Monday, October 28.

(Before the Lord Chancellor (Haldane), the Earl of Halsbury, Lord Atkinson, and Lord Shaw.)

BRITISH GLANZSTOFF MANUFACTURING COMPANY, LIMITED *v.* GENERAL ACCIDENT, FIRE, AND LIFE ASSURANCE CORPORATION, LIMITED.

(In the Court of Session, February 22, 1912, 49 S.L.R. 477, 1912 S.C. 591.)

Contract — Construction — Breach — Damages—Delay to Complete Works—Applicability of the Provision for Liquidate Damages for Delay to Case where Owner has Taken Possession and effected Completion through Other Contractors.

A contract for the construction of certain works contained a provision whereby the contractor was to pay liquidate damages, at certain rates per week, for any period beyond the date stipulated or allowed by the architect for completion. It also provided that in the event of the contractor suspending operations the owners might take possession of the plant and material and employ others to complete the works. The contractors became bankrupt and suspended operations, and the owners entered into possession and completed the works through other contractors.

Held that while the owners were entitled to sue for damages for breach of contract, they could not found on the provision for liquidate damages, the clause under which they had entered into possession being an enclave in the contract giving by itself a special remedy separate from the general remedy contained in the other clauses of the contract.

[This case is reported *ante ut supra.*]

The pursuers, the British Glanzstoff Manufacturing Company, Limited, appealed to the House of Lords.

The material *clauses of the contract* were these—"24. If the contractor fail to complete the works by the date named in clause 23, or within any extended time allowed by the architect under these presents, and the architect shall certify in writing that the works could reasonably have been completed by the said date, or within the said extended time, the contractor shall pay or allow to the employer the sum of £250 sterling per week for the first four weeks, and £500 per week for all subsequent weeks as liquidated and ascertained damages for every week beyond the said date or extended time, as the case may be, during which the works shall remain unfinished, except as provided by clause 23, and such damages may be deducted by the employer from any moneys due to the contractor. 24A. Provided always and notwithstanding anything in the last preceding clause contained, if the contractors shall complete the works prior to the date named in clause 23, then the employer shall pay or allow to the contractor by way of bonus and in addition to any other moneys payable or to become payable under this contract the sums following, that is to say, the sum of one hundred pounds per week for each and every week of the first four weeks during which the works shall have been completed prior to the date named in clause 23 hereof, one hundred and fifty pounds per week for each and every week of the next four weeks during which the works shall have been completed prior to the date named in clause 23 hereof, up to and inclusive of the eighth week from the date named in clause 23 hereof, and the further sum of two hundred and fifty pounds per week for each and every week over and above the said period of eight weeks during which the works shall have been completed prior to the date named in clause 23 hereof. 25. If in the opinion of the architect the works be delayed by *force majeure* or by reason of any exceptionally inclement weather, or by reason of instructions from the architect in consequence of proceedings taken or threatened by or disputes with adjoining or neighbouring owners, or by the works or delay of other contractors or tradesmen engaged or nominated by the employer or the architect, and not referred to in the specification, or by reason of authorised extras or additions, or in consequence of any notice reasonably given by the contractor in pursuance of clause 1, or by reason of any local combination of workmen or strike or lock-out affecting any of the building trades, or in consequence of the contractor not having received in due time necessary instructions from the architect for which he shall have specifically applied in writing, the architect shall make a fair and reasonable extension of time for completion in respect thereof. In case of such strike or lock-out the contractor shall, as soon as may be, give to the architect written notice thereof. But the contractor shall nevertheless use his best endeavours to prevent delay, and shall do all that may reasonably be required to the satisfaction of the architect to proceed with the works. 26. If the contractor, except on account of any legal restraint upon the employer preventing the continuance of the works, or on account of any of the causes mentioned in clause 25, or in case of a certificate being withheld or not paid when due, shall suspend the works, or in the opinion of the architect shall neglect or fail to proceed with due diligence in the performance of his part of the contract, or if he shall more than once make default in the respects mentioned in clause 16, the employer by the architect shall have power to give notice in writing to the contractor requiring that the works be proceeded with in a reasonable manner and with reasonable dispatch. Such notice shall not be unreasonably or vexatiously given, and must signify that it purports to be a notice under the provisions of this clause, and must specify the act or default on the part of the contractor upon which it is based,

After such notice shall have been given, the contractor shall not be at liberty to remove from the site or works, or from any ground contiguous thereto, any plant or materials belonging to him which shall have been placed thereon for the purposes of the works, and the employer shall have a lien upon all such plant and materials, to subsist from the date of such notice being given until the notice shall have been complied with. Provided always that such lien shall not under any circumstances subsist after the expiration of thirty-one days from the date of such notice being given unless the employer shall have entered upon and taken possession of the works and site as hereinafter provided. If the contractor shall fail for fourteen days after such notice has been given to proceed with the works as therein prescribed, the employer may enter upon and take possession of the works and site, and of all such plant and materials thereon (or on any ground contiguous thereto) intended to be used for the works, and all such materials as above mentioned shall thereupon become the property of the employer absolutely, and the employer shall retain and hold a lien upon all such plant until the works shall have been completed under the powers hereinafter conferred upon him. If the employer shall exercise the above power he may engage any other person to complete the works, and exclude the contractor, his agents and servants, from entry upon or access to the same, except that the contractor or any one person nominated by him may have access at all reasonable times to inspect, survey, and measure the works. And the employer shall take such steps as in the opinion of the architect may be reasonably necessary for completing the works without undue delay or expense, using for that purpose the plant and materials above mentioned in so far as they are suitable and adapted to such use. Upon the completion of the works the architect shall certify the amount of the expenses properly incurred consequent on and incidental to the default of the contractor as aforesaid, and in completing the works by other persons. Should the amount so certified as the expenses properly incurred be less than the amount which would have been due to the contractor upon the completion of the works by him, the difference shall be paid to the contractor by the employer should the amount of the former exceed the latter, the difference shall be paid by the contractor to the employer. The employer shall not be liable to make any further payment or compensation to the contractor for or on account of the proper use of the plant for the completion of the works under the provisions hereinbefore contained other than such payment as is included in the contract price. After the works shall have been so completed by persons other than the contractor under the provisions hereinbefore contained, the employer shall give notice to the contractor of such completion, and may require him from time to time, before and after such completion, to remove his plant and all such materials as aforesaid as may not have been used in the completion of the works from the site. If such plant and materials are not removed within a reasonable time after notice shall have been given, the employer may remove and sell the same, holding the proceeds, less the cost of the removal and sale, to the credit of the contractor. Any notice to be given to the contractor under this clause shall be given by leaving the same at the place of business of the contractor, or by registered letter sent to him at that address."

At the conclusion of the appellants' argument—

LORD CHANCELLOR—The question which arises on this appeal is as to the construction of a contract which was entered into between the appellants and a firm of contractors who have since got into difficulties. The question which is to be determined is whether a certain clause which confers a right to liquidate damages applies under the circumstances of the present case.

The respondents are an insurance company, who by a contract of guarantee became cautioners for the carrying out by the contractors of their contract, and there is no question raised in this case that their contract covers the question at issue.

What we have to determine is matter of pure construction. The contract covers a number of contingencies, but the important clauses of it are clauses 24 to 26 inclusive. These clauses show that the bargain which the appellants made for themselves was that the contractors should be bound under certain penal clauses to do the work which they had undertaken to do, and that in addition to what was provided for by those clauses the employer should have a special remedy which was conferred by clause 26. As I read clause 26 it was this—It had previously been provided in the contract that if the contractors failed to carry out and complete the works within the time, they should be subject to certain penalties; and if, on the other hand, they anticipated their time, they should get certain advantages. But when we come to clause 26 there is this carefully guarded power which is given (on a certain default being made by the contractors and certain notice being given to them) to the employer to enter and to complete the work either himself or through another contractor under the guidance of the architect, who is made the judge between the two parties, and whose duty it is to see that the employer does not put a larger burden upon the original contractors than could properly have been the case. The employer is bound by the opinion of the architect, who at the completion of the works carried out, after this taking possession and ousting of the original contractors, is to certify the amount of expense properly incurred. If by chance there has been an advantage in that the work has been more cheaply done than it would have been done under the

original contract, then the original contractors, notwithstanding they have been in default, are to get the benefit. The reason is plain. This is a very exceptional remedy under which they are ousted from the contract. But if, on the other hand, the architect certifies that additional expenses have been incurred, then those are to be recovered.

Now that clause 26, as I read it, constitutes an enclave in the contract by itself providing for a special remedy. The general remedy is to be found under the earlier clauses, and among them the one which has raised the question with which we are here dealing. Clause 24 provides that "if the contractor fail to complete the works by the date named" in the previous clause, which is the 31st January 1910, "or within any extended time allowed by the architect," then the architect, if he certifies "that the works could reasonably have been completed by the date or within the extended time," gives a certificate on which the contractor becomes liable to the payment of liquidated damages. The words are these—"The contractor shall pay or allow to the employer the sum of £250 sterling per week for the first four weeks, and £500 per week for all subsequent weeks as liquidated and ascertained damages for every week beyond the said date or extended time, as the case may be, during which the works shall remain unfinished, except as provided by clause 23, and such damages may be deducted by the employer from any moneys due to the contractor." In this case the appellants claim these sums as liquidated damages from the insurance company, who guaranteed the performance by the contractors of their contract, and the question is whether, as the procedure which has followed on the default of the contractor has been directed under clause 26, and not under the other general clauses of the contract, this clause 24 which I have just read applies. In my opinion it does not apply, and I think it does not apply for two reasons—first of all, that it is altogether inapt to the provisions made by clause 26, which contain a complete code of themselves, and secondly, because upon its construction I read it as meaning that if the contractors have actually completed the works, but have been late in completing the works, then, and in that case only, the clause applies. Under the circumstances in which this appeal comes before us the contractors have not completed the works; on the contrary, they have been ousted from the works by the employers under their powers given them by clause 26. I am therefore of the same opinion as the learned Judges in the Court of Session, who were unanimous in holding that clause 24 has no application to the present case, and I move your Lordships that the appeal be dismissed with the usual consequences.

EARL OF HALSBURY—I am entirely of the same opinion, and I concur in the judgment which has been delivered.

LORD ATKINSON—I concur.

LORD SHAW—In this action liquidated damages are asked against the original contractor named Brown. During the period stipulated in the contract for the completion of the works, another contractor, named Henshaw, was called in, Brown having gone bankrupt. The damages therefore here claimed are claimed as liquidated in respect of such number of weeks as is estimated to be the time which Brown would have taken to complete the contract had Henshaw not been called in. This seems to me in its nature inconsistent in principle with the very idea of pactional damages. Clause 24 in my judgment gives no foundation for such a hypothetical claim. It only applies to the failure by Brown himself to complete timeously his contract, but it does not apply to a state of matters in which under section 26 of the Act a different remedy has been adopted under what is really a separate code.

I desire to add that there are two points in the judgment of Lord Mackenzie with which I wish to associate myself. These are as follows—"The provision," says the learned Judge, "that the architect may allow an extension of time is of importance. The contract has been so innovated upon that no application to the architect for an extension of time by the original contractor is possible." On another point his Lordship says—and in this I also agree—"I am unable to see how the pursuers can charge Brown & Sons, under a liquidate damages, because they failed to complete the works by 31st January 1910, when on their bankruptcy they made a contract with Henshaw & Sons to complete by 31st December 1909."

On the main ground I entirely agree with what my noble and learned friend on the Woolsack has said, and I am glad in conclusion to know, that the actual damages, if any have been incurred, can be proved in this suit, and, if proved, will be recovered.

Their Lordships dismissed the appeal with expenses.

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