

## COURT OF SESSION.

Thursday, February 22.

### FIRST DIVISION.

[Lord Dewar, Ordinary.]

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

*Contract—Building Contract—Penalty for Delay—Claim against Guarantor—Competency—Penalty or Liquidated Damages.*

A contracted with B for the execution by the latter of certain work. C guaranteed B's due performance of the contract. The contract contained a clause entitled "damages for non-completion," which provided that if B failed to complete the works by a certain date he should pay to A the sum of £250 a-week for the first four weeks and £500 a-week for all subsequent weeks as liquidated and ascertained damages. B having failed to complete the work, A entered into possession (as he was entitled to do under the contract) and finished the work himself through another contractor. He then sued C under the guarantee for liquidate damages for delay—the delay being calculated on the number of weeks that it actually took to have the contract completed by the other contractor.

*Held* that the penalty clause contemplated completion of the works by B, the original contractor; that it did not apply where, as here, another contractor had finished the work; and that accordingly the claim for liquidate damage was inappropriate and must be repelled.

The British Glanzstoff Manufacturing Company, Limited, *pursuers*, brought an action against the General Accident, Fire, and Life Assurance Corporation, Limited, *defenders*, for payment of £3000 odd which they alleged to be due under a contract of indemnity whereby the defenders undertook to guarantee the due fulfilment of a contract between the pursuers and a firm of contractors, Messrs William Brown & Sons, for the construction of certain works.

The contract between the pursuers and Messrs William Brown & Sons provided, *inter alia* :—

"24. *Damages for Non-Completion.*

"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."

The guarantee bond granted by the defenders was as follows:—"Now this bond witnesseth that we, the General Accident, Fire, and Life Assurance Corporation, Limited, whose registered office is situated at General Buildings, Perth, do hereby guarantee to the British Glanzstoff Manufacturing Company, Limited, the due fulfilment by the said Messrs William Brown & Sons of the said building contract so entered into by them to carry out the work above mentioned, and bind ourselves to pay and satisfy unto the said the British Glanzstoff Manufacturing Company, Limited, all losses and damage, costs, charges, and expenses as they may sustain, pay, or incur by or through the failure of the said contractors to carry out the said building contract, or by reason of the non-performance or non-observance by the contractors of the stipulations, provisions, and conditions on their part to be performed and observed and contained in the said contract, but declaring that this guarantee is limited to and shall not in any case exceed the sum of £4000 sterling."

The pursuers averred—"The said William Brown & Sons entered upon the construction of the said works and carried them on until the 20th day of August 1909, when a receiving order was granted in the Bankruptcy Court at Salford, Lancashire, against them. No further work was done by the said William Brown & Sons. In consequence of the said William Brown & Sons' failure to complete the contract it was necessary for the pursuers to obtain the services of other contractors, and on 16th September 1909 they entered into articles of agreement with Messrs Joshua Henshaw & Sons of Liverpool, Lancaster, who duly completed the construction of the said works. In terms of article 26 of the agreement the pursuers were entitled, on the contractors failing for fourteen days after notice to proceed with the works, to enter upon and take possession of the works and site and of the plant and materials on the ground, and to engage other persons to complete the works. The pursuers were further entitled to take such steps as were necessary, in the opinion of their architect, for completing the works without undue delay or expense, using for that purpose such plant and materials as were suitable. The pursuers exercised this right, and the works were completed without undue delay or expense other than that caused by the failure of the contractors during their period of possession to push on the work at the contract rate of speed, and their ultimate failure to complete the work in terms of the contract. . . . (Cond. 6) In the bankruptcy of the said William Brown & Sons the pursuers lodged a claim for the sum of £3231, 18s. 9d., and the said claim of £3231, 18s. 9d. was, after

negotiation, admitted on 31st December 1910 by the receivers in bankruptcy to the extent of £3031, 18s. 9d. The pursuers have sustained loss and damage at least to the amount of said sum in consequence of the said contractors' failure to fulfil their agreement with the pursuers, and the defenders are liable therefor under the contract of indemnity before referred to. . . ."

The pursuers' claim included, *inter alia*, the following item:—“(4) Liquidated damages for delay in completion of buildings as per contract:—

4 weeks at £250	-	£1000 0 0	
2     "     500	-	1000 0 0	
		£2000 0 0."	

The defenders pleaded, *inter alia*.—"2. The defenders should be assiozied from item (4) of the pursuers' claim for liquidate damage in respect—(a) That liquidate damage for delay in completing the work contracted for was not in the circumstances that have occurred a competent or appropriate claim against the contractors, whose contract the defenders guaranteed. (b) That in any case, in the circumstances that have occurred, the pursuers are barred from enforcing the liquidate damage clause against the original contractors. (c) That *esto* such claim was competent against the contractors, it is not a relevant or competent claim against the defenders under their guarantee. (d) That in any case, in the circumstances that have occurred, the pursuers are barred from enforcing the liquidate damage clause against the defenders."

On 5th December 1911 the Lord Ordinary (DEWAR) sustained the second plea-in-law for the defenders, and *quoad ultra* allowed to the parties a proof of their respective averments, and to the pursuers a conjunct probation.

The pursuers reclaimed, and argued—Clause 24 was not, as the Lord Ordinary thought, limited to failure on the part of the original contractor to finish the work within the stipulated time. It applied to all cases of non-completion irrespective of the contractor employed. That being so, it covered the present case. Where, as here, the original contractor had admittedly failed, the cautioner was not entitled to dispute liability, for that would be inconsistent with the true meaning of the contract of indemnity—*Parker v. Lewis*, 1873, L.R. 8 Ch. App. 1035 (*per Mellish*, L.J., at p. 1059). There was no need for proof, for the clause was one of liquidated damages and not penalty. As to the distinction between "penalty" and "liquidate damages," reference was made by the Lord President to *Public Works Commissioner v. Hills*, [1906] A.C. 368.

Argued for respondents—The failure referred to in the contract had not occurred, for the contract contemplated completion by the original contractor, and that was no longer possible. That being so, clause 24 was inapplicable, and the pursuers' remedy was an action for unliquidated damages—*Hudson on Building Contracts* (3rd ed.), 539, foot; *in re Newman*, 1876,

L.R., 4 C.D. 724, and 46 L.J. (Bankruptcy) 6; *ex parte Young*, 1881, L.R., 17 C.D. 668. Where, as here, the pursuers had dispossessed the original contractor and taken the contract out of his hands, their claim for liquidated damages was gone—*per Kennedy, J.*, in *Yeoden Waterworks Co.*, 1895, 72 L.T. 538, at p. 540. Where, as here, a surety undertook to make good any loss occasioned by a contractor's default, the sum payable under the bond was of the nature of penalty as contrasted with liquidated damages. That being so, it could not be regarded as the measure of damages due thereunder—*Board of Trade v. Employers' Liability Assurance Corporation, Ltd.*, [1910] 2 K.B. 649 (*per Fletcher Moulton*, L.J., at p. 655). Where the matter was doubtful the bond ought to be construed in favour of the guarantor—*Baird v. Corbett*, November 21, 1835, 14 S. 41. The respondents also contended that the pursuers' averments of damage were wanting in specification, and cited *North British Railway Company v. Wilson*, 1911 S.C. 730, 48 S.L.R. 620.

At advising—

LORD PRESIDENT—This is an action brought by a manufacturing company against an insurance corporation to recover damages under a guarantee bond under which the defenders guaranteed the performance of a contract by a certain Messrs William Brown & Company, which contract Messrs William Brown & Company had entered into with the pursuers. The pursuers wished certain work to be constructed, and Messrs William Brown & Company, who were contractors, undertook to execute them. There is no question that Messrs William Brown & Company did not complete the contract. They failed to do so; they threw it up, and upon that another set of contractors were brought in—Messrs Henshaw—who eventually finished the work. There is no question also that Messrs William Brown & Company went bankrupt, and that therefore the damages—whatever they are—cannot be recovered in full from them, and that something is due under the guarantee.

But really the question before your Lordships on the reclaiming note has been limited to one matter alone. The contract between the pursuers and Messrs William Brown & Company contained a clause entitled "Damages for non-completion." The 24th clause is as follows—" . . . [*His Lordship quoted the clause, vide supra.*] . . ." Now in the bill of damages which the pursuers put forward, and which they seek to recover under the guarantee, there is an item (No. 4) "Liquidated damages for delay in completion of buildings as per contract—Four weeks at £250," and "Two weeks at £500." The way they calculate that is this—They calculate the weeks by taking the weeks that it actually took to have the buildings completed by the other contractors.

Now the Lord Ordinary has sustained the second plea-in-law for the defenders, which is in these terms—" . . . [*His Lord-*

*ship read plea 2 ut supra*] . . .” The question that has been argued before us is whether that is right or not. The Lord Ordinary has allowed a general proof as to damages, but he has held that this particular clause does not apply.

I do not think it necessary in this case to determine the question that has so often arisen in these cases—I mean the question as between liquidate damages and penalty—because I have come to the conclusion that, whether this is liquidate damage or penalty, that question does not arise in the circumstances which have occurred.

The 26th clause of the contract provided that if the contractor, except for certain good reasons, shall suspend the works, then “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,” and then if he does not proceed (it is a long clause, and I do not read it) the employer may take possession of the plant and the materials upon the ground and finish the work himself; that means, of course, finish the work through another contractor, because the actual employer is not a person who could do the work.

Now that is what happened, and it seems to me that when you see there is a clause of that sort allowing the employer to enter upon the ground and finish the work instead of the contractor it is obviously incompatible with the provision as to damage for delay. I will assume that it is properly liquidate damage. I assume in favour of the person who pleads it that that is so, because it is perfectly evident that the question of the time that the thing takes then passes into other hands altogether. The contractor is gone. He has got no more power, so to speak, to stop the running of the time. He will be liable of course in damages for his breach of contract, so to speak, at common law, as a contractor is in every contract if he breaks it. But this particular clause, which provides for a penalty per week for delay in completion, seems to me upon the face of it necessarily to apply, and to apply only, to a case where the works are finished by the original contractor.

If that is so, that is an end of the whole matter, because whether it is liquidate damages or whether it is not if the clause does not apply to the circumstances as they emerge in the case of the original contractor, of course it cannot apply in a question under the guarantee.

Therefore upon the whole matter I think that upon this preliminary point the Lord Ordinary is right, and that the case must go back to him.

LORD KINNAR—I agree.

LORD JOHNSTON—I think that the Lord Ordinary’s judgment should be sustained.

There is much to be said in favour of the contention that clause 24 of the contract, particularly when read in conjunction with clause 24A, stipulates for liquidate damages for delay, and not for a fine or penalty.

But even admitting that this is so, the provision of section 24 is, I think, ousted, in the circumstances of the contractors’ bankruptcy and failure to carry out the contract, by those of section 26. Section 24 contemplates that the work is to be completed in natural course, but not to contract time. Section 26 provides for a breach of contract of another kind, viz., failure to proceed, and empowers the employers to take the work into their own hands, and to complete it themselves or by another contractor. In that situation the clause provides for the method under which the contractors are to be charged with what it costs their employers to complete the work, but also, be it noted, are to get the benefit of any saving the employers may make. And in ascertaining the sum due *hinc inde* the architect is called in to a certain effect, on which, however, neither party appears to stand. But whether the amount of extra or under cost is fixed by him or otherwise, the ascertainment and settlement of accounts for actual cost of completion does not exhaust the situation. The contractors are *ex hypothesi* in breach, and that breach does not necessarily affect only the cost of completion. There may be other damage to the employers. And while the contract does provide for ascertainment of the balance, one way or the other, of the cost of construction, it neither provides for nor precludes a claim for other loss and damage consequent on the breach. Such other damage may result purely from the delay occasioned, or may involve other considerations. But it is evidently a matter which could not be measured by liquidate damages. Neither does the clause stipulating liquidate damages apply to it, nor could such clause very well have been framed, because the data involved are not necessarily mere loss from delay, but may be other matters neither definite nor capable of being foretold. Hence this damage must be ascertained in the ordinary way. The amended averment in support of the claim is, I think, relevant, and therefore the Lord Ordinary was right in allowing the proof which he has done.

The terms of the bond of guarantee cover the claim.

LORD MACKENZIE—I agree with your Lordships. It is sought to make the guarantors liable for liquidate damages under clause 24 of the original contract, which provides that these are to be paid if the contractors, *i.e.*, William Brown & Sons, fail to complete the works by the date named in clause 23, the 31st of January 1910, or within any extended time allowed by the architect. Brown & Sons became bankrupt on 20th August 1909, and no further work was done by them under the contract. The receivers carried on the work until the middle of September, when they intimated to the pursuers that they did not propose to proceed further. On 16th September the pursuers made an agreement with Henshaw & Sons to complete the work by 30th December 1909, and they, as the pursuers aver, duly com-

pleted the construction of the said works. The pursuers say there were eight weeks' delay, but allow two weeks' extension, and claim for six weeks' delay. It appears to me, upon a sound construction of clause 24, that the pursuers' demand fails, for the clause was not intended to apply to the case where another contractor completes the work. In support of this view the provision 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. The reason is that the pursuers have exercised their rights under the 26th clause, which entitles them to enter and employ any other person to complete the works. Upon completion the architect is to verify the amount of the expenses properly incurred consequent on and incidental to the default of the original contractor, who is either to receive or pay, as the amount may be greater or less than the sum that would have been due to him if he had completed the works. This in the circumstances displaces the 24th clause which provides for liquidate damages.

I may add upon the relevancy of the pursuers' case on this head that I am unable to see how the pursuers can charge Brown & Sons under a liquidate damages' clause 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. The respondents submitted an agreement that the pursuers' averments of damage were wanting in specification, but I do not think there is anything in this. I am accordingly of opinion that the reclaiming note should be refused.

The Court adhered.

Counsel for Pursuers (Reclaimers)—Murray, K.C.—D. Anderson. Agents—Hume M'Gregor & Company, S.S.C.

Counsel for Defenders (Respondents)—Constable, K.C.—M. J. King. Agents—Simpson & Marwick, W.S.

Friday, February 23.

#### FIRST DIVISION. INCORPORATION OF TAILORS OF EDINBURGH, PETITIONERS.

*Friendly Society—Trade Incorporation—Alteration of Bye-Laws—Act for the Abolition of the Exclusive Privilege of Trading in Burghs in Scotland (9 and 10 Vict. cap. 17), sec. 3.*

The only surviving member of an ancient incorporation of tailors petitioned the Court, under section 3 of the Act for the Abolition of the Exclusive Privilege of Trading in Burghs in Scotland, to give its sanction to certain alterations in the bye-laws of the incorporation. The petition was opposed

by representatives of the tailors' trade on the ground that the petitioner's proposal was really a scheme to endow his own relatives, and the respondents suggested that they themselves should be allowed to submit a scheme, or alternatively that the Court should remit to some person to submit one.

The Court dismissed the petition *de plano*, holding that it was not "just and expedient" to sanction the proposed alterations, and (*dub.* Lord Dundas) that the Court was not entitled to adopt the suggestion of the respondents that it should create a scheme of its own and impose it upon the incorporation.

The Act for the Abolition of the Exclusive Privilege of Trading in Burghs in Scotland (9 and 10 Vict. cap. 17), section 3, enacts—"It shall be lawful for every such incorporation from time to time to make all bye-laws, regulations, and resolutions relative to the management and application of its funds and property, and relative to the qualification and admission of members, in reference to its altered circumstances under this Act, as may be considered expedient, and to apply to the Court of Session by summary petition for the sanction of the said Court to such bye-laws, regulations, or resolutions; and the said Court, after due intimation of such application, shall determine upon the same and upon any objections that may be made thereto by parties having interest, and shall interpose the sanction of the said Court to such bye-laws, regulations, or resolutions, or disallow the same, in whole or in part, or make thereon such alterations or adject thereto such conditions or qualifications as the Court may think fit, and generally shall pronounce such order in the whole matter as may to the said Court seem just and expedient."

On 17th October 1911 the Incorporation of Tailors of Edinburgh presented a petition to the First Division of the Court for sanction of alterations upon the existing bye-laws and regulations of the Incorporation in terms of the Act 9 and 10 Vict. cap. 17, section 3.

The petition set forth, *inter alia*—"2. The petitioning Incorporation is one of the ancient crafts or trade incorporations of Edinburgh. It was constituted under Seal of Cause of the Town Council of Edinburgh, the oldest constitutive document being a charter or act of the Town Council of Edinburgh, dated 26th August 1500. Up to the date of the said recited statute it possessed, like other similar incorporations, certain exclusive trading privileges and rights which were abolished by section 1 of the statute above recited. It also from ancient times possessed accumulated funds which were derived entirely from payments by intrants and members and were not contributed to by any outside person or persons, body or bodies. Said funds were applicable and were applied to various competent purposes of the Incorporation, and, *inter alia*, for the mutual benefit of members and their widows and