COURT OF APPEAL

8TH JULY, 1987

BEFORE SIR GODFRAY LE QUESNE Q.C., (President)
J.D.A. FENNELL, ESQ., O.B.E., Q.C.,
J.M. COLLINS, ESQ., Q.C.,

BETWEEN	A.C. GALLIE, LIMITED,	APPELLANT
AND	WILLIAM HERBERT DAVIES	RESPONDENT

Advocate G.R. BOXALL for the Appellant
Advocate R.J. MICHEL for the Respondent

JUDGEMENT

(delivered by Mr. Collins)

MR. COLLINS: This is an Appeal against a decision of the Royal Court dated the 26th February, 1985, upon a preliminary issue relating to the quantum of damages to be awarded to the plaintiff under a judgment on liability given on the 11th October, 1977. Under that Judgement, given in proceedings which were started in 1974, the first and second defendants have been held liable to the plaintiffs in respect of the faulty design and construction respectively, of a warehouse, offices and flat at Plot 23, Rue des Prés Trading Estate.

The second defendant has died and all issues relating to his liability, as so

determined, have been compromised and his estate are not now parties to this Appeal.

The building works had reached practical completion in 1968 and defects had very soon become apparent. These defects included serious cracking in the walls of the building. The Royal Court, in the words of the Court of Appeal in affirming its judgement with regard to liability, came to the conclusion that the design provided by the architect did not provide, or did not provide adequately, for inevitable movement of the portal frames, which movement would arise from the roof loading and from the wind and snow loading which was likely to occur during the life of such a building.

The interval of time since practical completion in 1968 and since the institution of proceedings in 1974 is somewhat startling. It is to be observed moreover that once the preliminary issue, at present under appeal has been determined, the parties are still faced with a determination of the quantum of damages, unless those damages can be agreed.

It was in July 1981 that works of repair started. They took six months to complete and on the plaintiffs case cost £32,300 excluding professional costs and fees. The defendants have contended that the measure of damages is not to be taken at July 1981, but rather in 1977 or alternatively mid -1976. They have expressed their case with regard to these two dates in their written submissions. The Royal Court, in the decision now under appeal, took its own course and decided that quantification was to take place as at the 31st December, 1976. From this determination both the plaintiffs and the defendants now appeal.

Where a plaintiff suffers damage by reason of negligence or breach of contract, resulting in his being provided with a defective building, and where damages fall to be assessed by reference to the cost of the repair, the date upon which such damages fall to be assessed, is often of crucial importance. The principles governing the choice of the appropriate date are now well established in England and they are to be found in the decision of the Court of Appeal in Dodd Properties (Kent) Limited -v- Canterbury City Council and others, (1980) 1 All

E.R. 928, together with the decision of Oliver. J, as he then was, in Radford -v-De Froberville (1978) 1 All E.R.33. In one passage in the judgment of the learned Deputy Bailiff, as he then was, it at one time seemed to us that the learned Deputy Bailiff was declining to treat the latter authority as of persuasive force in this Island, despite its having been approved in the earlier Court of Appeal authority to which I have referred. On further consideration, we have concluded that this was not his intention and that he was, in effect, seeking to distinguish that case upon its facts. However that may be, in the absence of any local conditions giving rise to the need to adopt any different approach on this Island, we consider that the Courts in Jersey should be guided by the principles to be found in those two cases.

So far as the present action is concerned, and in particular the issue before us, it suffices to say that on the above authorities it is agreed by both parties that the damages do not fall to be assessed at the date of breach, but rather at the earliest date upon which the plaintiffs should reasonably have entered into such contract as was necessary for the carrying out of the repairs.

How then does this test fall to be applied to the facts of this case? The earliest date which was contended for was one of two alternatives advanced by the respondent. It is expressed in his written case as follows. "The first date for repairs, June 1973". I mention too that the case contains an alternative date, namely June, 1976. Argument has turned upon those dates and upon intervening periods, and of course the period from 1976 onwards. In putting forward the first of those two specific dates, namely 1973, Advocate Michel has to overcome a finding which is partly a finding of primary fact and partly a matter of inference, which the Royal Court expressed in these terms: "We have come to the conclusion that in 1973, it would not have been an appropriate time nor reasonable for the plaintiff, as it was then advised to have attempted to mitigate its loss". Advocate Michel has drawn our attention to correspondence in 1972 which seemed to show on the face of it that the architect retained by the plaintiffs in place of the defendant, Mr. Peck, had decided upon the nature of remedial works required even at that time, namely in 1972. On the face of it, this appears to be in flat

contradiction to the clear oral evidence which he gave to the effect that he and Mr. Fincham, the consulting engineer, retained by the plaintiffs after trouble had arisen, were unable to ascertain the causes of the cracking until 1976. However, it is to be observed Mr. Peck was not given an opportunity to deal with this inconsistency in cross-examination, and we do not think it right in those circumstances to interfere with the findings of the Royal Court. We would add that, while it may occasion some suprise that it took Mr. Peck and Mr. Fincham eight years to ascertain the cause of the cracking we do not consider that the evidence goes anywhere near establishing that their failure to do so broke the causative effect of the defendant's own breach of contract. Since this aspect was not at all fully investigated at the trial, we do not think it right to say that a stage was reached prior to March, 1976, when the plaintiffs should have taken the matter out of the hands of their experts and gone ahead with ordering repairs. It was in these circumstances reasonable in our view for the plaintiffs to continue to rely upon their professional advisers and to take no steps until the cause had been ascertained in March, 1976 as Mr. Peck stated. The date of the relevant letter in March, 1976, relevant that is to the ascertainment of the cause of the cracking, was within days of the commencement of the trial on liability. That trial started on the 8th March, 1976, and it appears from the plaintiff's solicitor's letter of the 11th June, 1978 that a decision was taken by them, if not by their clients, that no works should be undertaken until the Court had inspected the building and the damage.

The trial took place on various days between March and November 1976, and it is to be observed that inspections by the Court took place on two occasions. When evidence and submissions were concluded in November 1976, it was no doubt not known to either party that the Court would take nearly twelve months to deliver it's judgment on what was, after all, a preliminary issue. In these circumstances it seems to us that it was reasonable for the plaintiffs, having been held up through no fault of their own, to delay commencement of repairs until the outcome of the trial was known. We accept that this was not the case of a

plaintiff who wishes to wait to see if he is successful in the action before committing himself to repairs. It was clear in this case that the plaintiffs would have repaired the premises whether they obtained a judgement against the defendants or not. This is not a case, therefore, on all fours, with the circumstances described in such cases as Radford -v- De Froberville (above) and Dodd Properties (Kent) Limited -v- Canterbury City Council and others (above). Looking at the facts of this case however, and for the particular reasons which we have already stated, we consider that it was reasonable for the plaintiffs to await receiving the judgement in October, 1977. Thereafter a comparatively modest period should be allowed for obtaining a price, or even perhaps for going out to tender, and for the period necessary for the successful contractor to be ready to start work. There was nothing to prevent the plaintiffs having procured the preparation of the necessary specification and drawings while awaiting judgment. Taking all these matters into account, we consider that the work should have been put in hand at the 31st December, 1977. Although the plaintiffs financial situation was referred to, both at the trial and in the appellant's written case, little was made of it in argument before us, and the plaintiffs cannot be regarded as impecunious or in any way likely to be considered as having been inhibited for financial reasons, from starting work at that time.

The Plaintiffs contention that they were entitled reasonably to wait until the summer of 1981 is dependent upon two successive factors. First it is said, that in late 1977 and 1978 there was no alternative accommodation available to them in order to house their warehousing business. Secondly it is said that in 1979 and 1980 it was becoming and became increasingly clear that the plaintiffs would be purchasing new and greatly extended premises so that the disruption and expense of a double removal could be avoided. Of course if they should have obtained alternative accommodation in late 1977 or in 1978, they would have commenced work prior to the period in which that permanent removal had been so decided upon. This therefore, is a crucial interval.

The plaintiff company is owned and managed by a Mr. Barrette, and it is quite clear from the evidence that he is a most successful and efficient business man, who has run an expanding business and built up a flourishing trade. The evidence given by a Mr. Wright and a Mr. Falle, employees of the plaintiff's, to the effect that they telephoned all the agents on the Island, that is to say, the totality of the names appearing in the yellow pages, falls far short of the steps which we consider should have been taken by a competent business man like Mr. Barrette. No letter was written to any of the agents, so that nothing permanent will have found its way onto their files, unless it so happened that such person who answered the telephone at the other end, happened to make a note with sufficient emphasis and permanence to serve as a practical reminder. No effort was made to advertise. We do not find that these shortcomings were in any way made good by Mr. Barette's enquiries of Mr. Peck, who was, after all, an architect and not an estate agent. Since the plaintiffs made no proper and business like enquiries, the Court is left without any sufficiently convincing evidence of the lack of suitable warehousing accommodation on the Island at the relevant period. By the time this aspect of the action came on for trial seven years later, it would have been impossible to make good a lack of evidence for which the plaintiffs themselves must take responsibility.

For these reasons we allow the appeal to the extent that we substitute the 31st December, 1977, for the 31st December, 1976, as the date upon which the plaintiffs should have undertaken the works and the date at which the amount of damages suffered by the plaintiffs should be quantified.

Cases referred to in the Judgment.

Dodd Properties (Kent) Ltd., -v- Canterbury City Council & Others.
(1980) 1 All E.R. 928.

Radford -v- de Froberville, (1978) 3 All E.R. 33.

Other cases cited.

The Clippens Oil Company Ltd -v- The Edinburgh and District Water Trustees,
(1907) A.C. 291.

Cory & Son Ltd. -v- Wingate Investments (London Colney) Ltd.,

Livingstone v. The Raywards Coal Company
(1880) 5 A. C. 25.

Milianos v. George Frank (Textiles) Ltd.
(1975) 3 All E.R. 801.

Johnson v. Agnew (1979) 1 All E.R. 883.

British Westinghouse Electric Co. Ltd. v. Underground Electric Railways Co. of

London Ltd. (1911 - 1913) All E.R. 63.

Clark v. Woor (1965) 2 All E.R. 353.

Roper v. Johnson (1868-1890) 2 L.R. Digest 1881 E.R. 8 C.P. 167.

Smailes v. Hans Dessen and Co. (1906) Law Times Rep. Vol. XCIV 492.

Perry v. Sidney Phillips & Son (1982) 3 All E.R. 705.