BUILDING LAW REPORTS

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VOLUME
2

Theme

Set-off and damages for defects

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The Great Set To About Set-Off

The case of *Dawnays v Minter* (1 BLR 16) might well have passed unnoticed had the learned editor of Hudson's *Building and Engineering Contracts* not written a lengthy article for *The Law Quarterly Review* attacking the case and its successor, which was published in January 1973 at 89 LQR 36.

Under the title of 'Set Back to Set-Off', it was, it is submitted, a collection of legal fallacies which culminated in the conclusion that: 'The construction placed by the Court of Appeal on clause 13 of the FASS form is not supported by a really careful and detailed examination of the FASS form itself or of the main contract to which it is expressed to be supplemental.'

This article, and the uncertainty about the law that followed it, provided a heaven-sent excuse for main contractors to withhold sums certified and due to sub-contractors on pretexts which owed more to the prevailing absence of funds than to the facts themselves. Egged on by modern accountants, whose philosophy is expressed in their slogan 'never pay anything until you have to', building owners as well as main contractors found it highly convenient to have a set-off claim to excuse delay in payment.

To adopt the words of Roskill LJ in *GKN Foundations v Wandsworth LBC* at 1 BLR 42, it was 'eloquent of the current restrictions on credit, high interest rates and general tightness of money. . .' But it is noteworthy that even Mr Duncan Wallace did not ascribe to *Dawnays v Minter (supra)* the incorrect interpretation of the meaning that was subsequently ascribed to it. He regarded it as an incorrect construction of clause 13 of the FASS contract; he did not subscribe to the view, later denounced by two law lords in their opinions in *Gilbert-Ash v Modern Engineering*, that Lord Denning had been putting architect's certificates in the same category, for the purpose of Order 14, as bills of exchange (and ship freight for that matter: see *The Brede* 1974 1 QB 233 and *The Aries* Court of Appeal, *The Times* 6 February 1976). Both bills of exchange and ship freight, by a century-old rule of law, have to be paid in full without any deduction, and therefore no defence, however convincing, can ever be raised against them, by way of set-off or counterclaim.

The position was, with respect, explained correctly by Roskill LJ in *Mark v Schield* (1 BLR at 37) dealing with the criticism that it was wrong in principle to place an interim certificate in the same category as a bill of exchange: 'it is plain that the Master of the Rolls was only using a bill of exchange as an analogy. . . . What the Master of the Rolls was saying was that the debt was of a class which, *by reason of the contractual provisions of the contract*, ought not to be allowed to be made the subject of a set-off or counterclaim as a reason for not paying the sum which the architect has duly certified as due from the building owner to the builder.'

There is all the difference in the world, between a document which has characteristics attributed by law, and one with which the parties themselves, in exercise of their freedom of contract, have chosen to vest certain characteristics. Once that distinction is grasped, any problem about *Dawnays v Minter* disappears and it is submitted that the case was and is still good law.

In the first place, a distinction must be drawn between the use of the words 'set-off' as a noun and as a verb. The Rules of the Supreme Court allow certain counterclaims to be 'set off' against claims but the noun 'set-off' means, and can only mean, a *liquidated amount* that is a fixed and ascertained sum. It can therefore never be a general claim for unliquidated damages.

In an action to recover money by a plaintiff, a set-off is a specified sum of money for which the defendant could maintain an action against the plaintiff *arising out of the same subject matter,* due from *and to the same* parties in the same right. There is therefore a fundamental difference between a right of set-off and a counterclaim.

A counterclaim, on the other hand, is by contrast any claim for which the defendant could bring an action against the plaintiff, whether in respect of the same matter or some other matter; and it can be a claim for unliquidated damages (ie, for damages to be assessed by the court).

What the defendants set up in *Dawnays'* case was not a set-off but a counterclaim, ie, a claim for an unliquidated sum of damages for delay alleged to have been caused by the plaintiffs.

Although there are numerous references in the books in recent years to a 'common law right of set-off', the common law knew nothing of a right of set-off. This proposition is inherent in the nature of an action at common law in contract.

The earliest building contract still extant in England is, I believe, one dating from 1308 by a carpenter to build a hall with stable, kitchens and other offices in the city of London 'in about six months' for a furrier (Guildhall muniments: Letter book Cf 96), though a similar contract dated 1310 to build three shops in the parish of St Michael in the Cornmarket (St Paul's MSS No 1497) runs it close. There was one dated 1307 for the construction of the tower of Lincoln Cathedral which was well known in the eighteenth century, but this seems now to have disappeared.

These early contracts were in the form of deeds of indenture whereby, for an obligation under seal to pay money, the builder provided sureties for due performance.

But these early deeds contributed nothing to the modern law of contract which began in the early sixteenth century by the tort action of *assumpsit* in the Queen's Bench court. The essence of this was (i) that the defendant had undertaken *(assumpsit)* to do a certain thing (ii) the plaintiff had suffered loss because he had failed to do it. Action for *debt* was something quite different.

The cross-promises of defendant and plaintiff were therefore two independent rights, which could only give rise at common law to two separate actions. If, as happened, a builder was promised x marks if he built a booth on a fairground, was not paid and sued for his money, it was not defence that, immediately after he had built it, the booth fell down. This might, however, after 1503 be a separate action by the defendant on an *assumpsit* for breach of a promise that the booth would be properly built.

The defendant's claim for damages for breach of contract could never be a matter of set-off against the plaintiff's claim for payment.

This method of two separate trials proved to be inconvenient in the eighteenth century when Parliament, *because* the common law provided no right of set-off, passed two acts: The Statute of Set-Off (2 Geo II c 22) 1729, and

the Statute of Set-Off (8 Geo II c 24) 1735. These allowed a defendant to raise, in the same proceedings, claims he had against a plaintiff arising out of the same transaction, provided they were *liquidated debts ascertained with certainty* at the date of pleading. These acts remained in force until 1897.

They are now represented by the Rules of the Supreme Court. The acts were, and the Rules are, both matters of procedure only, and as is pointed out in *Mottram v Sunley (post)* a defendant cannot, by refusing to pay an amount certified by an architect and by forcing the plaintiff to sue him, thereby gain a right to establish a claim by legal proceedings which he would not have possessed had he paid the amount as he ought to have done. A substantive right cannot be acquired by a rule of procedure, and it is an error to refer to the rule in *Mondel v Steel* as establishing 'a common law right of set-off'.

A right to abate the price of goods sold has nothing to do with set-off. In the eighteenth century, the English courts began adopting some of the principles of the mercantile law (based upon Roman law). In *Basten v Butter* (1777), it was held that where goods were sold with an express or implied warranty, to avoid two actions 'it was open to the defendant to prove that the price of goods sold might be reduced by so much as the article was diminished *in value* by reason of non-compliance with the warranty'.

But *Mondel v Steel* 1 BLR 106 expressly held that this right of abatement of price did not extend to a claim for damages. 'All the [defendant] could by law be allowed. . .was a deduction from the agreed price. . .but all claim for damages beyond that. . .could not be allowed'—Parke B. Lord Salmon's opening observation about damages by way of set-off in the *Gilbert-Ash* case (1 BLR 100) is therefore, it is submitted, wholly erroneous.

Moreover, that case held that it was limited strictly to contracts for the sale of goods and not to mixed contracts of services and goods. The descendent of *Mondel v Steel* is section 53 Sale of Goods Act 1893, incorporated therein precisely because it was a rule applicable to the sale of goods and not a general common law right.

The Court of Chancery, before the merger of the common law and equitable courts, would restrain an action at common law by an injunction to the plaintiff. 'The Court of Equity would not act merely because there were cross-demands,' (per Morris LJ in *Hanak v Green,* 1 BLR at 66). There had to be something more, something which impeached 'the title to the legal demand', ie, fraud or unconscionable conduct on the part of the plaintiff.

Clearly a nebulous claim to an unliquidated sum as damages for delay (as was the case in *Dawnays)* is not sufficient to amount to any right of equitable set-off.

It is time, therefore, to turn to the facts in *Dawnays'* case. The plaintiffs were nominated sub-contractors for steelwork under the standard FASS form to the defendants, who were joint contractors under a JCT contract to erect an office block in Euston Road, London, for the Hearts of Oak Building Society.

In the 32nd interim certificate, the architect had included a sum of £27,870 in respect of work done by the plaintiffs. The defendants received this sum from the building owners as part of the total sum due under the certificate. The defendants refused, however, to pay any part of this to the plaintiffs, alleging they were entitled to an even greater, but unspecified sum, as unliquidated damages for delay.

The plaintiffs therefore took out a writ for £27,870 and a summons under Order 14 for summary judgment. The defendants did not file affidavits to resist that, but took out a separate summons claiming to have the action stayed under section 4 of the Arbitration Act 1950, by reason of the arbitration clause in the FASS contract. The 'difference' alleged between the parties was not whether the defendants were entitled to damages for delay and, if so, how much, but the entirely academic question as to whether they were entitled to set off unliquidated damages for delay against sums due under interim certificates.

So that even had the plaintiffs won an arbitration, they would not have got any award which would entitle them to payment of the sum due in the interim certificate. An application to stay an action under section 4 of the Arbitration Act 1950 is not the same as an application for leave to defend under Order 14 of the Rules of the Supreme Court.

Under section 4, the court has a discretion, whether they will stay the court proceedings or not. (See Parris: *Law and Practice of Arbitrations* p 41).

Under Order 14, quite different considerations arise on an application for leave to defend. For this reason, *Dawnays'* case was no authority for the proposition advanced in The Rules of the Supreme Court (The White Book, 1973 edition) at page 138. But even so 'a robust approach' should be adopted in Order 14 cases on building contracts: per Lawton LJ, *Ellis v Wates (post).*

In exercising its discretion to refuse a stay of the action in *Dawnays'* case the Court of Appeal was following precedent. The previous authority of the Court of Appeal is to be found in the judgment in *Pitchers Ltd v Plaza (Queensbury) Ltd* 1940 1 All ER 151. At page 155, Lord Goddard said: 'When an employer reserves the advantage in a building contract of appointing his own architect, who is there to certify, and, in certifying, to protect his interests, and when one knows how much he [the builder] is in fact at the mercy of the architect and when one finds that the architect and the employer are disputing the certificate, the court should be very slow to take a step which simply means that the builder is going to be kept out of his money for a long time as, of course, is the case if it is a proper case to go to arbitration. . . .'

In the *Gilbert-Ash* case, Lord Salmon said (at 1 BLR 104): 'If. . .the contractors were unwilling to go to arbitration until completion or abandonment of the main contract. . .I am sure the courts, in exercise of their discretion, would refuse a stay.'

As has been seen, the contractors were not proposing to go to arbitration on the issue as to what monies were due for delay at the date of the interim certificate. For the simple reason that, at the date of the interim certificate no sums whatsoever were due to the main contractors in *Dawnays'* case for delay on the part of the sub-contractor.

As Lord Denning pointed out (1 BLR at 22), under the FASS contract there is no provision for liquidated damages for delay. The main contractor has first to prove the extent of his loss or damage before he can recover anything by way of general damages.

This, however, is subject to the condition precedent set out in the words of clause 8: 'Provided that the Contractor shall not be entitled to any loss or damage under this clause unless the Architect shall have issued a

Certificate. . .stating in his opinion the sub-contracts works ought reasonably to have been completed. . . .'

The courts have repeatedly said, before, in, and since *Dawnays'* case that a main contractor has no claim whatever for damages for delay until and unless he holds such a formal certificate from the architect: see *Brightside Kilpatrick Engineering Services v Mitchell Construction (1973) Ltd* 1 BLR 62, in which the judgment was delivered by the Court of Appeal on 24 June 1975.

The clause 13 of the FASS contract which was before the Court in *Dawnays'* case was correctly interpreted. It has, of course, since been altered. But there never was validity in the argument that the words 'is liable' means 'is responsible in law for' not 'has been established by the judgment of a court or an award of an arbitrator'.

The Appeal Committee of the House of Lords which considered the application of F.G. Minter Ltd for leave to appeal (Lords Wilberforce, Pearson and Diplock) clearly thought that was correct, as can be seen from the dialogue at 1 BLR 24.

Only such deductions as the building contracts expressly allow can be made from sums certified on interim certificates by the architect. *Expressio unius personae vel rei, est exclusio alterius* ('The express mention of one thing to the exclusion of another') is fully applicable to construction contracts: *Gold v Patman & Fotheringham* 1948 1 WLR 697.

The JCT contract admits only of five deductions (apart from the retention and previous payments) from interim certificates: clause 2(1), employment of others; clause 19, insurance premiums; clause 20 [A], insurance premiums; clause 22, liquidated damages for delay; and clause 27(c), direct payments to nominated sub-contractors.

The FASS form admits of only two: clause 8 *agreed* sums; and clause 13, sums the sub-contractor *is liable* to pay.

The authority of *Dawnays'* case has never been overruled and it has been expressly affirmed by the House of Lords in the *Mottram's* case. *Gilbert-Ash* turned entirely upon the special terms of the sub-contract and observations made about *Dawnays'* were entirely *obiter*. Three out of the five law lords expressed the view that the case was correct as an interpretation of clause 13 of the FASS contract; but three were concerned to denounce the idea that Lord Denning had held that an architect's certificate was at a matter of law the same as a bill of exchange.

But *Mottram's* case was different. Here, the majority of the House expressly approved the principle that, as between employer and main contractor, the employer can only deduct such sums as are expressly authorised by the terms *of the contract itself.* Lord Salmon, dissenting, himself pointed out that if the House allowed the summary judgment against Mottram to stand, it would be approving of *Dawnays'* case (of which he and two other law lords had expressly disapproved in *Gilbert-Ash*). The House of Lords *did* allow the summary judgment to stand.

As Lord Denning said in *John Thompson Horseley Bridge Ltd v Wellingborough Steel* 1 BLR 69: 'Once the work is certified and the amount is due, it must be paid. It is not to be held up for cross-claims'.

As Roskill LJ pointed out in *Frederick Mark Ltd v Schield* 1 BLR 32: 'the contract charges the architect and him alone, with determining what are the amounts that he thinks should be paid. . .under an interim certificate'. (That

case, strangely enough, is the one of which Mr Duncan Wallace seemed to approve, albeit partially).

But under Order 14, a court is entitled to look at the affidavits for the defendant and see if there is a possible defence, as the Court of Appeal did in *Carter Horseley and Ors v Dawnays Ltd (post)* in respect of the claim for day work (2 BLR 11) and allow, if it seems fit, leave to defend on such terms as it cares to impose. That does not extend to counterclaims under the JCT and FASS contracts.

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Token Construction Co Ltd v Naviewland Properties Ltd

Naviewland Properties Ltd v Token Construction Co Ltd

and

Henry Wylie, Frank White and Alistair M. Smith, trading together as

Henry Wylie and Partners

by counterclaim
and

Ove Arup and Partners

(a firm)
third party, by counterclaim

Coram: *The Court of Appeal, Civil Division*
Davies LJ, Karminski LJ, Orr LJ

Date of judgment: *11 May 1972*

Counsel: *Mr L. Joseph for the appellant defendants*
Mr L.G. Krikler for the respondent plaintiffs

The defendants in the first action (plaintiffs in the second) entered into a contract with the plaintiffs on 17 October 1967 for the construction of an office in Glasgow for a sum in excess of £200,000. The contract was not in a known standard form and only the payment clause is set out in the judgment. There was no arbitration clause.

Interim certificates for £222,227 were issued by the defendants' architect and of these £184,699 were paid by the defendants. No final certificate was issued, although the work was completed.

The plaintiffs sued early in 1970 in the High Court for £37,527 3s 2d, the difference between the sums certified and those paid. They took out a summons under Order 14 (set out in 1 BLR 16) for summary judgment. However, the defendants filed affidavits in opposition, and persuaded the master that they had a substantial counterclaim against the plaintiffs and were given unconditional leave to defend.

Some two years later, the plaintiffs applied on a summons under Order 27, rule 3 for judgment for the £37,527 3s 2d.

Order 27 reads:

> *Judgments on admissions of facts*
> '(3) where admissions of fact are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the Court for such judgment or order as upon those admissions he may be entitled to, *without waiting for the determination of any other questions between the parties*, and the Court *may* give such judgment, or may make such order, on the application as it thinks *just*.' [Editor's italics]

The Official Referee gave judgment accordingly.

The Court of Appeal held:

1. The case of *Dawnays v Minter* (1 BLR 16) was binding on the Court of Appeal.

2. The defendants' contention that the certificates were invalid because the architects were negligent or 'careless and not up to their business', and ought not to have passed the work and issued the certificates, did not justify the Court of Appeal in making any order different from that made by the Official Referee in exercise of his discretion.

3. He was not wrong to fail to exercise the discretionary powers conferred on him by Order 47, rule 1:

> *'Power to stay execution by writ of fieri facias*
> 1.(i) 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 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. . .the Court may by order stay the execution of the judgment or order. . .'

Commentary

This hitherto unreported case is the one the learned editor of the 10th edition of Hudson's *Building and Engineering Contracts* relied upon as proving that what he termed 'the rule in *Dawnays'* case' (1 BLR 16) was inequitable. 'A division of the Court [of Appeal] presided over by Edmund Davies LJ has applied the principle, with some obvious misgivings, in a case where the court clearly considered that the defendant's counterclaim was not only certainly well-founded, but that to allow judgment to be entered might well drive the defendant himself into liquidation' (89 LQR 37). The reader can now judge for himself whether the Court of Appeal had any 'obvious misgivings' and whether 'the defendant's counterclaim' (ie *against the contractor*) was 'certainly well-founded'. There is no evidence whatsoever that the contractor, who had done the work four years earlier and had paid out money for his labour and for materials, was in any way responsible for any defects the building may have had—none having been proved. Indeed, the defendants had sold the completed building to Hambro's Bank Executor and Trustee Company, who presumably bought after survey, and had themselves taken a lease from the new owners. They seemed uncertain whether the alleged defects, if any, were the responsibility of their own architects, Henry Wylie and Partners, the consulting engineers, Ove Arup, or the contractor. They certainly seemed less than enthusiastic about pursuing a claim against the contractor, or anybody else for that matter. In 'early 1970', the plaintiffs' claim was stayed, and the defendants received leave to put forward their counterclaim. By 11 May 1972, they seem to have made little progress with it.

As to the suggestion that judgment might 'drive the defendant himself into liquidation', that seems to be pure speculation, for which there was no evidence whatsoever, but which, if true, might well be more related to the collapse of the property market than to the alleged defects of the building.

The learned Official Referee and the Court of Appeal were, it is submitted, clearly right to exercise the discretion conferred on them by Order 27 and Order 47 as they did, and the objections to the case voiced at 89 LQR 59, can now be seen to be not merely ill-conceived but with little relation to the facts.

Lord Salmon, who commented on this case in *Gilbert Ash v Modern Engineering* (1 BLR 103), appears not to have read the judgment itself but to have relied entirely upon the summary provided in the *Law Quarterly Review* as accurate. His opinion should be read accordingly.

Token Construction Co Ltd v Naviewland Properties Ltd and others

Court of Appeal, Civil Division
Davies LJ, Karminski LJ, Orr LJ

DAVIES LJ: This in some respects is a remarkable case. It is an appeal by the defendants Naviewland Properties Ltd from an order of His Honour Judge Stabb, who on the 14 March 1972 gave judgment for the plaintiffs under Order 27, rule 3, that is to say on admissions in the pleadings, for a sum of £37,527 3s 2d. I expect that that was done in decimal currency, but that was the amount of the claim on the writ.

The case arises out of a building contract which was entered into between the parties on the 17 October 1967, the defendants being the building owners and the plaintiffs the builders. The contract was for the erection of a substantial building in Glasgow at a total sum of well over £200,000. The amount of the judgment was ascertained in this manner. Interim certificates to a total of £222,227 had been issued (that is not disputed by the defendants); payments on account to the amount of £184,699 had been made; and the difference between those two sums was the amount of the judgment. The contract, as I say, was entered into in October 1967 and the building proceeded, though there has been no final certificate; and eventually on the 13 November 1969, the writ in this action was issued.

The contention of the defendants, whose case has been most clearly put forward in this court by Mr Joseph, is that in all the circumstances judgment for that amount should not be given in any event because the defendants have a most formidable counterclaim for damages against the builders and against the architects; and it is contemplated that they will also bring in the consulting engineers, who, rather oddly in this case and contrary to the usual practice, were nominated and selected by the builders themselves, and partly at any rate remunerated by the builders themselves.

The counterclaim arises in this way; and I am bound to say that on paper it is a formidable one. There are many complaints. We have been invited to look at a number of reports by architects, engineers, and so on. But the two main complaints can, I think, be summarised in this way. It is said that the facing bricks of this building were wholly unsatisfactory; but, perhaps even more important, it is said, and there is a good deal of evidence on paper to support it, that this building was structurally unsafe, and we have been told that it has had to be largely demolished and re-erected. It has obviously taken the defendants a long time to get on with the work of demolition and replacement. This matter was before the court in early 1970 on an application by the plaintiffs for judgment under Order 14; unconditional leave to defend was given, on the basis that there was this substantial counterclaim by the defendants. And it was only after a fairly recent decision of this court in the case of *Dawnays Ltd v F.G. Minter and Trollope & Colls Ltd*, to which I will have to return in a moment, that this application to the learned judge was made and succeeded.

Mr Joseph's main submission, as I have already indicated, is that the *prima facie* evidence of very substantial defects in this building, which he says must have been due partly to the architects but largely, on some of the

evidence, to the builders themselves, and possibly also due to the consulting engineers who came into the case in the circumstances that I have just adumbrated, makes it clear that judgment should not be given against the defendants.

I will turn now to the recent authority, which has twice been followed subsequently in this court, of *Dawnays'* case, to which I have just referred. I do not think that it is necessary for me to go into the facts of that case. It is sufficient if I read a most important passage from the judgment of the Master of the Rolls.

> 'Mr Knight submits that those two clauses [in the contracts] should be read together. I agree that they should be. But, so reading them, I hold that both clauses—clause 13 in the sub-contract and clause 27(b) in the main contract—refer to liquidated and ascertained sums which are established or admitted as being due. The reason is because, taking the various words, it is only such a sum which is capable of being "deducted"; it is only such a sum as to which it can be said that the sub-contractor is "liable to pay": it is only such a sum of which it can be said that the main contractor is "entitled". Each of those words shows to my mind that the only sums which can be deducted from the certificate are liquidated and ascertained sums established or admitted to be payable. It is not permissible to deduct claims which are unliquidated and are still matters of dispute.
>
> It must be remembered that a disputed claim cannot be referred at once to arbitration. Unless all agree, the determination of a disputed claim has to wait until the completion of the work. The arbitration clause makes that plain. It follows that, if Mr Knight's contention is correct, it would mean that his clients could hold this money (which is the sub-contractor's money) indefinitely. They could hold on to it until the end of the main contract, that is, until the whole work was completed. They could then hold on to it still longer whilst the dispute was referred to arbitration. They would not have to pay it over until the arbitration was concluded, maybe after a case stated to this court. That seems to me to run counter to the very purpose of interim certificates. Every business man knows the reason why interim certificates are issued and why they have to be honoured. It is so that the sub-contractor can have the money in hand to get on with his work and the further work he has to do. Take this very case. The sub-contractor has had to expend his money on steel work and labour. He is out of pocket. He probably has an overdraft at the bank. He cannot go on unless he is paid for what he does as he does it. An interim certificate is to be regarded virtually as cash, like a bill of exchange. It must be honoured. Payment must not be withheld on account of cross-claims, whether good or bad—except so far as the contract specifically provides. Otherwise any main contractor could always get out of payment by making all sorts of unfounded cross-claims. All the more so in a case like the present, when the main contractors have actually received the money.'

That case is binding upon us and was followed in this court in *Frederick Mark Ltd v Schield.* I do not think that I need quote from that, or from the other case to which our attention has been drawn, *GKN Foundations Ltd v Wandsworth London Borough.*

Mr Joseph in his very clear argument has sought to distinguish *Dawnay's* case on several grounds. Before going to those arguments, I think that I should refer to the payment clause in the contract with which we are presently concerned. It is not an RIBA form of contract; and there is no arbitration clause in it. The payment clause is in these terms:

> 'At the Period of Interim Certificates named in the Appendix to these Conditions [that is, monthly] the Architect shall issue a certificate stating the amount due to the Contractor from the Employer, and the Contractor shall, on presenting any such certificate to the Employer, be entitled to payment therefor within the Period for Honouring Certificates named in the Appendix to these Conditions'

and that period is 14 days. Interim certificates were admittedly given, and to the extent that I have mentioned at the beginning of this judgment are admittedly unpaid.

Mr Joseph says, first of all, that there is no arbitration clause in the present contract. That is perfectly true. But it seems to me that that makes no valid difference at all. This case has shown that, although there has been no final certificate, the building owner, by putting forward his counterclaim in 1970, has held up the moneys which otherwise would be due to the plaintiffs on the certificates; and, from what we can see of this case, if the certificates are not to be honoured it may well be a matter of years before the matter is finally adjudicated upon.

Secondly, says Mr Joseph, the importance that the Master of the Rolls attached to keeping in that case, the sub-contractor in funds to continue the work does not arise here because, he says, the contractors' work here has been done, done terribly badly according to Mr Joseph, of course, but has been done, and therefore they do not want any money to continue work in progress. But that is, I think, to ignore the fact that the plaintiffs here have had to spend money on materials and on labour, with what result remains to be seen when this action comes to be tried; but they have had to spend the money, and either they are out of pocket themselves or for aught we know they have a loan at a bank on which they have had to pay interest.

The third distinction which Mr Joseph puts forward in this court is that the evidence here of bad work is so overwhelming that that puts this case in quite a different category from the other three cases to which our attention has been drawn. He says that the hardship on the defendants here, if this order stands, is really so great that justice demands that a different order should be made. He says, and we accept it from him of course, that the defendants' financial position is unhappy. If they are to have this order enforced against them, it may well be that they will be driven into liquidation. It may well be that, instead of their having the conduct and control of the counterclaim, that will be in the hands of a liquidator. He points out that, in view of the fact that this building was sold to Hambro's Bank Executor and Trustee Company by the defendants, who then took a lease from the new freeholders, they have had to pay for some two years now, and will have to continue to pay, very substantial sums by way of rent: we were told that they have paid something of the order of £95,000. It is also said by Mr Joseph, no doubt with accuracy, that since this building has had to be substantially demolished and re-erected the cost of that will be something of the order of £50,000 to £60,000: and all those burdens will be likely to break the

back of the defendant company without the added straw of this judgment for £37,000 odd. It is also said that although in *Frederick Mark Ltd v Schield* there was a dispute as to the computation of the certificates, there was no attack on the certificates at all; whereas here it is the defendants' case that the architects were negligent, or careless and not up to their business, and that they ought not to have passed this work and issued these certificates at all.

That is a summary, perhaps inadequate, of the considerations that have been put before us on behalf of the defendants on this part of the case. It does appear, I must say, that the defendants, in the events that have happended, do find themselves in an extremely unhappy position. But nevertheless I have come to the conclusion, despite the arguments that I have summarised, that, in the light of the authorities to which I have referred, particularly perhaps *Dawnays'* case and also *Frederick Mark Ltd v Schield*, this court is constrained to take the view on this part of the case that the existence of this substantial counterclaim by the defendants does not justify this court in making any order different from that made by this court in the earlier cases.

The second point taken by Mr Joseph for the defendants is really a quite distinct point. It is said that the court ought to exercise what is, I suppose, its discretionary power under Order 47, rule 1, which provides that:

> '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 inexpendient 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.'

Judge Stabb, we were told, doubted whether, in the light of the authorities to which I have been referring, he had any jurisdiction to make an order under Order 47. But in any event he took the view that the defendants had been guilty of so much delay since April 1970, when it is said that these defects were first ascertained, up to the present time, two years or more, that he ought not, in the exercise of his discretion, to suspend execution on this judgment. For myself, though I do not think that it is necessary to discuss the matter, I should have thought that the learned judge would have had discretion to make the order had he thought fit. But, despite the possible hardship facing these defendants, I have come to the conclusion that he was quite right in refusing to suspend the judgment, as he was asked to on proper motion, by the defendants.

For those reasons, though one cannot help feeling considerable sympathy for the defendants, which does not help them very much, I am of opinion that the learned judge's order ought to be affirmed, and that this appeal ought to be dismissed.

KARMINSKI LJ: I agree.

This is a case where, as my Lord has said, on the evidence on affidavit it is