BUILDING LAW REPORTS

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VOLUME
19

Theme

Breach of Statutory Duty and Cases of Current Interest

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Introduction

In addition to recent cases this Volume contains three cases concerned with liability for breach of statutory duty. We expect that this theme will be continued in future volumes although the decision of the House of Lords in *Pirelli v Oscar Faber & Partners* should provide an answer to some of the questions which have come before lower courts in recent years. The three cases contained in this Volume are *Crump v Torfaen Borough Council* (at page 84); *Haig v London Borough of Hillingdon* (at page 143); and *London Borough of Newham v Taylor Woodrow Anglian Ltd* (at page 99). The last named deals with a contractual liability to comply with building byelaws. As in previous volumes we shall now briefly summarise the primary interest that each case might have to the reader.

As expected, *F. G. Minter Ltd v W.H.T.S.O.* (1980) 13 BLR 1 produced considerable comment and discussion within the construction industry about the recovery of interest or financing charges in general, but especially under the 1963 editions of the J.C.T. Forms (to which *Minter's* case is directly relevant). At the same time the continuing pressure of high interest rates has called into question the decision of the House of Lords in *London Chatham & Dover Railway Co v South-Eastern Railway Co* [1893] AC 429 that in general a person who fails to pay a sum due under a contract upon the due date is not liable to compensate his creditor for the damages thereby suffered as a result of that breach of contract unless the failure attracts the application of the second limb of *Hadley v Baxendale* (1854) 9 Ex. 341. The limited reform of the law made by Parliament by the Law Reform (Miscellaneous Provisions) Act 1934 is plainly not adequate for present commercial needs (if it ever was) since it only enables a Court to award interest on a sum for which judgment is given. The law apparently provides little assistance to a creditor whose debt is paid but paid late, before judgment, if he has secured no suitable contractual provision to compensate him.

We have therefore included in this Volume *Department of Environment for Northern Ireland v Farrans (Construction) Ltd* (at page 1) since it provides a contribution to the debate on these questions. It must however be regarded as of limited assistance outside Northern Ireland (even on a persuasive level) for reasons which we give in our Commentary.

The second case (at page 25) — *Rumbelows Ltd v A.M.K. (a firm) & Another* — is of much greater interest particularly in relation to the liability of a sub-contractor to the employer under a building contract for negligence by him in executing work under the sub-contract in circumstances in which his contractual liability to the contractor

under the terms of the sub-contract might be expressly limited. Such limitations of liability are of course frequently sought and obtained, even in relation to work done by nominated sub-contractors under standard forms. Is an employer who has no knowledge of or does not assent to such limitations of liability thereby precluded from recovering from the sub-contractor any part of the damages that he might suffer as a result of the sub-contractor's negligence? Judge Fay QC decided, having regard to *Morris v Martin* [1966] 1 QB 716 that an employer ought not to be so prejudiced.

Fox v Wellfair (at page 52) should be added to the collection of cases on arbitration and arbitrators contained in Volume 15 of these Reports. It is particularly relevant in these days of movement towards giving arbitrators powers to make their own investigations and determinations of the facts of a dispute. The case shows clearly that there are both practical and legal dangers in conferring such powers on an arbitrator. And the case is also of importance where no such powers are conferred on an arbitrator.

In *Esmil Ltd v Fairclough Civil Engineering Ltd* (at page 129) the Court of Appeal had to consider what amount if any should be paid to a sub-contractor after the expiry of the "fixed price period", taking into account the application of the BEAMA formulae to the circumstances of the case. The issues raised are perhaps peculiar to the terms of the sub-contract used. Nevertheless the observations of Donaldson LJ (at page 137) are likely in our view to be of assistance to Courts and arbitrators faced with the task of "construing" a contract, especially where the terms of the contract need to be reconsidered in the light of changed circumstances.

Of the last three cases in this Volume two have a common link in that they are concerned with the consequences of the decision of the House of Lords in *Anns v Merton* [1978] AC 728; 5 BLR 1 and the cases which preceded it. In *Crump v Torfaen Borough Council* (at page 84) Balcombe J had to decide whether the plaintiff's case was barred by limitation, the defendant arguing that some at least of the symptoms of the relevant defects had appeared more than 6 years before the issue of the Writ. He held that the plaintiff's case was not barred by statute for reasons which appear clearly from the judgment to which reference is likely to be made in future. In *Haig v London Borough of Hillingdon* (at page 143) Judge Fay QC had to decide a fairly typical case brought against a local authority for failure to detect by inspection non-compliance with the building regulations. The judgment may be of assistance to practitioners who have to prepare such cases for trial.

In *London Borough of Newham v Taylor Woodrow-Anglian Ltd* (at page 99) the Court of Appeal was concerned with the terms of the "package-deal" contract under which Ronan Point was built. Since

O'Connor J had held that the contractor was not liable in negligence the appeal was principally concerned with the liability of the contractor under the terms of the contract. In dismissing the appeal the Court of Appeal took a different view of the terms of the contract in relation to the liability of the contractor for design and in particular in relation to provisions requiring compliance with building bye-laws. We shall consider similar circumstances in the next Volume of these Reports.

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DEPARTMENT OF ENVIRONMENT FOR NORTHERN IRELAND v FARRANS (Construction) Ltd

30 June 1981

High Court of Justice in Northern Ireland
Chancery Division

Murray J

The Craigavon Development Commission (to whose rights and duties the Department of the Environment for Northern Ireland succeeded) was the employer under a contract dated 19 September 1974 with Farrans (Construction) Limited (the Contractor). The contract incorporated the J.C.T. Conditions Local Authorities Edition With Quantities 1963, July 1972 Revision. The date for completion was 24 May 1975 with liquidated damages payable under Clause 22. The execution of the works was delayed by various events and practical completion was not achieved until 3 April 1978. The architect ultimately extended time under Clause 23 by 127½ weeks, i.e. until 3 November 1977. The architect also issued four certificates under Clause 22 certifying on each occasion the date by which the Works ought reasonably to have been completed, namely:

(1) On 12 May 1976, certifying 17 October 1975 as the reasonable date;
(2) On 18 July 1977, certifying 26 July 1976;
(3) On 24 July 1978, certifying 9 May 1977;
(4) On 11 April 1979, certifying 3 November 1977.

On receipt of the first of the four certificates the employer began to deduct liquidated damages from sums otherwise due to the contractor pursuant to interim certificates. By 18 July 1977 the employer had deducted £197,900 but in consequence of the second of the Clause 22 certificates the employer paid the contractor £77,900 of the liquidated damages previously deducted and that process was repeated following the issue of the third and fourth certificates.

In 1978 the contractor notified the employer of its intention to refer

to arbitration certain claims including the employer's right to deduct liquidated damages. No arbitration took place since the parties settled those differences on 18 December 1979 by, inter alia, an agreement on the part of the employer to pay the contractor £179,000. The contractor thereafter claimed to be paid interest on those sums which the employer had deducted under Clause 22 but which had subsequently been paid to the contractor. The employer denied liability and the contractor issued an Originating Summons seeking answers from the Court to certain questions. The parties agreed that the answer to question (a) was that the architect was entitled to issue more than one certificate under Clause 22. The remaining questions arising for decision were:

> "(b) Whether upon the true construction of the contract the defendant [i.e. the contractor] is entitled in law to make any claims for interest upon or financing charges referable to moneys refunded by the plaintiff [i.e. the employer] to Farrans ("the refunds") which had previously been deducted by the plaintiff as liquidated damages on foot of certificates issued by the architect under Clause 22 of the contract and which became repayable following the issue by the architect of certificates under Clause 23 thereof extending the date for completion."
>
> (c) If the answer to question (b) is Yes, whether the defendant is entitled to recover on foot of such claim:
>
> (i) a sum representing interest or financing charges calculated on all the refunds in respect of the period between the date of deduction and the date of repayment of each; or
> (ii) a sum representing interest for financing charges calculated on such part or parts of the refunds as are attributable to periods of delay caused by variations under Clause 11 or disturbance of the regular progress of work under Clause 24 of the contract; or
> (iii) a sum representing loss sustained by Farrans by reason of the deduction by the plaintiff of the liquidated damages subsequently refunded; or
> (iv) some other and, if so, what sum."

***HELD**, in favour of the contractor:*

1. The answer to question (b) was: Yes, since:
   (1) Clause 22 was to be construed as meaning that when the employer received the first or any subsequent certificate it was

open to it to start making deductions under Clause 22 but it did so at its own risk that a subsequent certificate would vitiate the certificate on which it was relying and leave it without protection against a claim for breach of contract in failing to pay on the due dates the amounts shown in the relevant interim certificates.

(2) The employer was therefore in breach of contract in deducting monies on the basis of the first, second and third certificates.

2. In answer to question (c):

(1) The contractor was entitled to the remedy appropriate to a common law claim for breach of contract.

(2) The arbitrator had power to award damages which, could include interest incurred or lost by the contractor as a foreseeable consequence of the employer's failure to pay on the due date.

(3) If the contractor proved:

(a) that because of interest or financing charges it suffered loss or damage through the employer's breach of contract in failing to pay any of the deducted monies to the contractor on the due date, and

(b) that a reasonable person in the employer's position would have contemplated such loss or damage as a probable consequence of the employer's breach of contract,

the arbitrator should award the contractor damages to compensate it for the loss or damage: *Wadsworth v Lydall* [1981] 1 WLR 598 followed.

R. D. Carswell QC and F. Girran appeared on behalf of the Employer, instructed by the Crown Solicitor for Northern Ireland
Ian S. Lamb appeared on behalf of the Contractor, instructed by Carson & McDowell, Belfast

Commentary

It should be observed that Murray J was not asked to decide the question whether an architect under the 1963 Edition of the J.C.T. Standard Form of Building Contract could issue more than one certificate under Clause 22. He expressly recorded that (see page 15). At first sight it seems sensible particularly in circumstances such as those which gave rise to this case that the architect should have such a power for in that way he would be able to take account of causes of delay arising since the previous certificate without having to resort to the rather cumberous device of advising the employer to challenge the previous certificate on the grounds that it failed to take into account the events which had subsequently occurred. As a result of such a challenge, depending on the contractor's attitude, a dispute

might arise which would then be referred to the arbitrator who would have power to open up, review and revise the earlier certificate and to substitute his view taking into account what had occurred since the certificate had been issued. Mr Donald Keating QC in *Building Contracts*, 4th Edition, at page 345, is of the opinion that the architect under the 1963 Edition of the J.C.T. form had such a power. On the other hand the language of Clause 22 provides some basis for an argument to the contrary, e.g. it pre-supposes action by the architect only after the contractor's failure to complete by the date stipulated resulting in the recovery by the employer of "a sum ... as liquidated and ascertained damages".

That Murray J appears to have taken the view that the parties were wrong to have agreed that the architect had power to issue more than one certificate under Clause 22 appears from his approach to the first question that he himself had to decide (see for example points (ii) and (vi) at pages 19 and 20 below). Leaving aside the contractor's alternative arguments in support of his claim for interest based on "equitable principles" and Clauses 11(6) and 24(1) of the Contract Conditions which the learned Judge rejected (rightly, it is submitted, in the circumstances of this case), Murray J held that the employer was in breach of contract and thus the contractor was entitled to recover damages which might be measured in terms of interest or financing charges. The steps by which he arrived at these conclusions are set out at pages 20 to 22 below. We shall comment first on his conclusion that the employer was in breach of contract and secondly on the damages recoverable.

As regards the learned Judge's view that the employer was in breach of contract, perhaps the most important part of his reasoning appear in points (v) and (vi) on page 20 below where he said:

> "... It was the employer's own voluntary decision to make the deductions and no doubt it took the decision in what it thought to be its own financial interest.
> (vi) The only basis upon which the employer can justify the deductions placed upon the First, Second and Third Certificates is that there was a succession of dates on which the Works ought reasonably to have been completed — each date so to speak being valid and effective while the relevant certificate stood — but I see nothing in the Contract to justify such an extraordinary conception and I reject it."

We would not ourselves so describe that "conception". The commercial reality is of course that the employer has been unable to take possession of the Works at the date originally stipulated or as extended. Clause 22 envisages that a certificate may be issued as

soon as the relevant date by which the Works ought to have been completed have been attained. We find it difficult to justify the proposition that once the stipulated completion date has passed an employer should not only not be compensated for the lack of use of the Works so that he may recover something towards the investment in the Works (which he has by then made) but should also have to shoulder the additional burden of financing that unprofitable investment at least until practical completion at which time or shortly thereafter the architect should be able to determine the final extension of time and issue a certificate under Clause 22. Furthermore if the employer is not in breach in not paying sums certified as long as he is in possession of a valid certificate under Clause 22, and if it is accepted that more than one certificate under Clause 22 may be issued (as Murray J was bound to do), then it is not easy to see how the issue of a second subsequent certificate under Clause 22 automatically and retroactively renders previous deductions of liquidated damages breaches of contract even though at the time that they were made they were not contrary to the terms of the contract.

It is possible that the views expressed by the courts in the last century towards the interpretation of liquidated damages may still preclude the 1963 Edition of the J.C.T. Form being read so as to give effect to these considerations, even though it is a standard form — and one which is far from being imposed on contractors but which has instead evolved by agreement between competing interests and in response to economic pressure. So we now find that Clause 24.2.2 of the 1980 Edition of the J.C.T. Form expressly requires the employer to pay or repay to the contractor any amount recovered, allowed or paid if the architect/supervising officer should fix a later completion date than that by reference to which damages had been assessed. It is thought that if the employer duly gave effect to Clause 24.2.2 of the 1980 Edition of the J.C.T. Form he would not thereby be making good a breach of contract.

Murray J went on to hold that the contractor could recover interest as damages for the breach. Until very recently it had long been thought that such a claim could not succeed at common law: see *London Chatham & Dover Railway Co v South-East Railway Co* [1893] AC 429, although that state of affairs was regretted (see per Lord Herschell at page 437).

Such a rule was therefore in the 19th century and still is as Stephenson LJ said in *Minter v W.H.T.S.O.* [1980] 13 BLR 1 at 17: "an anomaly and an anachronism". Forty years passed before Parliament acted and then only made a limited reform in the law — see the Law Reform (Miscellaneous Provisions) Act 1934. Thirty years ago in *Trans Trust SPRL v Danubian Trading Co* [1952] 2 QB 297 some indication of the way in which the common law rule might still be

circumvented was given. Romer LJ said that he was not prepared to subscribe to the view that in no case could damages be recovered for non-payment of money (see page 307) and Denning LJ (as he then was) said:

> "I do not think that the law has ever taken up such a rigid standpoint. It did undoubtedly refuse to award interest until the recent statute . . . but the ground was that interest was 'generally presumed not to be within the contemplation of the parties'. That is, I think, the only real ground on which damages can be refused for non-payment of money. It is because the consequences are as a rule too remote."

It might be doubted whether in a commercial contract the non-payment of part of the contract price could be regarded as giving rise to a loss which was generally presumed to be not within the contemplation of the parties, and thus was irrecoverable without proof of special facts so as to bring the claim within the second rule of *Hadley v Baxendale* (1854) 9 Ex. 341 — see *Minter's* case referred to in the next paragraph.

The judgment of Brightman LJ in *Wadsworth v Lydall* [1981] 1 WLR 598 (cited by Murray J at page 21 below) reflects the same approach as that of Romer and Denning LJJ in the *Trans Trust* case. Murray J was certainly right to have been referred to that case for it is not clear what distinction in principle exists between a contract to pay a certain sum of money on a particular day and a contract whereby the contract price is to be paid by way of variable instalments (as in a building contract). In both cases failure to pay the sum due will result in loss — and in *Minter's* case it was accepted that "in the building and construction industry the 'cash flow' is vital to the contractor and delay in paying in for the work he does naturally results in the ordinary course of things in his being short of working capital, having to borrow capital to pay wages and hire charges and locking-up in plant, labour and materials capital which he would have invested elsewhere. The loss of the interest which he has to pay on the capital he is forced to borrow and on the capital which he is not free to invest would be recoverable for the employer's breach of contract within the first rule in *Hadley v Baxendale* without resorting to the second, and would accordingly be a direct loss . . . ". (See 13 BLR at 15, where Stephenson LJ records the parties' agreement and see also page 23 per Ackner LJ).

Such losses are ones which are difficult to estimate accurately and for that reason might also be regarded as falling within the category of "general damages" rather than "special damages", particularly if the claim is advanced on a conventional basis such as on the

assumption that loss might be recovered by way of the interest notionally paid to a bank on the principal. Certainly we consider that where such losses are incurred by a party to a commercial building contract they will not generally be losses falling within the second limb of *Hadley v Baxendale*. On that basis they would appear to be caught by the common law rule against the recovery of interest as damages for breach of contract to pay a sum of money. Interest would only be awarded by a court or arbitrator if and when there was a judgment or award for the principal sum and not where the principal sum had already been paid to the plaintiff or claimant.

Wadsworth v Lydall was however a case in which the Court took the view that the plaintiff's claim and loss fell within the second limb of *Hadley v Baxendale* — hence the loss would normally have to be specifically pleaded and proved (see the judgment of Brightman LJ). Murray J also emphasised in his judgment (see page 22) that the contractor would have to prove loss or damage and that such loss or damage would have been contemplated by "a reasonable person in the employer's position... as a probable consequence of the employer's breach of contract". So Murray J's circumvention of the anomalous and anachronistic rule appears to have been based on the notion that the contractor's claim fell only within the second limb of *Hadley v Baxendale* — although as we have pointed out the claim almost certainly lies under the first limb.

Since there was no appeal from the decision of Murray J we must await either clear action by Parliament to reform the law so that Courts and arbitrators can award interest as damages for non-payment of sums of money or there must be a re-consideration by the House of Lords of the *London Chatham & Dover Railway* case and subsequent cases and a clear re-statement by that Court of the law.

We are grateful to Mr Donald Keating QC and Mr Gordon Burnison for bringing this case to our attention.

DEPARTMENT OF ENVIRONMENT FOR NORTHERN IRELAND v FARRANS (Construction) Ltd

30 June 1981

High Court of Justice in Northern Ireland Chancery Division

Murray J

MURRAY J: This originating summons arises out of a building contract dated 19 September 1974 made between the Craigavon Development Commission and Farrans Limited under which the latter Company agreed to build an office block for the Commission at Craigavon for the sum of £1,511,425.00 or such other sum as should become payable under the contract ("the Contract"). The plaintiff in these proceedings, the Department of the Environment for Northern Ireland, succeeded to the rights and duties of the Commission under the Contract and the building company's name has been changed to Farrans (Construction) Limited. In this judgment I will refer to the plaintiff as "the Employer" and the defendant as "the Contractor". The Contract is in the familiar Standard Form of Building Contract issued by the Joint Contracts Tribunal under the sanction of the Royal Institute of British Architects and various other bodies and is known as the Local Authorities Edition with Quantities 1963 Edition (July 1972 Revision). It consists of various parts including one intituled "The Conditions hereinbefore referred to" ("the Conditions") which contains thirty-five printed conditions forming an important part of the Contract. The Appendix to the Conditions provides, inter alia, that the date on which the contractor was to be given possession of the site was 15 November 1973, and the date for completion was to be 24 May 1975. There then comes a provision that "Liquidated and Ascertained Damages" for the purposes of Clause 22 of the Conditions are to be at the rate of £2,500.00 per week (or part thereof) and since this whole case centres on that Clause I must set it out in full:

"22. If the Contractor fails to complete the Works by the

Date for Completion stated in the Appendix to these Conditions or within any extended time fixed under clause 23 or clause 33(1) of these Conditions and the Architect/Supervising Officer certifies in writing that in his opinion the same ought reasonably so to have been completed, then the Contractor shall pay or allow to the Employer a sum calculated at the rate stated in the said Appendix as Liquidated and Ascertained Damages for the period during which the Works shall so remain or have remained incomplete, and the Employer may deduct such sum from any monies due or to become due to the Contractor under this Contract."

The extension of time under Clause 23 of the Conditions referred to in Clause 22 is also at the heart of this dispute and I must also set that Clause out so far as relevant. (Clause 33(1)(c) relates to the extension of time for war damage and, of course, has nothing to say to this case).

"23. 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 the 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 —

.....

(d) by reason of civil commotion, local combination of workmen, strike or lockout affecting any of the trades employed upon the Works or any of the trades engaged in the preparation manufacture or transportation of any of the goods or materials required for the Works, or

(e) by reason of Architect's/Supervising Officer's instructions issued under clauses 1(2), 11(1) or 21(2) of these Conditions, or

.....

(g) by delay on the part of nominated sub-contractors or nominated suppliers which the Contractor has taken all practicable steps to avoid or reduce,

.....