10 ConLR 51

John Jarvis Ltd v Rockdale Housing Association Ltd

COURT OF APPEAL (CIVIL DIVISION)

SIR NICOLAS BROWNE-WILKINSON V-C, BALCOMBE AND BINGHAM LJJ

12 DECEMBER 1986

Building contract – JCT Standard Form (1980 edition), Clause 28.1.3.4 – Whether the phrase "caused by some negligence or default of the contractor" extends to cover negligence or default of nominated sub-contractors.

Determination of employment – Clause 28 – Whether contractor's notice of determination given "unreasonably or vexatiously"

O In clause 28.1.3.4 of JCT 80 the term "the contractor" does not include a nominated sub-contractor, his servants or agents. The language of clause 28.1.3.4 is directed to the question whether the issue of a postponement instruction by the architect is the fault of the contractor. A contractor does not lose his right to determine his employment because a nominated sub-contractor has failed to perform his work.

O "Unreasonably" as used in the proviso to clause 28 of JCT 80 is a general term which can include anything which can be objectively judged to be unreasonable, while "vexatiously" connotes an ulterior motive to oppress or annoy.

On 8 March 1983 the respondents (Jarvis) entered into a contract with the appellants (Rockdale) for the erection of 50 flats for the elderly, with two wardens' flats and ancillary accommodation, at Sevenoaks, Kent, using the JCT Standard Form of building contract, 1980 edition, private version, with quantities. The flats were to be built on pile foundations, and Elmat Piling Ltd (Elmat) were nominated as sub-contractors for the work, having entered into a direct contract with Rockdale in form NSC/2 on 23 February 1983. Pursuant to the architect's nomination instruction, Jarvis sub-contracted with Elmat on 18 April 1983 using the JCT Standard Form of nominated sub-contract NSC/4. This provided for 137 piles to be completed in three areas, for Elmat to commence work on 16 May

1983 and for the whole of the piling work to be completed by 10 June 1983. Elmat did not in fact start work until 24 May 1983 and by 17 June 1983 (when Jarvis requested the architect formally to certify that Elmat had failed to complete on time) they had only completed or commenced work on 74 piles, of which only 31 had been approved by the consulting engineer so that concreting work could be carried out. The architect certified that Elmat had failed to complete on time on 24 June 1983 and indicated that in principle he would

grant Jarvis an extension of time. On 28 June 1983 Jarvis gave the architect formal notice of default by Elmat under clause 35.24.1 as the first step towards renomination.

On 30 June 1983 a test to one pile proved satisfactory, and on 4 July Elmat completed construction of the piles. On 5 July 1983 a further pile was tested under load and failed, as did another tested 6 days later. At this stage Elmat stated that their sub-contract was complete, and shortly thereafter left the site. Meanwhile the architect instructed Jarvis to require Elmat to prove all the remaining piles, as provided in the piling specification, and the local authority's engineer declined to accept any pile constructed by auger and required further tests on the piles.

On 13 July 1983 Jarvis wrote to the architect stating that they could do no more work at that stage and seeking instructions. The architect replied by letter on 15 July informing Jarvis that they “should cease work on this element of the contract”. The trial judge held (and the appellants now accepted) that this letter was a valid instruction to postpone work under clause 23.2. By this time four piles had been tested and two of them had failed the tests. There was subsequent correspondence and meetings between the parties and their advisers (see (1986) 5 ConLR 118, at pp. 120–121), and Jarvis sought a renomination instruction. No such instruction was forthcoming and, after taking counsel's advice, on 8 September 1983 Jarvis gave notice of determination of their employment under clause 28.1.3.4 of JCT 80 on the ground that the “carrying out of the whole of the uncompleted works has been and is suspended for a continuous period of one month by reason of the architect's instruction of 15 July 1983 issued under clause 23.2 to cease work on the ground beams ...”.

The trial judge, Mr Recorder Ronald Bernstein QC, held ((1986) 5 ConLR 118) that Jarvis were contractually entitled to give that notice and determined a number of other preliminary issues, substantially in favour of Jarvis. Rockdale appealed against that judgment, and in the Court of Appeal the issue was whether, insofar as his decision was one of law, it was correct, and whether, insofar as it was one of fact, it was challengeable on any of the limited grounds available where the decision of the tribunal below was (as here) subject to appeal only on a point of law.

HELD: The appeal would be dismissed on the following grounds:

(1) “The contractor” in clause 28.1.3.4, whilst including the contractor's

servants or agents, does not include a sub-contractor nominated by the employer. Clause 28.1.3.4 is directed to the practical question: whose fault is it that the architect's instruction to postpone work was given? “If it was the fault of the contractor, his servants or agents, then the contractor cannot rely on the suspension of work which followed the notice to postpone as a ground for determining the contract ... If it was not the fault of the contractor, his servants or agents, he can. He does not lose that right because a nominated sub-contractor chosen by the employer has failed to perform his contract ...” (*per curiam*, see p. 62). On the facts of the case it was plain that the issue of the postponement instruction was caused by Elmat's defective performance and repudiatory conduct and not by any negligence or default of Jarvis even if it was assumed that Jarvis was in technical breach of the main contract (see p. 63).

(2) The contractor's notice was not given “unreasonably or vexatiously” within the proviso to clause 28. Although the trial judge had not misdirected himself, he had failed to take a number of relevant matters into account in reaching a conclusion on unreasonableness. Had either party asked the court to remit the case to the trial judge to make the final factual decision, it would have done so (see pp. 69–70).

(3) Since the parties were content for the court to make the decision and there was little conflict on the primary facts, it would do so. In all the circumstances, it was not possible to conclude that the contractor's decision to determine his employment lay outside the band of possible reasonable decisions (see pp. 70–71).

BINGHAM LJ.

This is an appeal against a judgment of Mr Recorder Bernstein QC sitting as a Deputy Official Referee on 29 November 1985. He then determined, substantially in favour of the plaintiff, a number of preliminary issues raised between the parties: (1986) 5 ConLR 118. The defendant appeals against his decision, although the area of dispute is now considerably narrowed.

The plaintiff (the contractor) entered into a contract with the defendant (the employer) for the building of 50 flats for the elderly plus 2 wardens' flats and ancillary accommodation on a site in Sevenoaks. The contract price was some £1 282 000. The contract period was 86 weeks from possession of the site, which was given in April 1983. Subcontractors were nominated to carry out certain specialist works, one of the companies so nominated being Elmat Piling Ltd (Elmat) who were to build 137 piles. Elmat were late in starting their work, and the work, when done, was defective. Elmat then withdrew from the site. Until the piles were properly built the contractor could not carry on with the main contract works. Pursuant to the conditions of the main contract, the architect gave the contractor an instruction which the judge held (and which the employer now accepts) to have been a valid instruction to

postpone the contract works. Just under two months later, the contractor gave notice to the employer, terminating the main contract. This issue before the judge was whether the contractor was contractually entitled to give that notice. He held that he was. In this court the issue is whether, insofar as the judge's decision was one of law, it was correct, and whether, insofar as it was one of fact, it is challengeable on any of the limited grounds available where the decision of the tribunal below is (as here) subject to appeal only on a point of law.

The contract between the employer and the contractor, made on 8 March 1983, was in the JCT 1980 Standard Form private version with quantities. Under the articles of agreement between the parties, John Jarvis Ltd were called “the Contractor”, and after reference to the contract bills of quantities and the contract drawings the contractor undertook to carry out and complete the works shown upon, described by or referred to in those documents. In the conditions which formed part of the contract, “contractor” was defined to mean “the person named as Contractor in the Articles of Agreement”, namely John Jarvis Ltd.

Clause 2.1 of the conditions provided:

> “The Contractor shall upon and subject to the Conditions carry out and complete the works shown upon the Contract Drawings and described by or referred to in the Contract Bills and in the Articles of Agreement, the Conditions and the Appendix ... in compliance therewith, using materials and workmanship of the quality and standards therein specified”.

By clause 4.1.1 the contractor was required forthwith to comply with all instructions issued to him by the architect. By clause 6.6.1 the contractor was obliged to comply with statutory and local authority requirements. Clause 8.1 provided that all materials, goods and workmanship should so far as procurable be of the respective kinds and standards described in the contract bills. The clause also empowered the architect to direct that work be opened up for inspection, for which the contractor was to be paid unless the work when opened up was found to be defective.

By clause 19.2:

> "The Contractor shall not without the written consent of the architect (which consent shall not be unreasonably withheld) sub-let any portion of the Works. A person to whom the Contractor sub-lets any portion of the Works other than a Nominated Sub-Contractor is in this Contract referred to as a 'Domestic Sub-Contractor'".

Nominated sub-contractors were the subject of special conditions. Clause 23.2 provided:

> "The Architect may issue instructions in regard to the postponement of any work to be executed under the provisions of this Contract".

This provision is of major importance in this case, because the later clause on which the argument turns depends upon the judge's conclusion (now,

as I have said, accepted) that the architect did give the contractor an instruction under this clause following Elmat's withdrawal from the site.

Clause 25 is an important clause, dealing with extension of time. I need only for present purposes quote sub-clauses 25.2.1.1, 25.3.1, 25.3.1.1 and 25.3.1.2:

> "Clause 25.2.1.1. If and whenever it becomes reasonably apparent that the progress of the Works is being or is likely to be delayed the Contractor shall forthwith give written notice to the Architect of the material circumstances including the cause or causes of the delay and identify in such notice any event which in his opinion is a Relevant Event...."
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> Clause 25.3.1. If, in the opinion of the Architect, upon receipt of any notice, particulars and estimate under clauses 25.2.1.1 and 25.2.2.,
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> 1.1 any of the events which are stated by the Contractor to be the cause of the delay is a Relevant Event and
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> 1.2 the completion of the Works is likely to be delayed thereby beyond the Completion Date ... the Architect shall in writing to the Contractor give an extension of time by fixing such later date as the Completion Date as he then estimates to be fair and reasonable".

The "relevant events" specified in the clause included *force majeure*, exceptionally adverse weather conditions, loss or damage caused by certain insured perils and, relevantly for present purposes, compliance with the architect's instructions under clause 23.2 and "delay on the part of nominated sub-contractors or nominated suppliers which the contractor has taken all practicable steps to avoid or reduce". The list of "relevant events" in the clause is a long one, and I have not quoted them all, but in each case the delay is either the

responsibility of the employer or a nominated sub-contractor or nominated supplier, or it is caused by something outside the control of the employer and the contractor. The list does not, I think, specify any event which would appear to suggest personal fault on the part of the contractor.

Clause 26 is also important for present purposes. I quote the following extracts:

> "Clause 26. Loss and expense caused by matters materially affecting regular progress of the Works.
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> 26.1. If the Contractor makes written application to the Architect stating that he has incurred or is likely to incur direct loss and/or expense in the execution of this Contract for which he would not be reimbursed by a payment under any other provision in this Contract because the regular progress of the Works or of any part thereof has been or is likely to be materially affected by any one or more of the matters referred to in clause 26.2 and if and as soon as the Architect is of the opinion that the regular progress of the Works or of any part thereof has been or is likely to be so materially affected as set out in
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> the application of the Contractor then the Architect from time to time thereafter shall ascertain, or shall instruct the Quantity Surveyor to ascertain, the amount of such loss and/or expense which has been or is being incurred by the Contractor".
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> 26.2. The following are the matters referred to in clause 26.1 ...
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> 26.2.5. Architect's instructions under clause 23.2 issued in regard to the postponement of any work is to be be executed under the provisions of this Contract ..."

Any sum ascertained under this clause was to be added to the contract sum payable to the Contractor.

Clause 27 provided for determination of the main contract by the employer upon various specified grounds. Save where the contractor had become insolvent, the employer was bound to give written notice specifying the contractor's default and notice of termination could only be given if the default continued for 14 days after receipt of the notice. Even then, the notice of termination might not be given unreasonably or vexatiously.

Clause 28 provided for determination of the main contract by the contractor. It is of such central importance in this appeal that I think I should quote the whole of clause 28.1 (excluding the provision dealing with insolvency):

> "Clause 28. Determination by Contractor
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> 28.1. Without prejudice to any other rights and remedies which the Contractor may possess, if
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> 28.1.1 the Employer does not pay the amount properly due to the Contractor on any certificate (otherwise than as a result of the operation of the VAT Agreement) within 14 days from the issue of that certificate and continues such default for 7 days after receipt by registered post or recorded delivery of a notice from the Contractor stating that notice of determination under clause 28 will be served if payment is not made within 7 days from receipt thereof; or

28.1.2 the Employer interferes with or obstructs the issue of any certificate due under this Contract; or

28.1.3 the carrying out of the whole or substantially the whole of the uncompleted Works (other than the execution of work required under clause 17) is suspended for a continuous period of the length named in the Appendix by reason of:

28.1.3.1 *force majeure*; or

3.2 loss or damage to the Works (unless caused by the negligence of the Contractor, his servants or agents or any sub-contractor, his servants or agents) occasioned by any one or more of the Clause 22 Perils; or

3.3 Civil commotion; or

3.4 Architect's instructions issued under clause 2.3,13.2 or 23.2 unless caused by reason of some negligence or default of the Contractor; or

10 ConLR 51 at 57

3.5 the Contractor not having received in due time necessary instructions, drawings, details or levels from the Architect for which he specifically applied in writing provided that such application was made on a date which having regard to the Completion Date was neither unreasonably distant from nor unreasonably close to the date on which it was necessary for him to receive the same; or

3.6 delay in 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 or the failure to execute such work or delay in the supply by the Employer of materials and goods which the employer has agreed to provide for the Works or the failure so to supply; or

3.7 the opening up for inspection of any work covered up or the testing of any of the work, materials or goods in accordance with clause 8.3 (including making good in consequence of such opening up or testing), unless the inspection or test showed that the work, materials or goods were not in accordance with this Contract; then the Contractor may thereupon by notice by registered post or recorded delivery to the employer or Architect forthwith determine the employment of the Contractor under this Contract; provided that such notice shall not be given unreasonably or vexatiously."

The period named in the appendix (see clause 28.1.3) was one month. In giving notice of determination here, the contractor relied on sub-clause 28.1.3.4, basing himself on the architect's instruction to postpone the works under clause 23.2 which had led to a delay of over one month. Upon such determination, if valid, the contractor became entitled to be paid by the employer for the total value of work completed at the date of determination and of work begun and executed but not completed at that date and any sum ascertained in respect of direct loss and/or expense under clause 26 and the total cost of materials and goods properly ordered and any direct loss and/or damage caused to the contractor or to any nominated sub-contractor by the determination. The learned judge was content to assume that this clause gave the contractor the right to be paid all the profit that he would have made if he had completed the works in accordance with the contract, and before us neither party challenged that assumption.

Clause 35 of the contract contained a complex and detailed code of conditions governing the position of nominated sub-contractors. I need not set out all these provisions, and having regard to the conclusion to which I have come I shall omit reference even to some provisions which feature prominently in the argument. But the outline scheme is important. Clause 35.1 provided (in part):

> "35.1 Where
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> 35.1.1 in the Contract Bills ...
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> *10 ConLR 51 at 58*
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> the Architect has whether by the use of a prime cost sum or by naming a sub-contractor reserved to himself the final selection and approval of the sub-contractor to the Contractor who shall supply and fix any materials or goods or execute work the sub-contractor so named or to be selected and approved shall be nominated in accordance with the provisions of clause 35 and a sub-contractor so nominated shall be a Nominated Sub-Contractor for all the purposes of this Contract".

Clause 35.4 provided that "No person against whom the Contractor makes a reasonable objection shall be a Nominated Sub-Contractor".

In *North West Metropolitan Regional Hospital Board* v *TA Bickerton & Son Ltd* [1970] 1 All ER 1039, [1970] 1 WLR 607, the House of Lords held that the employer was under an implied duty to re-nominate upon withdrawal of a nominated sub-contractor and urged reconsideration of the 1963 RIBA Form to make that duty express. This form gives effect to that recommendation. Sub-clause 35.24 provided:

> "35.24 If in respect of any Nominated Sub-Contract:
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> 35.24.1 the Contractor informs the Architect that in the opinion of the Contractor the Nominated Sub-Contractor has made default in respect of any one or more of the matters referred to in clause 29.1.1 to 1.4 of Sub-Contract NSC/4 or NSC/4a as applicable and the Contractor has passed to the Architect any observations of the Sub-Contractor in regard to the matters on which the Contractor considers the Sub-Contractor is in default; and the Architect is reasonably of the opinion that the Sub-Contractor has made default ..." [then:]
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> 35.24.4 Where clause 35.24.1 applies:
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> 4.1 the Architect shall issue an instruction to the Contractor to give to the Sub-Contractor the notice specifying the default to which clause 29.1 of Sub-Contract NSC/4 or NSC/4a as applicable refers; and may in that instruction state that the Contractor must obtain a further instruction of the Architect before determining the employment of the Sub-Contractor under clause 29.1 of Sub-Contract NSC/4 or NSC/4a as applicable; and
>
> 4.2 the Contractor shall inform the Architect whether, following the giving of that notice for which the Architect has issued an instruction under clause 35.24.4.1, the employment of the Sub-Contractor has been determined by the Contractor under clause 29.1 of Sub-Contract NSC/4 or NSC/4a as applicable or where the further instruction referred to in clause 35.24.4.1 has been given by the Architect the Contractor shall confirm that the employment of the Sub-Contractor has been determined; then

> 4.3 if the Contractor informs, or confirms to the Architect that the employment of the Sub-Contractor has been so determined the
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> *10 ConLR 51 at 59*
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> Architect shall make such further nomination of a sub-contractor in accordance with clause 35 as may be necessary to supply and fix the materials or goods or to execute the work; provided that where the employment of the Nominated Sub-Contractor has been determined for the reasons referred to in clause 29.1.3 of Sub-Contract NSC/4 or NSC/4a as applicable, the Contractor shall be given the opportunity to agree (which agreement shall not be unreasonably withheld) the price to be charged by the substituted sub-contractor as provided in clause 35.18.1".

Lastly, I should mention that the contract provided for the payment of liquidated damages for delay at the rate of £3 000 per week.

Side by side with this main contract and (as has just been seen) referred to therein, was a series of nominated sub-contract forms. The first of these NSC/1, was a tender by Elmat for the piling sub-contract works. This appear to have been signed for Elmat on 20 December 1982. The architect gave preliminary notice of his nomination of Elmat before the main contract was made, but both the architect and the contractor signed NSC/1 to indicate (respectively) their approval and acceptance of it afterwards, and by form NSC/3 dated 6 April 1983 the architect formally nominated Elmat. The piling work was to begin on 16 May and to be completed by 10 June.

Form NSC/2 contained, unusually, an agreement directly between the employer and Elmat. In *North West Metropolitan Regional Hospital Board* v *T. A. Bickerton & Son Ltd* [1970] 1 All ER 1039, [1970] 1 WLR 607 Lord Reid (at p. 611G) referred to the scheme for nominated sub-contractors as

> "An ingenious method of achieving two objects which at first sight might seem incompatible. The employer wants to choose who is to do the prime cost work and to settle the terms on which it is to be done, and at the same time to avoid the hazards and difficulties which might arise if he entered into a contract with the person whom he has chosen to do the work."

Form NSC/2 represents a further refinement of the scheme. Among the obligation which the parties to this agreement undertook towards each other was this:

> "2.1 The Sub-Contractor warrants that he has exercised and will exercise all reasonable skill and care in
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> 1. the design of the Sub-Contract Works insofar as the Sub-Contract Works have been or will be designed by the Sub-Contractor; and
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> 2. the selection of materials and goods for the Sub-Contract Works insofar as such materials and goods have been or will be selected by the Sub-Contractor; and
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> 3. the satisfaction of any performance specification or requirement insofar as such performance specification or requirement is included or referred to in the description of the Sub-Contract Works included
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> *10 ConLR 51 at 60*

> in or annexed to the Tender. Nothing in clause 2.1 shall be construed so as to affect the obligations of the Sub-Contractor under Sub-Contract NSC/4 in regard to the supply under the Sub-Contract of workmanship, materials and goods."

The last sentence of this sub-clause echoes sub-clause 35.21 of the main contract, which I have not so far quoted:

> "35.21 Whether or not a Nominated Sub-Contractor is responsible to the Employer in the terms set out in clause 2 of the Agreement NSC/2 or Clause 1 of the Agreement NSC/2a the Contractor shall not be responsible to the Employer in respect of any Nominated Sub-Contract Works for anything to which such terms relate. Nothing in clause 35.21 shall be construed so as to effect the obligations of the Contractor under this Contract in regard to the supply of workmanship, materials and goods."

Lastly, form NSC/4 contained the formal sub-contract made between the contractor and Elmat executed on 18 April 1983. As one would expect, this closely followed and reproduced (*mutatis mutandis*) the conditions of the main contract. Elmat undertook to carry out and complete the piling sub-contract works in compliance with the sub-contract using materials and workmanship of the quality and standards specified. I need not rehearse the standard terms of the sub-contract, but the piling specification which formed part of it is of importance. The piles when built were to be tested. If any working pile failed the test, the remainder of the piles constructed before that test were to stand condemned as unsatisfactory until each individual pile had been demonstrated by Elmat to be of acceptable quality and to have an acceptable bearing capacity.

The first major issue between the parties turned on the proper construction of sub-clause 28.1.3.4. Mr Martin Collins QC for the employer argued that the contractor was not entitled to give notice of determination in reliance on this sub-clause because the architect's instruction under clause 23.2 had been "caused by reason of some negligence or default of the contractor", thereby bringing the case within the exception in sub-clause 28.1.3.4. Put very briefly, the argument was this. "Contractor" in 28.1.3.4 was in its context to be understood as meaning "the contractor his servants and agents and any sub-contractor and his servants and agents". Elmat's admitted breach of contract was thus a default of the contractor within the meaning of the sub-clause. But if "contractor" was to be understood as meaning simply "the contractor, his servants and agents", the result was the same: since the contractor was contractually responsible for all sub-contractors, whether nominated or domestic, every breach by a sub-contractor necessarily put the contractor in breach of the main contract; the result of Elmat's breach was accordingly to put the contractor in breach of the main contract. According to this alternative submission the exception to 28.1.3.4 was to be understood

as if it read "unless caused by any breach by the contractor of his obligations hereunder."

Mr Anthony Colman QC for the contractor put a different construction on the sub-clause. In reliance on the absence of reference in 28.1.3.4 to the contractor's servants and agents, the reference to "the contractor" should be understood, as the definition clause indicated, as referring to John Jarvis Ltd. This meant, it was argued, the directing mind or senior management of the contractor, on the part of whom no negligence or default could be shown. If, however, "the contractor" was to be understood more widely, it still excluded sub-contractors their servants and agents, and it was argued that every breach by a sub-contractor did not put the contractor in breach of the main contract: the contractor's duty was to hand over completed work in compliance with the main contract, and until he failed to do that he was not in breach of the main contract whether or not any nominated sub-contractor was in breach of his subcontract with him. Thus it was not correct that Elmat's breach automatically put the contractor in breach of the main contract. If that was wrong, the contractor relied on clause 35.21 as excusing him.

I cannot accept the employer's submission that “the contractor” in clause 28.1.3.4 is to be understood as including sub-contractors and their servants and agents. Both in this clause and elsewhere in the contract the draftsman has made express reference to sub-contractors, their servants and agents. The absence of any such reference here is not (as Mr Collins argued) explained by the context, nor can it be dismissed as of no significance. Even an inexperienced draftsman could be relied upon to avoid such an error. As Diplock LJ observed in *Prestcold (Central) Ltd* v *Minister of Labour* [1969] 1 All ER 69, [1969] 1 WLR 89 at p. 97B:

> “The habit of a legal draftsman is to eschew synonyms. He uses the same words throughout the document to express the same thing or concept, and consequently if he uses different words the presumption is that he means a different thing or concept ... a legal draftsman aims at uniformity in the structure of his draft.”

On the other hand, I cannot accept the contractor's submission that “the contractor” should be understood as excluding reference to the contractor's servants and agents. It is true that elsewhere in the clause express reference is made to the contractor's servants and agents and the principles I have mentioned, strictly applied, would compel the conclusion that the lack of reference here was significant. I do not, however, think that this contract can be quite so strictly construed. Elsewhere in the conditions “the contractor” can only be sensibly understood as including his servants and agents. It would make little commercial sense, and would introduce a new and unnecessary complexity to this contract (which is already complex enough), if the exception in clause 28.1.3.4 operated only where there was negligence on the part of the contractor's directing mind

or senior management. I feel sure that is not what the draftsman intended. “The contractor” can in my judgment be naturally and sensibly understood as referring to, in this case, John Jarvis Ltd, its servants and agents, through whom alone alone it can, as a corporation, act.

Whether the contractor is necessarily put in breach by every breach, or by the repudiatory breach, of a nominated sub-contractor is a question of some nicety. In contending that he is, the employer relied in particular on the contractual chain, in which the contractor assumed responsibility for the work to be done by a nominated sub-contractor, and this responsibility he continued to bear even where (as here) the nominated sub-contractor entered into a direct contractual relationship with the employer. The contractor, in opposing this submission, relied on various observations in *North West Metropolitan Regional Hospital Board* v *T. A. Bickerton & Son Ltd* [1970] 1 All ER 1039, [1970] 1 WLR 607 (see for example pages 620E and 625E) and on various provisions of this contract (some of which I have not mentioned) to show that the nominated sub-contractor's breach did not put the contractor in breach until the time of practical completion. On the construction of the sub-clause which I prefer it is not necessary to decide this question, and I think it undesirable to do so. I am content to assume in the employer's favour (but without deciding) that the effect of Elmat's breach of its sub-contract was to put the contractor in breach of the main contract.

It is, however, noticeable and in my judgment significant that sub-clause 28.1.3.4 makes no reference to breach of contract as such. That is surprising if the existence of a breach of contract by the contractor is what determines his right or lack of right to rely on the sub-clause. In my view the language of the sub-clause is directed to a much more practical (and to men on the ground much more easily answered) question: whose fault is it that the architect's instruction to postpone the work was given? If it was the fault of the contractor his servants or agents, then the contractor cannot rely on the suspension of work which followed the notice to postpone as a ground for determining the contract. That accords with ordinary notions of fairness and good sense. If it was not the fault of the contractor, his servants or agents, he can. He does not lose the right because a nominated sub-contractor chosen by the employer has failed to perform his contract and so (on the assumption I am making) put the contractor in breach of the main contract, despite the lack of any actual fault (as opposed to technical breach of contract) on the part of the contractor his servants and agents. That also accords, in my judgment, with ordinary notions of fairness and good sense. If the applicability of the sub-clause depended on a builder's capacity to resolve the questions of interpretation debated before us

over a number of hours, the sub-clause would in practical terms become almost inoperable. I do not think that is what the draftsman intended.

10 ConLR 51 at 63

On the facts of the present case it is plain beyond argument that the architect's instruction to postpone which led to the suspension of work was caused by Elmat's defective performance and repudiatory conduct and not by any negligence or default of the contractor even if it be assumed that he was in technical breach of the main contract. No criticism of the contractor's performance has been made at any stage. In agreement with the learned judge, I accordingly resolve this question in favour of the contractor.

The second major issue between the parties at first instance was whether the contractor's notice of determination had been given “unreasonably or vexatiously”. The employer argued that it had. The judge, in agreement with the contractor's submission, ruled that it had not. The employer challenged that conclusion. Recognising, however, that RSC Order 58 r. 4(3) prevented any frontal attack on what was essentially a conclusion of fact, Mr Collins relied on the familiar *Edwards* v *Bairstow* [1956] AC 14, [1955] 3 All ER 48 grounds for challenging such a decision, arguing (*a*) that the judge had misdirected himself, (*b*) that he had failed to take account of all relevant factors; and (*c*) that he had reached a conclusion which no reasonable Official Referee properly directed in law could have reached. In order to understand these submissions it is necessary first to summarise the facts leading up to the contractor's determination of the contract and then to see how the learned judge expressed his conclusions.

Elmat should have begun work on 16 May 1983. They did not appear and on that date the contractor gave the architect notice of delay under the contract. A week later Elmat did start work, but on 3 June the contractor gave the architect a further notice of delay. On 6 June the contractor wrote to the architect in strong terms expressing extreme concern at the delay which had occurred and the adverse financial consequences which he feared would result from it. Elmat's work should have been finished by 10 June, but by 17 June they had only completed or begun work on 74 piles out of the total of 137. On the 14 June the contractor again gave notice of delay, elaborated on the 15 June. On 17 June the contractor requested the architect formally to certify that Elmat had failed to complete on time. On 24 June the architect did so certify, and showed himself willing in principle to grant an extension of time. On 28 June the contractor gave the architect formal notice of default by Elmat, this being the first step towards re-nomination. On 30 June one pile was tested and found acceptable. On 4 July Elmat completed construction of the piles. On 5 July a further pile was tested under load and failed, as did another pile tested six days later. At this stage Elmat, somewhat surprisingly, declared that their sub-contract was complete, and shortly thereafter they left the site. Meanwhile, the architect called on the contractor to require Elmat to prove all the remaining piles, as provided in

10 ConLR 51 at 64

the piling specification, and the local authority declined to accept piles built by a certain method.

On 13 July the contractor wrote to the architect in a tone of some desperation, suggesting that they could do no more work at that stage and seeking instructions. On 15 July the architect replied “you should cease work on this element of the contract.” Preliminary instructions were given for determining Elmat's sub-contract with a view to re-nomination. It was this letter from the architect which amounted, as all are now agreed, to an instruction to postpone the work under clause 23.2. But it seems plain that the architect did not intend to give such an instruction nor did he then think that he had done so. At that stage the contractor also did not think that the architect had done so.

The situation was, on any showing, an unhappy one. The contract was a month overdue, and instead of 137 sound piles having been built there were 137 piles of which two (out of four tested) had failed. A valid requirement for the remaining piles to be tested had been made, but there was effectively no longer a piling sub-contractor. The contractor made very plain his anxiety at the risks to which he felt exposed, which the architect recognised and offered to discuss. A meeting took place between the contractor, the architect and

Elmat on 27 July, but without result. A further meeting took place on 1 August, attended by Elmat and their solicitors, the contractor and his independent adviser, the architect and the engineer. By this time a core test on three piles had shown Elmat's workmanship to be defective. The contractor had already concluded that Elmat's conduct was repudiatory, and at the meeting Elmat's solicitors appeared to accept this. The contractor accordingly asked the architect, on 2 August, to renominate a piling sub-contractor. At this point the contractor consulted the solicitor who now represents him. On 4 August the architect agreed to re-nominate, but on the same day (and again two weeks later) Elmat's solicitors denied that Elmat had repudiated, while accepting that there could be a re-nomination without prejudice to that denial. This, as the judge found, caused some perplexity, because both the contractor and the architect were of opinion that there could be no re-nomination until the original sub-contract had been in some way disposed of.

On 15 August 1983 one month expired from the architect's notice to postpone, and on 24 August the contractor again called upon the architect to re-nominate. There was a note of urgency in this letter. In fact, the architect was taking steps to obtain competitive tenders; indeed, it was the contractor who had on 1 August pressed for competitive tendering, no doubt apprehending that when he came to claim from Elmat any compensation he had had to pay the employer as a result of the re-nomination Elmat would challenge any assessment based on a non-competitive tender. The contractor was not, however, involved in, or informed of the progress of, the tendering.

On 6 September the contractor's solicitor wrote a letter to counsel asking him to advise. This letter makes no reference to any instruction by the architect to postpone the work, but does contain the following paragraph:

> “John Jarvis wish to determine the contract with the employer because if they do not they envisage incurring substantial expenses as a result of the delay now being suffered, which they consider they will not be able to recover from the employer under clause 26 of the main contract, but will only have a remedy against Elmat, who it is felt, are financially unsound and will certainly defend any proceedings instituted against them.”

Counsel was asked specifically whether the contractor was entitled to determine the main contract under the provision referred to in the letter or for any other reason. It seems plain that on that date the contractor was not expecting an early termination of the contract, because on 7 September he sent to the architect a report on the ground and soil conditions on the site, inviting the architect's observations. Also on that date, the consulting engineer reported to the architect on the piling tenders received and recommended one tenderer for re-nomination. The contractor did not see that letter, but did know that a re-nomination was imminent. It was, however, September now, and it would be about two months before the piling would be completed.

On 7 September leading and junior counsel advised the contractor in consultation. They advised that the architect's letter of 15 July was an instruction to postpone work within the meaning of clause 23.2, which came as a surprise to the contractor. It does not appear that counsel advised, certainly at any length, on unreasonableness, nor did the contractor then or at any other time seek advice on the financial risk to him if notice of termination was not given. Having received counsel's advice, the contractor decided to determine the contract. Junior counsel drafted a letter accordingly, setting out the history and adding: “We regret having to act in this manner towards your Association but we trust that you will appreciate that in the circumstances we have little alternative.” The architect was “astonished” and “stunned” to receive the letter.

The learned judge dealt with this issue in this way [(1986) 5 ConLR 118 at pp. 140–142]:”

> “It is common ground that though the concluding words of clause 28.1, providing that 'notice shall not be given unreasonably or vexatiously' focuses attention upon the state of mind of the giver, i.e., the contractor, that does not mean that the contractor is entitled to ignore all interests other than his own. Mr Collins on this issue contended *inter alia* that determination would be

bound to cause a substantial loss to the employer because not only would it inevitably delay completion of the Works, and probably lead to a significantly

higher price having to be paid under a new main contract but also the contractors would be entitled to claim all the profit that they would have made had the contract continued. As against this, he said, the contractors if they had continued would have been likely to be protected wholly or largely against loss by means of the provisions dealing with extension of time (clause 25) and direct loss and/or expense (clause 26). I accept that if a contractor who is himself adequately protected against any loss (including loss of profit) attributable to delay, serves a notice to determine his employment in circumstances that will inevitably result in grave delay and expense to the employer, the argument that he has acted unreasonably might well be a powerful one.

But in my judgment that is far removed from the facts of this case. Mr Ball's [the contractor's general manager's] evidence was that in terms of value this contract represented about half of the workload that the plaintiffs had in hand at the time. He said that in August, when they first contemplated exercising their right to determine the employment the main factors affecting their minds were:

(1) The delay that had taken place had changed the job from one that could be carried out during the summer months into one that had to be carried out in the winter months, with all the additional costs and difficulty that that would create, particularly on the financial side; they could not see where that would be reimbursed.

(2) Although the architect had indicated that he would assist so far as the main contract conditions would allow, the plaintiffs could not see that the contract conditions were necessarily adequate; in fact they doubted if the conditions would be adequate. They were very apprehensive about their exposure to a claim for liquidated damages, fixed by the contract at £3 000 per week, if they overran the contractual completion date. Such a claim would create colossal financial problems for them. In the final stages of making the decision those making it had to look to their responsibilities to their own company, to their employees and their families and to their creditors and suppliers. The plaintiffs did not like taking the decision; but they finally decided it was the right decision to take to protect their own interests.

I have not hitherto mentioned the evidence of Mr Ford [the architect], the only witness called. That is mainly because little, if any, of his evidence is in dispute. In my judgment he is a highly competent and conscientious man and an impressive witness. His relationship with Mr Ball up to the date when notice of termination was given was excellent. I accept that if the plaintiffs had continued on the job he would not have attempted to deny to the plaintiffs any compensation for the delay that he thought they were entitled to under the contract. I also accept for present purposes the argument that determination

by the contractor give him the right to be paid all the profit that he would have made if he had completed the works in accordance with the contract.

But the proviso in clause 28.1, that notice to determine by the contractor shall not be given unreasonably or vexatiously, does not in my judgment require the contractor to undertake a fine balancing exercise. It is only when there is a gross disparity between the benefit to him and the burden to the employer that the exercise of his right even approaches unreasonableness. And where, as here, he is worried by the financial risks to which he is now exposed; he takes into

> account the damage that determination might cause to the employer; but he decides that in all the circumstances he must put his own interests and those of his employees and creditors first, I find it impossible to say he has acted unreasonably. I am fortified in this conclusion by the judgment of Ormrod LJ in *J. & M. Hill & Son Ltd* v *London Borough of Camden* (1980) 18 BLR 26 at p. 33 where the learned Lord Justice said that to be given unreasonably the determination must be totally unfair and almost smacking of sharp practice. I have accepted the evidence of Mr Ball that the motivation for giving notice was the desire to protect themselves against a potentially crippling loss. The fact that by giving notice they achieve for themselves an unexpected profit does not in my judgment make their conduct unreasonable.
>
> On this issue too, therefore, I find for the plaintiffs."

The employer submitted that the judge misdirected himself in adopting a subjective approach and in concentrating on the contractor's state of mind, instead of directing himself that the standard of reasonableness was to be determined by reference to a reasonable contractor in the circumstances in which the contractor found himself and to whom the actual and imputed knowledge of the contractor was to be ascribed. The judge's wrong approach was, it was said, reflected in his reliance on the judgment of Ormrod LJ in *Hill*, which dealt with a different situation and was prefaced by an expression of uncertainty as to what "unreasonably" could mean in that context. The employer submitted that the correct approach was that of His Honour Judge Newey QC in his unreported judgment in *Lubenham Fidelities & Investments Co Ltd* v *South Pembrokeshire District Council* 26 May 1983:

> "Construction contracts often extend over long periods of time and involve the use of considerable resources in land and materials and if they are not completed the financial and other consequences can be very serious. I think that the inclusion of provisos in standard forms of contract, one of which was used in this case, are intended to prevent parties from standing on their legal rights when the effect of their so doing will be quite disproportionate to their grounds of
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> complaint. I think that 'unreasonably' in a proviso relates principally to lack of proportion.
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> 'Vexatiously' must mean something different from 'unreasonably'. I think that it imports an intention to harass or distress. I think that surrounding facts and circumstances are relevant for the purposes of deciding what is unreasonable and/or vexatious. The fact that parties are negotiating at the time when a notice is served might well make the service of it unreasonable, but in my view there can be many other circumstances in which service would be unreasonable."

The contractor submitted that the correct direction on the proviso would be: "Notice is not given unreasonably and vexatiously unless a reasonable contractor, circumstanced in all respects as was the contractor at the time when he gave notice to determine, would have thought that it was unreasonable or vexatious to give such notice." Although the judge did not expressly direct himself in such terms, it was (the contractor argued) plain that his approach closely corresponded with this direction. When used in a legal context, the adverb "vexatiously" connotes an ulterior motive to oppress or annoy. It was not seriously argued that this was such a case, and the judge's findings make plain that it was not.

"Unreasonably" as used in the proviso to clause 28 is a general term which can include anything which can be objectively judged to be unreasonable. But, as Lord Hailsham LC pointed out in *Re W. (an infant)* [1971] AC 682 at p. 700C, in the context of unreasonable withholding of consent to adoption:

> "It does not follow from the fact that the test is reasonableness that any court is entitled simply to substitute its own view for that of the parent. In my opinion, it should be extremely careful to

> guard against this error. Two reasonable parents can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable. The question in any given case is whether a parental veto comes within the band of possible reasonable decisions and not whether it is right or mistaken. Not every reasonable exercise of judgement is right, and not every mistaken exercise of judgment is unreasonable. There is a band of decisions within which no court should seek to replace the individual's judgment with its own."

There is not in my view much difference between the tests propounded by the parties, although I prefer the contractor's, since the sub-clause provides that notice shall not be given unreasonably and not that it may only be given reasonably. It is true that the judge did not choose expressly to direct himself in accordance with either test, but his approach was in my view consistent with both and I find no flaw in his reasoning. It is true that in *Hill* both Lawton and Ormrod LJJ expressed doubt as to what

"unreasonably" could mean, and I have no doubt that the observations of Ormrod LJ were directed to the facts of that case, which was one of failure to pay after a notice of intention to determine. But, as the judge made clear, he did not base his conclusion on those observations; he simply found reassurance in them. In my judgment the employer has not shown that the learned judge misdirected himself.

The employer also contended that the judge had wrongly failed to take into account a number of relevant matters which had been urged upon him and which he should have taken into account in reaching a conclusion on unreasonableness. Those matters included the following.

(1) The architect had not been bound to give a clause 23.2 instruction to postpone (and he had not intended to do so). His instruction was beneficial to the contractor because it enabled him to claim an extension of time under clause 25 and compensation for loss and expense under clause 26. It would be unfair if the contractor could take advantage of the architect's instruction by determining the contract which, without it, he could not have done.

(2) The contractor's conduct was inconsistent. He asked that there should be competitive tendering, he twice asked the architect to re-nominate (on one occasion after one month had expired from the instruction to postpone), he continued until the last minute to behave as if the contract was continuing and then he snatched at an adventitious opportunity to bring the contract to an end when he knew re-nomination was imminent. No warning of the contractor's intention to give notice of determination was given.

(3) There was no fault on the part of the employer or the architect. The delay was outside their control. The contractor never asked how the re-nomination was progressing or that it should be speeded up or complained that it was taking too long.

(4) The contractor had made no claim and given no notice in respect of the postponement and had not taken up the architect's invitation to discuss contractual entitlement. Nor had the contractor taken the obvious step of seeking legal advice on the financial risk to him if the contract continued.

Although the contractor argued that the judge's conclusion was amply supported by the facts which he found, that does not meet this argument of the employer. The points listed (which were of couse elaborated in argument) are, I am persuaded, points for which there is an evidential foundation. They were points drawn to the attention of the judge. They were relevant matter for him to consider in deciding whether the contractor gave the notice unreasonably or not. Although the judge did make reference to clauses 25 and 26, his judg-

ment does not show that he was weighing the other points in the balance (although of course he may have been). I feel bound to conclude that the employer has made good this criticism.

10 ConLR 51 at 70

Having reached that conclusion, I should in a case such as this feel great hesitation whether this court should itself undertake the weighing of the competing considerations. Had either party asked us to do so I should for my part have thought it necessary to remit the case to the tribunal which heard the witnesses to make the final factual decision. Both parties, however, said they were content that this court should itself make the decision, and since there is in truth little conflict on the primary facts it seems desirable that we should do so.

A reasonable main contractor in the position of the contractor, called upon to decide whether he should give notice of determination under clause 28.1, faced a difficult and anxious decision. He would see the cause of the trouble as Elmat, a sub-contractor chosen by the employer before the main contract had been entered into. He had had a right of reasonable objection but had had (one assumes) no ground for objecting. As Elmat's performance had gone from bad to worse he had lost no opportunity to make his fears known to the employer. At a point when there had been no further work the contractor could usefully do the architect had recognised the reality of the situation by giving what now appeared, on legal advice, to have been an instruction to postpone work. That had been nearly two months earlier, and in the interim the work had not, in practical terms, advanced at all. That was not the employer's fault, but nor (the contractor would reasonably reflect) was it his own. During July, August and early September he had, it is true, acted as if he expected the main contract to continue. That had been because, despite his anxieties, he had expected the main contract to continue, and he had always intended to honour what he had believed to be his contractual obligations. But he had never represented that he would not rely on any right of determination he might have, and he had not misled the employer into acting to his disadvantage. No notice of the contractor's intention to determine had been given to the employer, but clause 28.1 (unlike most corresponding clauses in the contract) did not require such a notice. If notice were to be given a potentially valuable right might be lost. It could not be overlooked that the giving of notice might cause substantial loss to the employer, but the contractor would not be bound (even if he would be entitled) to claim his full loss of profit. And what if the contract were to continue? It was inescapable that works planned to last through two summers and a winter would now last through two winters and a summer. Loss and expense of various kinds wold necessarily be incurred. The risk to the contractor would be greatly mitigated (perhaps even eliminated) if the architect accepted all the contractor's claims under clauses 25 and 25. But he might not, and to the extent that he did not the contractor would be at risk. Even if, at the end of protracted arbitration proceedings, the contractor were ultimately successful the loss could still be substantial. Weighing it all up, even a reasonable contractor might in my judgment very well conclude

10 ConLR 51 at 71

that, rather than risk joining the long list of builders driven into failure by contracts that went wrong, he should in his own interest and that of his employees and creditors exercise the right which the contract gave him. I do not find it possible to conclude that the decision which the contractor reached here lay outside the band of possible reasonable decisions. I accordingly reach, by a somewhat different route, the same conclusion as the judge reached.

It necessarily follows that I reject the employer's third ground of challenge, that the learned judge reached a conclusion which no reasonable Official Referee properly directed in law could have reached.

For these reasons I would dismiss his appeal.

BALCOMBE LJ.

I agree.

SIR NICOLAS BROWNE-WILKINSON VC.

I agree.

[Applications by both parties for leave to appeal to the House of Lords were refused].

COUNSEL

For the appellants: Mr J. M. Collins QC and Mr A. J. Anderson (instructed by Messrs Hamlins Grammer & Hamlin).

For the respondents: Mr A. D. Colman QC and Mr G. Dunning (instructed by Messrs Squire Rayfield).