

CA on appeal from Norwich District Registry (HHJ Mellor) before Peter Gibson LJ; May LJ; Hale LJ. 30th June 2000

JUDGMENT : LADY JUSTICE HALE:

1. The issue in this appeal is whether the appellant local authority ('the council') was entitled to terminate after seven months two contracts made with the respondent, ('the contractor'), to provide Leisure Management and Grounds Maintenance services for a four year period. On 7 May 1999, His Honour Judge Mellor, sitting as a Deputy High Court Judge, held that the council was not so entitled, ordered it to pay the contractor the sums due under the contracts, and gave directions for the assessment of his damages.
2. The authority appeals, on the grounds (1) that the judge misconstrued the contracts in holding that they did not expressly give the council the right to terminate on the facts as he had found them; or (2) that he was wrong to construe those facts as not amounting to a repudiatory breach of the contracts.
3. We are told that the contracts in question were in a standard form drafted by the Association of Metropolitan Authorities and most commonly used by local authorities for contracts of this type. The issues raised may therefore be of wider importance.

The facts

4. In 1995 the council advertised for tenders for its Leisure Management and Grounds Maintenance Phase 11 Contracts. Both were of particular importance to a seaside resort such as Great Yarmouth. The first covered grounds maintenance and management of its sports facilities, including cricket and football pitches, bowling greens and a pitch and putt course. The second covered the maintenance of the council's parks, gardens and children's playgrounds, including planting the summer flower beds to produce the sort of display to be expected in a town which regularly came second in the large town category of the Anglia in Bloom competition.
5. The contractor was then in a small way of business as a horticultural contractor, with some private clients and some parish council contracts. In June 1995 the council resolved to include him among the three businesses invited to tender for the contracts in addition to its own Direct Services Organisation ('the DSO'). In the event, only he and the DSO submitted tenders. The contractor's tenders of, respectively, £441,488.50 and £301,586.62 per annum were much lower than the DSO's. The council had a preference for using the DSO, and its officers had grave reservations about whether the contractor was equal to the challenge. Nevertheless, the council resolved to award him both contracts. It was part of his case at trial that these attitudes, coupled with the reluctance of the council's workforce to transfer to his employment, coloured much of what later took place.
6. Having been awarded the contracts, the contractor had to borrow substantial sums to make the necessary investment in equipment and material and to increase his workforce very considerably.
7. The contracts were dated 14 February 1996. They were to run for four years from 1 January 1996. On 9 May 1996 the council served the first of many default notices under the contracts. Particularly important were a series of default notices issued on 24 June 1996 requiring the claimant to complete the summer bedding within five days. Other important complaints concerned the state of the cricket pitches and bowling greens, and the failure to renovate certain football pitches in time for the start of the new season in September 1996. The judge considered each default notice in detail, finding some proved, some not proved, and some proved but trivial or remediable, but it is not necessary for us to consider them, save where they are directly relevant to his conclusions.
8. On 2 July 1996 the council indicated that termination of the contracts might be considered at the next meeting. On 19 July 1996 the contracts committee recommended termination of the contracts subject to counsel's opinion. On 2 August 1996 the committee resolved to terminate both contracts under clauses 4 and 23 of the Conditions of Contract (see below). This was done by two letters hand delivered to the contractor on 5 August 1996. Responsibility for the contracts, and the employment of the transferred workforce, was taken over by the DSO, which had earlier decided to keep the necessary plant in case this might happen.
9. The council withheld payments otherwise due to the contractor under the contracts. It also resolved to pursue a claim against him for damages. The claimant issued his writ, claiming the sums due to him under the contracts and damages for wrongful termination, on 30 December 1996.

The relevant contractual terms

10. The contractual documents, as defined in each contract, consisted of the tender, the council's tender booklet, containing the information and instructions to tenderers, the conditions of contract, the specifications, the bills of quantities and schedules of rates. Most important for our purposes are the Conditions of Contract.
11. Clause 2.2 is headed 'Documents Mutually Explanatory':
'2.2.1 Except as otherwise expressly provided, the Contract Documents are to be taken as mutually explanatory of one another. Any ambiguities or discrepancies, shall be resolved by the Authorised Officer who shall thereupon issue to the Contractor appropriate instructions in writing and the Contractor shall carry out be bound by [sic] such instructions.
'2.2.2 In the event of any inconsistency between the Conditions and any provision in any of the Contract Documents, the Conditions shall prevail.'
12. The authorised officer is defined in clause 3:
'3.1 The Authorised Officer will be the Borough Engineering & Leisure Services Officer who will have responsibility for all matters relating to the Contract. He or she will also have overall responsibility for the contract in terms of settling any disputes, disagreements, interpretations etc.'

13. Clause 4 is headed 'Modifications'. It permits the Authorised Officer to instruct the contractor to change any of the services to be provided in a variety of ways. It is relevant only because the council also resolved to terminate the contracts under this clause. The judge held that it was not entitled to do so and there is no appeal against that holding.
14. Clause 6 is headed 'Contractor's Obligations':
'6.1 During the Contract Period the Contractor shall provide the Service in a proper skilful and workmanlike manner, to the Contract Standard and to the entire satisfaction of the Authorised Officer.'
Clause 6.4 provides that if the contractor fails so to provide the service or any part of it the council may provide the service itself and charge the contractor accordingly. This is without prejudice to the council's rights under Conditions 23 and 27.6 (see below).
15. The most significant provision is contained in Clause 23, headed 'Termination'.
'23.2 If the contractor:
23.2.1 commits a breach of any of its obligations under the Contract; ...
. . . the Council may, without prejudice to any accrued rights or remedies under the Contract, terminate the Contractor's employment under the Contract by notice in writing having immediate effect.'
'23.3 If the Contractor's employment is terminated as provided in Condition ... 23.2 and is not reinstated, the Council shall:
23.3.1 cease to be under any obligation to make further payment until the costs, loss and/or damage resulting from or arising out of the termination of the Contractor's employment shall have been calculated and provided such calculation shows a sum or sums due to the Contractor; . . .'
Clause 23.3 also gives the Council certain other rights such as to use the Contractor's materials and equipment in providing the same services. Clause 23.4 provides that the Council's rights under Condition 23 'are in addition to and without prejudice to any other rights the Council may have whether against the Contractor directly or pursuant to any guarantee, indemnity or bond'.
16. The default notices were issued under Clause 27.6, headed 'Default by Contractor and Liquidated Damages':
'27.6.1 At any time after four weeks from the commencement date, where the Authorised Officer is satisfied that in any particular case the Contractor has failed to perform the service or to comply with an obligation completely in accordance with the provisions of the contract, he shall be entitled to record in writing a Notice of Default (to be called 'Default Notice') which shall be sent to the Contractor.
27.6.2 A Default Notice shall specify the matter of default. If the matter is capable of remedy the Default Notice shall inform the Contractor of what action must be taken to remedy the default and the period for compliance.
27.6.3 A deduction of £140 will be made by the Authorised Officer from the amount due to the Contractor at the end of a period for submission of accounts ...
27.6.4 Default Notice shall not be issued by the Authorised Officer in the following circumstances:
(a) extenuating circumstances reasonably considered by the Authorised Officer to be beyond the control of the Contractor, such as civil emergencies, disputed or industrial action in organisations other than the contractor's; ...
(c) any other circumstances considered to be reasonable by the Authorised Officer.
27.6.5 All sums payable by the Contractor to the Council and all deductions pursuant to this Condition shall be paid as liquid damages and not as a penalty
27.6.7 Nothing in this clause shall be regarded as preventing the Authorised Officer from acting under the provisions of Clause 6.4 immediately in the event of the Contractor's failure to provide the service or any part thereof . . .'

The first issue

17. The council argued first that clause 23.2.1 should be applied literally so as to give them the right to terminate the contract for the breach of any of the obligations contained in it, other than the trivial. The judge was referred to a number of well-known authorities. On the one hand, 'it is open to the parties to agree that, as regards a particular obligation, any breach shall entitle the party not in default to treat the contract as repudiated': see **Bunge Corporation v Tradax Export SA** [1981] 1 WLR 711, per Lord Wilberforce at 715E. On the other hand '... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must yield to business commonsense': see **Antaios Compania SA v Salen Rederierna** [1985] AC 191, per Lord Diplock at p 201 D.
18. The judge pointed out that none of these authorities '... dealt with commercial circumstances having many parallels to those of a local authority and a contractor who is contractually required for a period of years to provide a wide variety of services on a repetitive basis.'
He continued: 'There has long been a tension in the world of contract between an attachment to literal meaning that makes for certainty with all in black and white and the parties knowing exactly where they are and little room for the relative unpredictability of judicial intervention, and a desire to avoid consequences seen as unfair or seen as offending commercial commonsense.'

As to which line of authority should apply, he concluded: *'In the context of a contract intended to last for four years, involving substantial investment or at least substantial undertaking of financial obligations by one party and involving a myriad of obligations of differing importance and varying frequency, I have no hesitation in holding that the common sense interpretation should be imposed upon the strict words of the contract and that a repudiatory breach or an accumulation of breaches that as a whole can properly be described as repudiatory are a precondition to termination pursuant to clause 23.2.1.'*

Another point in favour of a commercial, common sense interpretation was *'... that ephemeral breaches, even where substantial and not trivial, are subject to substantial contractual disciplines, default notices, deductions, performance by others at the contractor's expense and so on.'*

19. Mr Martin Mann QC, in challenging this conclusion, repeats essentially the same arguments as were put before the judge. These depend upon some basic principles of the law of contract, easy to state but not always easy to apply in practice.
20. As is well-known, the classic position in English (but not Scottish) contract law was that the consequences of breach depended upon the importance of the term broken. A minor breach of an important term, a condition, could entitle the innocent party to terminate the contract. Breach of a less important term, a warranty, would sound only in damages. Then along came the seminal case of *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, in which Diplock LJ, in the words of Lord Wilberforce in *Bunge v Tradax*, above, at p 714G, *'... illuminated the existence in contracts of terms which are neither, necessarily, conditions nor warranties, but in terminology which has since been applied to them, intermediate or innominate terms capable of operating, according to the gravity of the breach, as either conditions or warranties.'*
21. Lord Wilberforce emphasised, in the words already quoted in paragraph 17 above, that it is still open to the parties to agree that a term is so important to them that it should have that effect. He continued: *'It remains true, as Lord Roskill has pointed out in Cehave NV v Bremer Handelsgesellschaft m b H (The Hansa Nord)* [1976] QB 44, *that courts should not be too ready to interpret contractual clauses as conditions . . . But I do not doubt that, in suitable cases, the courts should not be reluctant, if the intentions of the parties as shown by the contract so indicate, to hold that an obligation has the force of a condition.'*
22. The problem with the council's argument in this case is that clause 23.2.1 does not characterise any particular term as a condition or indicate which terms are to be considered so important that any breach will justify termination. It appears to visit the same draconian consequences upon any breach, however small, of any obligation, however small. In this it is unlike cases, such as *Bunge*, which concerned an obviously vital time clause that can only be broken in one way, and much closer to the cases, such as *Hong Kong Fir Shipping* and *The Antaios*, concerning multi-faceted obligations, which can be broken in many different ways.
23. The comparable term in *The Antaios* provided that *'on any breach of this charterparty, the owners shall be at liberty to withdraw the vessel . . .'* The owners sought to do so on discovering that inaccurate bills of lading had been issued. As Lord Diplock observed, the dispute *'was a typical case of a shipowner seeking to find an excuse to bring a long term time charter to a premature end in a rising market. Stripped to its essentials the shipowners were seeking to rely upon the charterer's breach of an innominate term in the charterparty relating to the charterer's rights . . . to issue bills of lading . . . as constituting "any other breach of this charterparty" . . .'*
Lord Diplock agreed entirely with the arbitrators' view that *'the owner's construction is wholly unreasonable, totally uncommercial and in total contradiction to the whole purpose of the NYPE time charter form.'* The contract should not be interpreted in such a way as to defeat its commercial purpose.
24. Mr Mann seeks to distinguish clause 23.2.1 from the clause in *The Antaios* on the basis that the latter referred to *'any breach of this charterparty'*, while clause 23.2.1 refers to the *'breach of any of its obligations under this contract'*. While the *Antaios* term might be limited to a breach defeating the whole contract, the term here might refer to any material or non-trivial breach. The judge characterised this distinction as a semantic one and I agree with him. For the reasons which the judge gave, the notion that this term would entitle the council to terminate a contract such as this at any time for any breach of any term flies in the face of commercial common sense.
25. However, Mr Mann also argues that the judge should first have considered which terms of the contract had been broken and whether they were such important terms as to give rise to a right to terminate. He identified a core obligation in each contract, either in the exact terms of clause 6.1 or something very similar to it: *'During the contract period the contractor shall provide the Service in a proper skilful and workmanlike manner, to the contract standard and to the entire satisfaction of the authorised officer.'*
26. The difficulty with that argument is that this is a classic example of an innominate term: one which can be broken in so many different ways and with such varying consequences that the parties cannot be taken to have intended that any breach should entitle the innocent party to terminate the whole contract. In the words of Diplock LJ in the *Hong Kong Fir Shipping* case, at p 71: *'It is like so many other contractual terms an undertaking one breach of which may give rise to an event which relieves the charterer of further performance of his undertakings if he so elects and another breach of which may not give rise to such an event but entitle him only to monetary compensation in the form of damages.'*
27. Alternatively, Mr Mann argues that clause 23.2.1 has to be read with clause 27.6, which provided a mechanism for identifying those breaches which the council considered serious. That cannot be right. Clause 27.6 is primarily

aimed at remedying breaches as they occur rather than identifying repudiatory breaches. No distinction is drawn between more and less serious matters. The £140 charge is manifestly not liquidated damages: it bears no relationship at all to any damage which might be suffered as a result of the particular default notified. It was explained in evidence as a charge to cover the administrative costs of the procedure: otherwise it would undoubtedly be a penalty. In any event, the notices are primarily a way of securing proper performance under the contract rather than a way of bringing it to an end.

28. In my view the judge was entirely right to reach the conclusion he did on this aspect of the case and for the reasons he gave.

The second issue

29. The council argued that, in any event, the totality of breaches found by the judge were sufficient to justify it in terminating the contract. It was argued on behalf of the contractor that the appropriate test of a repudiatory breach was that derived from the *Hong Kong Fir Shipping* case, at p 66: '*. . . does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?*'

The judge later stated that, had he felt able to accept this proposition, his task would have been an easy one: '*Just as it is plain as can be that many of the breaches cannot be brushed aside as trivial, so it is plain as can be that even cumulatively the breaches relied upon cannot be said to have substantially deprived the defendant of the whole benefit for which it contracted.*'

30. However, he had taken the view that that test was '*apt for what one may call contracts of single obligation*', but: '*In the case of contracts of multiple, separate obligations, such as those under consideration in this case it seems to me, again invoking the doctrines of commercial common sense, that a breach which deprived the innocent party of substantially the whole benefit of substantially any aspect of the contract should be regarded as repudiatory.*'

He later identified three categories of repudiatory breach: '*Cumulative breaches that justify an inference that the contractor would continue to deliver a substandard performance in relation to substantial portions of the contract could, in my judgment, be assessed as repudiatory. In short such breaches would show that the contractor was not up to the job. Likewise, breaches that evinced an intention by the contractor to render a continuing substandard performance in respect of a defined and significant part of the works could be repudiatory. . . Thirdly, breaches of such significance as to be individually repudiatory, being substantial in themselves and not truly compensated for by contractual remedies, likewise could justify the termination of the contract.*'

31. There were no breaches in the second, intentional, category. Some breaches might fall within the third category, particularly those relating to the delayed start to the football season at two recreation grounds and the delay in the summer bedding. But the thrust of the council's case was directed at the first category. The judge then considered the effect of all the breaches admitted or proved in relation to each contract. He was invited by counsel to step back and form an overall view to see the wood from the trees. In relation to the Grounds Maintenance 11 contract, 'if the wood to be considered is a wood of breach trees alone, then the defendant's case . . . is overwhelming.' In relation to the Leisure Management Contract, he was 'just persuaded that the breaches . . . cumulatively would be sufficient to be treated as repudiatory.'
32. However, both had to be considered in context. That context included three important elements: first, it was an exceptionally dry summer; secondly, there was a discrepancy in the contractual documents as to the period allowed for the summer bedding to be completed, a discrepancy for which the council had to take responsibility; and thirdly, the council had issued a flurry of default notices on 24 June 1996, requiring the summer bedding to be completed within five days (ie within the shorter of the timescales envisaged in the documents), thus impelling the contractor to move men off other work and proceed at a faster rate than planned in order to avoid further financial levies under clause 27.6. This had had a knock on effect upon other work. The judge concluded that '*... had these breaches stood by themselves I would in relation to both contracts, more hesitantly in one case, have concluded that they were indeed repudiatory. In the event, those matters to which I have referred as having to be taken into consideration have led me to the conclusion that the repudiatory breaches have not been shown.*'
33. Mr Mann QC for the council argues that the judge was wrong, as a matter of law, to discount the repudiatory effect of the breaches he had found by reference to these factors. He appeared, in the first of the three categories of breach described in paragraph 30 above, to be applying some concept of anticipatory breach. Having found that the cumulative effect of the existing breaches was repudiatory he could not then go back on that finding. Once a breach has been found, it is irrelevant that there may be excuses for it.
34. Mr Smith for the contractor, on the other hand, complains that the judge applied a test too generous to the council. He should have applied the *Hong Kong Fir Shipping* test as it stands. Further, whichever test he applied, the judge had to take all the circumstances into account. The drought was relevant because the contract provided for it: indeed, in the case of the football pitches, there was no breach at all, because the renovation had to be done when conditions allowed, it could not have been done at the expected time because the ground was baked hard, and the council's own expert accepted that irrigation was not practicable. The drought conditions were also relevant to the substandard quality of the bedding display before 7 August, by which time it was passable. The judge had to ask himself what the real causes of that were. Preparation had been affected by the flurry of default notices requiring three weeks' work to be done in five days. This was the council's fault because it was

their responsibility to resolve discrepancies. They knew of this discrepancy but did nothing about it until serving those default notices.

35. The question for the court (and indeed the contracting parties) in any case like this is whether the cumulative effect of the breaches of contract complained of is so serious as to justify the innocent party in bringing the contract to a premature end. The technical term is 'repudiatory' but that is just a label to describe the consequence which may flow. It is not always an entirely satisfactory label, if it implies that the conduct itself must always be such as to demonstrate an intention to abandon contractual obligations: while this will sometimes be so it is not an invariable requirement. As the judge indicated, there are in effect three categories: (1) those cases in which the parties have agreed either that the term is so important that any breach will justify termination or that the particular breach is so important that it will justify termination; (2) those contractors who simply walk away from their obligations thus clearly indicating an intention no longer to be bound; and (3) those cases in which the cumulative effect of the breaches which have taken place is sufficiently serious to justify the innocent party in bringing the contract to a premature end.
36. It is clear that the test of what is sufficiently serious to bring the case within the third of these categories is severe. No case has been cited to us which addresses this question in the context of a long running contract to provide public services such as this. There are some parallels with a charterparty, but that is a somewhat less complex undertaking than these. There are also some parallels with building contracts, in the number and variety of the obligations involved and the varying gravity of the breaches which may be committed, some of which may be remediable and some not. In *Sutcliffe v Chippendale and Edmundson* (1971) 18 BLR 157, at p 161, His Honour Judge Sir William Stubb QC said this: *'I take the view that the whole combination of circumstances that then existed and to which I have already alluded did justify the plaintiff in ordering the contractors off the site. I think that their manifest inability to comply with the completion date requirements, the nature and number of complaints received from sub-contractors and [the architect's] own admission that in May and June the quality of work was deteriorating and the number of defects was multiplying, many of which he had tried unsuccessfully to have put right, all point to the truth of the plaintiffs expressed view that the contractors had neither the ability, competence or the will by this time to complete the work in the manner required by the contract.'*
37. Building contracts differ from these contracts in that there will, it is hoped, be an end product. Defects may or should be remedied during or, in some cases, after completion. Delay in completion can be compensated. These contracts contemplated a multitude of different results at different times, from cricket pitches ready for the summer season, football pitches ready for the autumn, flower beds in full bloom at the appropriate times, properly mown grass on lawns and bowling greens, raked bunkers in a pitch and putt course, edged and weeded rose beds, pruned shrubs, cleared litter, and so on and so on. Mr Smith accepted that in the case of a four year contract such as this, the court is entitled to look at the contractor's performance over a year, the most important part of which is the spring and summer, but it must still ask itself whether the council was deprived of substantially the whole benefit of what it had contracted for during that period.
38. These contracts are, however, like building contracts in that the accumulation of past breaches is relevant, not only for its own sake, but also for what it shows about the future. In my view, the judge was right to ask himself whether the cumulative breaches were such as to justify an inference that the contractor would continue to deliver a substandard performance. However, I would agree with Mr Smith that the inference should be that the council would thereby be deprived of a substantial part of the totality of that which it had contracted for that year, subject to the additional possibility that some aspects of the contract were so important that the parties are to be taken to have intended that depriving the council of that part of the contract would be sufficient in itself. That is not what the judge found in this case.
39. Once it is accepted that the proven breaches are relevant to show what will happen in the future, it is clear that the judge was entitled to take both the drought and the knock on effect of the council's own behaviour in relation to the summer bedding into account. He examined the facts of this case in great detail over a trial lasting some 13 days. He was well placed to evaluate the true importance of the proven breaches in the context of the contracts as a whole and all the circumstances of the case. He had a judgment to make. If anything, the test which he applied was somewhat more favourable to the council than the test which, in my judgment, he should have applied. He was undoubtedly entitled to reach the conclusion that he did.
40. I would dismiss this appeal.

May L.J.:

41. I agree that this appeal should be dismissed for the reasons given by Hale LJ. Peter Gibson L.J.:
42. I also agree that this appeal should be dismissed for the reasons given by Hale LJ.

Order: Appeal dismissed. Order as drafted by Counsel.

Mr. Martin Mann Q.C. and Mr. C Young (instructed by Messrs Christopher Skinner of Great Yarmouth) for the Appellant
Mr. Mark Smith (instructed by Messrs Eversheds of Norwich) for the Respondent