Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of (1) ***Mort's Dock and Engineering Company, Limited***, v. *Wadey* (*No.* 6 *of* 1902); (2) ***Mort's Dock and Engineering Company, Limited***, v. *Wadey* (*No.* 43 *of* 1902); *and* (3) *Wadey* v. *Mort's Dock and Engineering Company, Limited* (*No.* 85 *of* 1903), *from the Supreme Court of New South Wales; delivered the* 15*th November* 1905.

Present at the Hearing of Appeal No. 1:

LORD MACNAGHTEN.
LORD LINDLEY.
SIR FORD NORTH.
SIR ARTHUR WILSON.
SIR JOHN BONSER.

Present at the Hearing of Appeals Nos. 2 and 3:

LORD DAVEY.
LORD ROBERTSON.
SIR ARTHUR WILSON.

[*Delivered by Sir Arthur Wilson.*]

The action out of which these Appeals arise relates to a contract, modified in some respects by a second contract, under which the Plaintiff, a contractor, undertook to construct for the Defendants, a Dock Company, a graving dock at Woolwich Dockyard, in the Port of Sydney. The dock was to be 450 feet in length on the floor from East to West, the entrance from the sea being at the East End.

The first contract was in a form familiar in such cases. It consisted of a specification issued by the Company with general conditions

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annexed, a tender by the contractor, and an acceptance by the Company of that tender, with other subsidiary papers. It is necessary to refer to some of the terms contained in these documents. The specification contained the following clauses amongst others :—

"This contract is for the formation of a dock measuring "450 feet long on the floor, measured from the inside of "invert . . . . in strict accordance with the plans and "specifications.

"*Excavations.*—The contractor will require to quarry "sufficient stone of approved quality to build entrance head "aprons, sides, stairs, coping &c.

"*Coffer-dam.*—The contractor will require to build a "strong coffer-dam in front of the works far enough out to "allow of caisson which will be built inside of dock, being "brought out and turned round so as to go into its fit, the "distance shown on the plans will admit of this. . . . . "The contractor will require to take upon himself the whole "responsibility for the design, construction and maintenance "of the coffer-dam during the time the works are in progress "and to remove same after the works are finished, and caisson "has been properly fitted.

"*Cleaning, &c.*—After the works are finished the con- "tractor to remove all rubbish, materials, &c., and leave the "place clean and in proper order. The contractor will require "to finish 100 feet of dock floor measured from inside of "invert in fifteen months from the date of contract and so give "the company possession of same for the purpose of building "the caisson thereon.

"*Time.*—As time is a great consideration the contractor is "required to state the shortest time in which he will "undertake to complete this work."

The General Conditions contained the following :—

"*Possession of Ground.*

"7. In giving the contractor possession of the site it shall "not be deemed that he is to have the exclusive possession but "only a limited possession, that is to say, such possession as "will enable him to perform the works comprised in this "contract."

"*Delay.*

"22. If the contractor shall not be able to obtain possession "of any portion of the ground required for the execution of "the works to be done in connection with this contract, or "from any cause whatever arising out of the acts or defaults

" of the manager or any officers or servants in his employment,
" or from any accident happening to the said works during
" their progress not arising from the neglect or default of the
" contractor or his servants or workmen, the contractor shall
" be delayed or impeded in the execution of his contract, the
" contractor may from time to time within seven days of the
" happening or occurring of such act, default or accident
" (apply in writing to the manager for an extension of time on
" account of such act default or accident), setting forth the
" cause of such application and the manager shall if he thinks
" the cause sufficient but not otherwise, allow by writing under
" his hand such an extension of time as he shall think ade-
" quate, and the penalties set off and deductions to which
" under this contract the contractor is liable, shall not attach
" until the expiration of such extension of time, but shall
" attach and the contractor shall become liable to the same
" from the date of the expiration of such extended time or
" times, and unless the contractor shall make such application
" within the time and in the manner aforesaid, and unless and
" until the manager shall allow such extension or extensions of
" time as aforesaid the contractor shall not by reason of any
" delay arising from the cause or causes aforesaid or any of
" them be relieved in any way or to any extent of his liability
" to finish and complete the works within the time in this
" contract specified, and in default of his so doing, to pay and
" to be subject to the liquidated damages, deductions and set
" offs as in these conditions provided, nor shall the manager be
" deprived in any way or to any extent of his right to deduct
" or recover any sum or sums as liquidated damages and not
" as or in the nature of a penalty or to make deductions or
" set offs which under this contract he is entitled to make,
" deduct, or set off or receive from the contractor for or by
" reason or on account of any delay in the completion of the
" work or any portion of the same nor shall the rights, powers
" and authorities by these conditions given to or vested in him
" be in any way affected."

Clause 25 provided for the deposit by the contractor with the Company's manager of a sum equal to 5 per cent. of his tender as security for his performance of his contract. Clause 26 provided for periodical payments for work done.

" *Delay or Bad Work. Bankruptcy, &c.*

" 27. In case the manager shall be at any time dissatisfied
" with the mode of proceeding or at the rate of progress of
" the works or any part thereof, or in case the contractor shall
" at any time neglect or omit to carry out the instructions
" of the manager or to dismiss any person employed when
" required . . . . the manager shall be at liberty without

" vitiating the contract and without prejudice to any right " that may have accrued to liquidated damages under any of " these conditions to take the works wholly or partially out of " the hands of the contractors . . . ."

" *Cancellation of Contract.*

"28. In any or either of the events mentioned in the last " preceding clause of these conditions the manager shall have " the option and full power and authority in lieu of proceeding " under such clause, and without prejudice to any right that " may have accrued to liquidated damages under any of these " conditions, to cancel this contract whether there are any " works remaining to be done or not, and in such case the " moneys which shall have been previously paid to the con- " tractor on account of the works executed, shall be taken by " him as full payment for all works done under this contract, " and upon notice in writing under the hand of the manager " that he, under the authority of this condition, cancels this " contract, being given the contractor, this contract shall be " cancelled, and thereupon all sums of money that may be due " to the contractor or unpaid, together with all implements in " his possession and all materials provided by him upon the " ground upon which the work is being carried on or adjacent " thereto shall be forfeited and all sums of money held as " security or named as liquidated damages for the non-fulfil- " ment of this contract within the time specified shall also be " forfeited and become payable to the company, and the said " implements and materials shall become and be the absolute " property of the company, and with the moneys so forfeited " and payable as aforesaid shall be considered as ascertained " damages for breach of contract."

The Plaintiff's tender dated the 1st February 1899 was for a lump sum of 38,791*l.* 17*s.* 9*d.*, and he undertook to complete the works within 75 weeks from the notification of the acceptance of his tender. That tender was accepted on the 6th February 1899, which latter date was therefore the date of the completion of the first contract.

At the time when the first contract was entered into, the fact appears to have been overlooked that there already existed a contract between the Company and a firm of Solomon and Bell, by which that firm had undertaken to clear away the upper surface of the site of the intended dock down to a certain level.

It was obvious that the existence of this contract might interfere with the carrying out of the Plaintiff's contract for the construction of the dock. The difficulty thus arising led to the making of the second contract, which was dated the 16th March 1899. It recited and annexed the documents already referred to as constituting the first contract, and that it had been agreed to alter, vary, and extend that contract. And it provided:—

"He the contractor shall and will perform the various works "in and about the full and proper formation and completion "of the said graving dock . . . . within the time and at "or for the price or sum in the said tender mentioned. . . ."

"1. B. The contractor shall make no objection to or take "any exception to the fact that the company is unable at the "present time to give him possession of the whole of the site "for the proposed dock as provided by the said general con- "ditions. The company will as soon as is practicable give "him possession of such site up to where certain pegs are "inserted about 220 feet from the lower end of the wall "dividing the property of one Fesq and the company and will "from time to time as soon as is practicable as the firm of "Solomon and Bell (herein-after mentioned) from time to time "complete their contract (herein after mentioned) with the "company give possession to the contractor of such portions "of the said site as have been completed by the said firm so as "to enable him to carry out his contract within the time "specified without extra cost or expense to the contractor.

"C. The company having entered into a contract with the firm "of Solomon and Bell for certain works in connection with "the site of the said dock the contractor shall at his own "expense make such amicable arrangements with the said "firm up to the said 220 feet as will enable him to duly "perform and complete this contract, and on such performance "and completion of this contract he shall complete so much of "the contract between the company and the said firm as shall "or may be incompleted by the said firm by reason of the site "mentioned in the said firm's contract being occupied by the "contractor's plant or from or by any other reason and he "shall and will indemnify and save harmless the company and "its effects against any actions losses damages and expenses in "any way arising out of the premises, and if he should make "any arrangements with the said firm to take over their said "contract or any part thereof such arrangemsnts shall be at "the expense of the contractor be* first approved in writing by "the company.

* *Sic.*

"D. The contractor shall within 8 weeks from the first day "of March instant commence work in connection with the "coffer-dam mentioned in the said specification and shall

"proceed with such work with all possible dispatch and "expedition continuously and without interval (Sundays "excepted) until the same is duly completed in accordance "with the said specification general conditions plans and these "presents. . . ."

"2. No extra time whatsoever for any of the works mentioned "in or contemplated by the said specification general con- "ditions plans tender and these presents shall on any account "or in any event be allowed or claimed beyond the period of "75 weeks mentioned in the said tender of the first day of "February last but such 75 weeks shall commence from the "first day of March instant."

In pursuance of Clause 1 B of the last-mentioned contract possession of the dock site from the eastern extremity up to the 220-feet line mentioned in that clause was secured to the Plaintiff. The remainder of the site was obtained by him at various subsequent periods from the Defendant Company or from Solomon and Bell. There was some conflict of evidence as to the exact dates at which portions were acquired, but from the view which their Lordships take of the essential facts of the case, it is unnecessary to examine these matters in detail. The Plaintiff made the deposit contemplated by Clause 25 of the General Conditions, and proceeded to carry out the work of excavation, bringing plant, tools, and materials on to the ground for that purpose. Certain sums were paid to him from time to time by the Company, but on the 21st June 1900, according to his Case, there was a large balance due to him on the account. Up to that time the work done by him had been largely at the western or landward end of the dock. Franki, the Company's manager, had become dissatisfied with the progress of the work at the eastern or seaward end, and on that day, the 21st June 1900, acting under Clause 28 of the General Conditions, he wrote to the Plaintiff:—

"*Re* Contract for the formation of Graving Dock at Woolwich Dockyard, Parramatta River."

"I beg to give you notice that I am dissatisfied with the "mode of proceeding and rate of progress of the works at the

" entrance to the dock and up to the 220-feet peg, referred to " in your contract with the Company of the 16th day of March " 1899 and therefore in pursuance of Section 28 of the General " Conditions I hereby cancel the said contract."

The Plaintiff thereupon brought the present Action in the Supreme Court of New South Wales. The substance of his complaint was that his contract had been improperly terminated, whereby he had lost the profits which he might otherwise have made, and that as a consequence of that termination his plant, tools, and materials had been taken by the Company, and the money balance alleged to be due to him had been lost. It may be said generally that the pleadings raised all the requisite issues; but it is necessary, in order to deal with these Appeals, to examine portions of the pleadings in some degree of detail.

The declaration contained nine counts. The first count stated in general terms the contract for the making of the dock and its partial completion by the Plaintiff. It contained the usual averments of readiness and willingness on his part and of the fulfilment of conditions precedent. It assigned as breach the Manager's cancellation of the contract whereby the Plaintiff sustained damages.

The second count was differently framed. It stated the contract for the construction of the dock. It averred that " it was mutually agreed " by the said contract that the Defendants " should as soon as was practicable after " the date of execution of the said contract " give to the Plaintiff possession within the " meaning of the said contract of a certain " portion of the site of the said proposed dock " and would from time to time as soon as was " practicable as the firm of Solomon and Bell in " the said contract mentioned from time to time " should have completed a certain contract " before then entered into by them with the

" Defendants give to the Plaintiff possession of
" such portions of the said site so completed as
" aforesaid and so as to enable the Plaintiff to
" carry out his said contract with the Defendants
" within the time in such contract provided and
" without extra cost or expense to the Plaintiff."
It then set out the power of determining the contract given to the manager by Clause 28 of the General Conditions and the forfeitures to follow from its exercise; it averred readiness and willingness and the fulfilment of conditions. And by way of breach it alleged that " the
" Defendants did not give to the Plaintiff such
" possession as aforesaid of the said first-
" mentioned portion of the said site as soon as
" was practicable as aforesaid nor did they from
" time to time as soon as was practicable as the
" said firm of Solomon and Bell from time to
" time completed their said contract give to the
" Plaintiff possession of the aforesaid other
" portions of the said site as aforesaid nor did
" they give to the Plaintiff such last-mentioned
" portions so as to enable him to carry out his
" said contract with the Defendants within the
" time therein mentioned nor without extra
" cost or expense to the Plaintiff but neglected
" and refused to give and hindered and pre-
" vented the Plaintiff from obtaining possession
" as aforesaid of the said portions of the said
" site and hindered delayed and prevented the
" Plaintiff from duly performing the said con-
" tract on his part and from performing the
" said contract as cheaply as he otherwise could
" and would have done or within the time in
" the said contract mentioned and by means of
" the premises the said manager became dis-
" satisfied with the mode of proceeding and rate
" of progress of portion of the said works and
" the said manager thereupon gave notice of
" cancellation of the said contract as aforesaid

" whereby the Plaintiff suffered the damages in " the first count alleged."

The seventh count was in trespass and the eighth in trover, and both related to the plant, tools, and materials upon the ground. The ninth count was a money count for goods sold and delivered, work done, money paid, money had and received, interest, and on accounts stated. This count related to the moneys said to have been due on the balance of account.

Amongst other pleas the Defendant Company pleaded a fifth plea to the first count, a tenth plea to the seventh and eighth counts, and a twelfth plea to the ninth count. Each of those pleas relied upon the manager's right under Clause 28 of the General Conditions to cancel the contract if dissatisfied, and upon the fact of his having done so; and on this ground they justified what was complained of.

To the last-mentioned three pleas the Plaintiff filed, amongst other things, a second replication " that the alleged dissatisfaction of the said " manager and the alleged unsatisfactory mode " of proceeding and rate of progress of the said " work were caused if at all by the fault of the " Defendants in neglecting and refusing to give " and in hindering the Plaintiff from obtaining " possession of the site of the said dock for the " purposes of carrying out the said work by the " Plaintiff and in supplying certain incorrect " plans for the purposes of the said work to the " Plaintiff and not otherwise."

The Defendant Company demurred to the Plaintiff's second replication. The demurrer came on for argument before the Supreme Court of New South Wales, and on the 5th November 1900 that Court held the replication to be good and disallowed the demurrer.

Against that judgment, the Defendant Company appealed to His Majesty in Council, and

that Appeal is the first of the three with which their Lordships have now to deal. It was argued in November 1902, but after the close of the argument the learned Counsel for the parties became aware that in the meantime the case had gone for trial in New South Wales, and so informed their Lordships, and accordingly judgment was held over.

This Appeal turns merely upon the allegations in the pleadings and has no material bearing upon the actual issue of the Case. The substance of those allegations seems to their Lordships to be shortly this: The Plaintiff complained that he had not been allowed to carry out his contract, that his plant, tools, and materials had been appropriated by the Company, and his money withheld from him. The answer was, that the manager was dissatisfied with the mode of proceeding and at the rate of progress of the works, that, as he was entitled to do, he had determined the contract, and that thereby the plant, tools, and materials, and all money balances become forfeited. The reply was, that the defects in mode of proceeding and in the rate of progress with which the manager was dissatisfied were caused by the Defendants' own default in the fulfilment of their own part of the contract. This being so the case falls precisely within the authority of *Roberts* v. *The Bury Improvement Commissioners* L.R. 5 C.P. 310, which was cited with approval in the judgment of this Board in *Lodder* v. *Slowey*, 1904 A.C. 442.

Their Lordships therefore agree with the judgment of the Supreme Court upon the demurrer.

After the Judgment upon the demurrer had been delivered by the Supreme Court the Case proceeded, and came on for trial before Cohen J. and a jury on the 19th and following days of February 1901. The point upon which the Case

was disposed of on that occasion was raised, in form, upon an objection to proposed questions. Counsel for the Plaintiff formulated two questions to be put to his witnesses :—" 1. Did the " Defendants give the Plaintiff possession of the " site, so as to enable him to complete his contract " within the time specified for its completion " and without extra cost or expense to him? " 2. Was the delay on the part of the Plaintiff " in carrying out his contract caused by the " Defendants' failure to give Plaintiff possession " of the site on which the dock was to be con- " structed, so as to enable the Plaintiff to " proceed with and carry out the contract at " such a rate of progress as would be required " to ensure completion within the time?" These questions were objected to, not for any matter of form, but upon the ground of substance that, having regard to the terms of the contract between the parties, the questions were irrelevant.

For the Plaintiff it was contended that under Clause I B of the contract of March the Company was absolutely bound to give the Plaintiff possession of the dock site outside the 220 feet line " so as to enable him to carry out his con- " tract within the time specified without extra " cost." For the Defendant Company it was argued that there was no obligation to give up the ground except as Solomon and Bell finished their contract. The learned Judge rejected the Plaintiff's construction of the clause in question and excluded the propcsed questions ; and thereupon the Plaintiff accepted a non-suit.

The Plaintiff then applied to the Full Court, and that Court by its judgment, delivered by Darley C.J., on the 12th November 1901, construed the contract, accepting the Plaintiff's view as to its effect, set aside the non-suit, and

ordered a new trial. Against that decision of the Full Court the Defendant Company appealed to His Majesty in Council, and the Appeal so brought is the second of those with which their Lordships have now to deal. It was called on for argument in February 1903, but by that time the new trial ordered by the Full Court had taken place, and the Case had again come before the Full Court in the proceedings which are now the subject matter of the third of these Appeals. The hearing was accordingly adjourned.

The new trial ordered by the Full Court took place before Pring, J., and a Special Jury in March, April, and May 1902. It had to do purely with the questions of fact. Evidence was given, and at the close of the Case the learned Judge left certain questions to the jury, and obtained their answers:—"(1.) Did "the Defendants from time to time, as soon as "was practicable, as the firm of Solomon and "Bell had completed their contract, give the "Plaintiff possession of the site and so as to "enable him to carry out his contract within "the time and without extra cost or expense "to him?" Answer, "No." "(2.) If the first "question is answered in the negative, were "Franki's dissatisfaction and the unsatisfactory "mode of proceeding and rate of progress of the "work caused by the default of the Defen-"dants in not giving possession of the site?" Answer, "Yes." "Was the Plaintiff ready and "willing to perform the contract according to "the terms thereof?" Answer, "Yes." A verdict was returned for the Plaintiff for 11,139*l*.

The Defendant Company moved the Full Court to set aside the verdict and to direct a new trial or to enter a verdict for the Defendant Company on the grounds, amongst others, that

the learned Judge at the trial ought to have directed a verdict for the Defendant Company, inasmuch as there was no evidence to go to the jury, either of the Plaintiff's readiness and willingness, or that the Plaintiff's delay, which led to the cancellation of the contract, was caused by the Defendant Company's failure to give him possession of the site.

The Full Court by its Judgment of the 13th November 1902 held that there was no sufficient evidence to go to the jury, set aside the verdict and directed a verdict for the Defendant Company. Against that Judgment the third of the present Appeals was brought by the Plaintiff to His Majesty in Council. And the second and third Appeals having now been argued together, the whole Case is before their Lordships.

Two questions arise for decision. The first is as to the construction of Clause 1 B of the contract of March 1899, and their Lordships can find but little in any of the other Clauses of that contract, or of the earlier documents, to assist in the interpretation of the words in question. The essential words are "The Com- "pany will from time to time as soon as is "practicable, as the firm of Solomon and Bell "from time to time complete their contract "with the Company, give possession to the "contractor of such portions of the said site as "have been completed by the said firm, so as to "enable him to carry out his contract within "the time specified without extra cost or expense "to the contractor." Only two possible constructions of these words have been suggested. That of the Plaintiff is, that the words "so as to "enable him to carry out his contract within "the time specified without extra cost," control everything that has gone before, and constitute an unqualified undertaking that whatever Solomon and Bell may do, the Plaintiff shall have the various portions of the site in time to carry

out the terms of his contract. The construction contended for by the Defendant Company is, that the subject matter of the clause is limited to such portions of the site as shall be from time to time completed by Solomon and Bell, that therefore no obligation on the part of the Company as to any part of the site came into existence until that part was vacated by Solomon and Bell, and that the later words could not properly be construed so as to extend the scope of the agreement embodied in the clause.

The sequence of the phrases used in the clause favours the latter construction, and there is no doubt that the last words of the clause, if regarded as a proviso overriding the limitations that have gone before, are badly chosen and awkwardly introduced. On the other hand, their Lordships think there is great weight in the consideration relied upon in the Chief Justice's Judgment of the 12th November 1901, that the Defendants' construction of the clause gives no effect whatever to the later words "so as to enable him to carry out his contract." An additional argument of some little weight in favour of the Plaintiff's contention arises from the fact that the first contract, in Clause 22 of the General Conditions, allowed for a possible extension of time in case of delay in obtaining possession, that that limited protection to the contractor was taken away by Clause 2 of the second contract, and that nothing was given in substitution unless it is to be found in the clause now under consideration. In the view which their Lordships take of the third Appeal the decision of this question will not affect the rights of the parties, and is only material as it affects the costs of the second Appeal. On the whole their Lordships are not prepared to dissent from the Full Court as to the construction of the clause. That is sufficient to dispose of the second Appeal.

It remains to consider the questions of fact which were dealt with at the second trial, and which form the subject of the third of the present Appeals. As, however, their Lordships agree with the conclusion arrived at by the Supreme Court, this part of the Case may be dealt with broadly without examination of the evidence in detail. The issues of fact were formally raised by the Plaintiff's averments of his own readiness and willingness to complete his contract, by the concluding allegation of his second count, and by his second replication. And the substance corresponds with the form. What had to be tried was whether on the 21st June 1900 the Plaintiff was in a position to carry out his contract, or would have been so but for the default of the Defendant Company; and whether the backwardness of his work was caused by the Defendant Company's failure to give him possession of the site of the dock. As to these averments the burden of proof lay upon the Plaintiff, and if he failed to prove them his suit must fail.

It has already been stated that the seaward end of the dock lay to the east. The heaviest part of the contractor's work lay at that end. There was to be the entrance, with its masonry piers and other appliances, and outside that end, had to be constructed the coffer-dam, without which the work could not be carried out. The contract clearly contemplated that the work at that eastern end should be promptly proceeded with. Clause 1 D of the second contract expressly required that work in connection with the coffer-dam should be commenced within eight weeks from the 1st of March, and proceeded with continuously until completion. The contract also required the contractor to finish 100 feet of dock floor measured from inside of invert by the 1st June 1900, and give

the Company possession of the same for the purpose of building the caisson thereon.

The coffer-dam was not commenced, nor were the materials for it procured until long after the contract time. It was only finished, according to the Plaintiff himself, about the middle of May 1900. On the 21st June little, if anything, had been done towards clearing the 100 feet, which was to have been finished by the 1st June, and the entrance piers were unbuilt. The delay in the progress of the works at this eastern end was the ground assigned by the manager for his dissatisfaction, and for the termination of the contract. The Case put for the Plaintiff is not that he did not obtain possession of the ground which was to be the site of the eastern works. His Case is, as presented to their Lordships, that under the contract the stone for building the pier heads at the entrance was to be obtained by quarrying upon the site of the dock, that the only suitable stone on the site lay considerably to the west, that there was delay in giving him possession of the western portions of the site, that the backward condition of the eastern works was due to the want of the stone, and that that want was caused by the Defendant Company's failure to give him possession of the western site in due time.

With regard to the Plaintiff's readiness and willingness their Lordships are unable to see any trace of evidence to support a finding in his favour. The fact is undisputed that he had postponed the construction of the coffer-dam so long that it was impossible for him to fulfil the terms of his contract, and he does not even say that any act or default of the Defendant Company prevented his erecting that coffer-dam in due time. Their Lordships also agree with the Supreme Court in thinking that there was no evidence to go to the jury on which they could

properly find that the condition of things with which the manager was dissatisfied was caused by delay in giving possession of the site or any part of it.

Their Lordships will humbly advise His Majesty that all the three Appeals should be dismissed. The costs of the first Appeal will be paid by the party Appellant in that Appeal, and there will be no Order as to the costs of the second and third Appeals which have been heard together.