which was later amended to £18,839.58. There were some negotiations. Proceedings were commenced by the plaintiffs under Order 14, seeking judgment in the amount claimed. Immediately before the proceedings before the Registrar upon that Order 14 summons, the defendants agreed to submit to judgment by consent in the sum of £12,000, with leave to defend for the balance. They had intimated by an affidavit which was given to the plaintiffs the day before that they had a defence and counterclaim arising out of the contractual dealings of the plaintiffs and the defendants in connection with another contract at a site at Hersden. As a matter of history, after the Winchester Way contract work had been completed by the plaintiffs, they had been successful in a tender for the Hersden contract, and they began work for the defendants on the Hersden contract immediately following the completion of the works at Winchester Way. That was also a building contract, but there was no nexus between the Winchester Way contract and the Hersden contract, save that the contracts were between the same parties, unless it be properly described as a nexus that both contracts were concerned with building work.

Before the learned Registrar there was an Order for judgment by consent for £12,000, leave to defend as to the balance; and, in the