

JUDGMENT HIS HONOUR JUDGE BOWSER Q.C. 29 July, 1998

A. CONCLUSION

1. This is an appeal from an Arbitration Award made by Mr. Brian Green FRICS, FCI Arb, dated 30 June, 1997. That award was the Second Interim Award made by Mr. Green in an arbitration in which the Respondent to this appeal was the Claimant and the Appellant was the Respondent.
2. The appeal is dismissed and the Award confirmed for the following reasons.

B. INTRODUCTION

3. To avoid confusion, I shall refer to the parties as Ballast Wiltshier and Thomas Barnes respectively.
4. This appeal is brought without leave pursuant to my decision in a Judgment dated 13 May, 1988. That Judgment was given to resolve a conflict between the parties as to whether or not leave to appeal was required. I held that Condition 38 of the DOM/1 conditions of contract were a part of the contract between the parties and that by the terms of Condition 38 the parties consented to appeals on law from the Arbitrator to the High Court without leave pursuant to section 1(3)(a) of the Arbitration Act, 1979.
5. On 13 May, 1998, at the request of both parties, I ordered that the Arbitrator provide Further Reasons for his Award pursuant to section 1(5)(b) of the Arbitration Act, 1979, in response to the following question: *"What are the reasons for requiring Ballast Wiltshier to pay Thomas Barnes retention moneys?"*

The parties asked me to make that order by consent to avoid a further expensive contested application. It was made clear by the parties and myself that the order carried no criticism of the Arbitrator.
6. Two submissions are made by this appeal:
 - (a) That the Arbitrator was wrong in law to order a payment of Retention Money;
 - (b) That the Arbitrator was wrong in law to hold that an agreement for Liquidated and Ascertained Damages was a penalty.

C. HISTORY

7. Ballast Wiltshier entered into a Main Contract with M.A.B. (U.K.) Limited to do construction works on a project known as The Arcades, Ashton-under-Lyne. Ballast Wiltshier employed Thomas Barnes to do certain reinforced concrete work on the project.
8. Thomas Barnes started their work in November, 1993. At that date there was no signed or dated contract. There was an agreement between the parties to be found in a somewhat untidy mass of documents. That agreement was made in November, 1993. It was a measured work contract.
9. The work was divided into 3 phases, Phases 1, 2, and 3. The terms of payment provided for payment for each phase separately with Retention Money to be retained from each payment. Phase 1 was completed in July, 1994 and Phases 2 and 3 were completed on 2 August, 1995. The Main Contract was completed on 27 October, 1995. A certificate of making good defects under the Main Contract was issued on 16 June, 1997. The first instalment of Retention Money has been paid and there is now no dispute about it. The second instalment, for Phases 2 and 3 was not paid and was in dispute and was made the subject of the Award and now of this Appeal.
10. After conclusion of the work, disputes arose between the parties, and Mr. Green was appointed as arbitrator and accepted the appointment. The appointment was only made after some argument between the parties and their representatives.
11. The Arbitrator gave directions at a Preliminary Meeting on 25 March, 1996. It is recorded in the Award and not disputed, that at that meeting the parties agreed that the Arbitrator had jurisdiction to consider all matters in dispute or difference between the parties under or in connection with the contract, whether or not those disputes or differences had arisen or arose subsequently.
12. There were lengthy hearings before the Arbitrator. He first heard submissions on some preliminary issues and published his first interim award on 28 May, 1996. There followed a further hearing, conducted under some difficulties due to failures to comply with his directions as to preparations for the hearing. Difficulties also arose because of the failure of the experts to agree upon figures which the

Arbitrator had expected would be agreed. By agreement of the parties, the Arbitrator arranged to meet the experts alone and without the parties or their representatives to ascertain the differences between the experts and decide upon those differences. The Arbitrator did so meet the experts on 7 April, 1997, before making his award. The Arbitrator on 30 June, 1997 published his second interim award which was expressed to be Final save as to the issue of costs.

13. By order of 27 March, 1997, the Arbitrator, not being a lawyer, ordered that each party should within 7 days of the close of the hearing notify him of any points of law on which it required reasons to be given in his reasoned award. One point was so notified to him and decided by him. There is no appeal from his decision on that point. The points now raised on this appeal were not so notified to the Arbitrator.

D. THE ISSUES IN THE ARBITRATION

14. By Re-Amended Points of Claim, Thomas Barnes claimed various substantial sums for disruption, prolongation, late payment, overheads and loss of profit, re-measured works, variations and dayworks, and for Retention Money, £31,320.20 alternatively half of that sum. The Re-Amendment, although dated 19 January, 1997, was sent by letter dated 21 February, 1997 and leave was given for it in March, 1997.
15. By Points of Defence and Counterclaim, Ballast Wiltshier counterclaimed alleging wrongful delay in completion of the contract. The relief claimed under clause 12 of the DOM/1 conditions was £1,960,000 liquidated and ascertained damages alternatively £146,627.22 general damages.
16. By his award, the Arbitrator found that Thomas Barnes were entitled to extensions of time totalling a further 11 weeks and one day over and above the extensions allowed by Ballast Wiltshier. The Arbitrator disallowed some of the monetary claims made by Thomas Barnes and allowed others. The claims allowed were gross claims including Retention Money. The Arbitrator held that the liquidated and ascertained damages counterclaimed were penal and disallowed them. He also dismissed the counterclaim for general damages for delay.

E. RETENTION MONEY

17. In this appeal, Ballast Wiltshier submit that
 - (a) Payment of the second moiety of Retention Money was not due until after the date of the second Award; and
 - (b) The Arbitrator made an error of law in construing the contract in determining what were the events upon which the second moiety of Retention Money was due to be released, and
 - (c) It was not within the jurisdiction of the Arbitrator to award Retention Money.
18. Ballast Wiltshier raise a number of technical points of pleading and jurisdiction, and I shall have to examine their case on the technicalities, though such technicalities should be foreign to arbitrations. Even on Ballast Wiltshier's case, the Retention Money fell due to be released within days after the Arbitrator published his Award. The disputes therefore have an air of unreality about them, but I am assured that there may be consequences of substance and I must therefore deal with the technical issues.
19. The Notice to Concur in the Appointment of an Arbitrator dated 7 September, 1995 did not make any express mention of Retention Money. For Ballast Wiltshier, it is accordingly contended that Retention Money was not among the matters submitted to the Arbitrator. I do not accept that contention. Included among the matters listed by the Notice to Concur as the subject of the arbitration were:
*"Your breach of contract in failing to make interim payments in accordance with the sub-contract.
Your set-off of moneys not agreed from payments due under the terms of the sub-contract.
Your failure to properly evaluate the works in accordance with clauses 13, 16, 17, 18, and 21.
Your incorrect deduction of cash discounts from payments not made in accordance with the subcontract.
Your failure to make payment in respect of constructive acceleration of the works by the subcontractor due to your failure to issue proper extensions of time to phases 2 and 3."*

Clause 21 of the contract referred to in the Notice to Concur is the clause (extending to almost four printed pages) providing for payment to the sub-contractor. That clause includes the provisions in

respect of Retention Money. Though one does not read the words "Retention Money" in the Notice to Concur, the Notice envisaged a review of the whole of the accounting between the parties which necessarily included Retention Money.

20. That reference of the matter of Retention Money to the Arbitrator was not limited to an assessment of the amount of the Retention Money, it also included granting him jurisdiction to make an award for payment of Retention Money when it fell due for release, even if the release date had not arrived at the date of the Notice to Concur. The Arbitrator had that jurisdiction, if for no other reason, by virtue of the agreement to which I have already referred, that the Arbitrator "had jurisdiction to consider all matters in dispute or difference between the parties arising under or in connection with the contract, whether or not those disputes have already arisen or shall arise in the future". I reject the contention that those words no more than recite the parties' agreement that Mr. Green would be appointed for any future disputes: that is not what the words say. If, as counsel for Ballast Wiltshier submits, a further appointment had to be made before any fresh dispute could be heard by the Arbitrator, a Respondent would be unable to raise any fresh point by way of Defence which had not already been raised by way of dispute at the time of the original appointment. Moreover, amendments to pleadings on both sides would be extremely limited. The agreement, however, only relates to future disputes, that is, to future disputes about existing causes of action. It does not relate to future causes of action.
21. Counsel for Ballast Wiltshier also takes points on the pleadings. Ballast Wiltshier allege that the second moiety of Retention Money was not claimed in the arbitration. The Points of Claim as originally drafted, in 3 paragraphs headed, "Retention money", claimed that the first moiety of the Retention Money ought to have been released and had not been paid. The issue in relation to the first moiety disappeared, and by the Re-Amendment to which I have referred, the second moiety was claimed. Although leave was not granted for that Re-Amendment until after the closing submissions of Ballast Wiltshier, Ballast Wiltshier could have, but did not ask for an opportunity to make further representations. In fact, no such further opportunity was needed because the whole of the Retention Money had been claimed from the outset, though not in the 3 paragraphs headed "Retention Money" to which I have referred. In the original Points of Claim and even more clearly in the first Amendment to the Points of Claim dated 14 November, 1996, Thomas Barnes claimed the total remeasured value of the works in gross figures: that is, they claimed the value including the amount which Ballast Wiltshier was entitled to retain. Ballast Wiltshier showed that they understood that the retention money was being claimed in the gross figures because in their Points of Defence and Counterclaim they made the point that Retention Money was being claimed twice, once in the gross figures and again as an individual claim. Thomas Barnes claimed the second moiety of Retention Money in their pleadings from the outset and before any amendment.
22. Ballast Wiltshier also contend that Thomas Barnes were not entitled to claim the second moiety of Retention Money because no cause of action had arisen in respect of it at the outset of the proceedings, whatever may be the point in arbitration proceedings which may be said to be the outset of the proceedings. Ballast Wiltshier rely on the well known case of **Eshelby. v. Federated European Bank Limited** [1932] 1 KB 254, an appeal from an Official Referee. The effect of that decision is that in a court action, whether by the pleadings in their original form or by amendment, a party may only make a claim in respect of a cause of action existing at the date of the writ. Ballast Wiltshier contend that no entitlement to the second moiety of the Retention Money existed at the date of whatever be taken to be the equivalent of the writ (either the Notice to Concur, or the Arbitrator's acceptance of his appointment, or the service of the Points of Claim) and therefore no claim for the second moiety is admissible in this action. That point should have been taken in the original Points of Defence and in the first Amendment to that pleading in relation to the claim for the remeasured amount in gross figures. It was not. The point should also have been taken even more strongly in resistance to the application for leave to Re-Amend the Points of Claim and thereafter in the Re-Amended Points of Defence if the re-amendment was nonetheless allowed: the point was not taken on either of those occasions.

23. In their Defence, Ballast Wiltshier pleaded, *"The respondent avers that its obligation to release half of the 3% retention at practical completion of the main contract works is and was subject to the provisions of the sub-contract as a whole."*

That pleading could have been struck out as embarrassing since it fails to indicate any specific provisions of the sub-contract relied on. The plea is either meaningless or it contains a hidden trap. It did not refer to the terms now relied on in this appeal and it did not plead that a condition precedent to the release of Retention Money had not been fulfilled. It was implied in Thomas Barnes' Points of Claim that the events necessary for the release of the Retention Money had occurred (Rules of the Supreme Court O. 18 rule 7(4)) and there was no denial of the occurrence of those events. Either the pleading failed to give notice of Ballast Wiltshier's case, or that case has changed since the pleading.

24. At the meeting of experts with the Arbitrator on 7 April, 1998, after the hearing, the Arbitrator was handed a Schedule setting out the positions of both experts. That document was not a pleading. In that schedule, in the column for comments of the expert for Ballast Wiltshier, it was stated: *"The Retention currently held for Phases 1, 2, and 3 is £32,320.20. This sum is not in dispute - second moiety not yet due and payable."*

The Retention Fund is £31,320.20. One moiety is properly held until release of Retention Funds by Employer calculated as follows"

In giving an account of that meeting in his Further Reasons, the Arbitrator said that Ballast Wiltshier's expert attended with authority only to "agree figures as figures". The Arbitrator wrote: *"The witnesses of opinion had no first hand knowledge of the circumstances which controlled the entitlement to the release of Retention. Based on hearsay, [Thomas Barnes's expert] considered the whole of the retention was due for payment and [Ballast Wiltshier's expert] said that his instructions were that the second moiety was not due for payment but he did not wish to resile from his evidence on the last day of the hearing which was that I ' ' could acknowledge that it was there and it was a sum to be paid' "*

25. Even in the Schedule produced by the experts, still less in the pleadings, the point that the Arbitrator had no jurisdiction was not taken. Nor was any written (or oral) notice given to the Arbitrator that there was a point of law as to his jurisdiction. If such notice had been given, he would have been in some difficulty about deciding his own jurisdiction, but he could have done so in effect by refusing leave for amendments if the point had been taken then. Normally, I would refuse to consider a point of law which had not been raised before the Arbitrator, but it would be wrong to allow to an Arbitrator jurisdiction which he did not have on the ground that no objection was taken at the time.
26. I hold that the Arbitrator did have jurisdiction to consider whether or not the Retention Money should be paid over. When the sum due for payment falls due to be paid, the party entitled to be paid has a cause of action for the whole gross amount irrespective of any possible retentions. Clause 21.1 Of the DOM/1 conditions provides that *"The first and interim payments and the Final Payment shall be made to the sub-contractor in accordance with the provisions of clause 21"* (my underlining). Clause 21.2 makes provision for the timing of payments. Clause 21.3 provides: *".... The amount of the first and each interim payment to the Sub-contractor shall be the gross valuation less*

.1. an amount equal to any amount which may be deducted and retained as Retention by the contractor in respect of the sub-contract works in accordance with clause 21.5"

Clause 21.5 provides: *"The Retention which may be deducted and retained by the contractor shall be ascertained as follows:"*

The sub-contractor has a **right** to the gross sum and the paying contractor has a *discretionary right*, which he may or may not choose to exercise, to retain a part of that gross sum. The sum retained is the sub-contractor's money: **Wates Construction v. Franthom Property** (1991) 53 BLR 23. If withheld, it is withheld as security for any set off which may be raised, but the sub-contractor has a cause of action for the whole gross sum and he is perfectly entitled to claim the gross sum without reference to retention money, leaving it to the paying party to raise the discretionary right to make a retention if he wishes. This analysis is reflected in the language commonly used, and used by the parties in this case, referring to the "release" of retention moneys.

27. Either in Court proceedings or in an arbitration, if a party entitled to payment makes a claim for a gross payment (without deduction of Retention Money), and the defendant or respondent by its Defence pleads an entitlement to deduct Retention Money, the issue on that entitlement should be joined in the Reply. If the Court or Arbitrator finds either that there was no entitlement to deduct Retention Money or that the entitlement to make that deduction has expired before Judgment or Award, the Judgment or Award may award payment of the Retention Money. It follows that the Arbitrator had jurisdiction either to award the release of the second moiety of the Retention Money if the date for release of the Retention Money fell due before the date of his award or else to make a declaration that it would fall due for release at some later date after his Award. I therefore turn to consider points taken as to what was the due date for release of the Retention Money.
28. Ballast Wiltshier submit that the Arbitrator made an error of law in determining what were the events upon which the second moiety of Retention Money was due to be released. As I have already indicated, Ballast Wiltshier did not state in their Defence what those events were.
29. In his Further Reasons, the Arbitrator quoted from the written closing submissions made to him on behalf of Ballast Wiltshier as follows: "*The amount of retention currently being held by the Respondent is some £31,320.20 in respect of Phases 1,2, and 3.*

The amount and liability to pay this amount to the Claimant (subject only to lawful set-off) has not and is not disputed by the Respondent. It is accordingly submitted that the matter of retention should not be taken into account in the award.

....The second moiety is not due until receipt of the Main Contract Making Good Defects Certificate. This has not arrived."

The Arbitrator quoted in his Further Reasons from correspondence in evidence before him which showed that by 5 December, 1996 the Employer's Agent was anticipating issuing the Certificate of Making Good Defects within "weeks rather than months". The Arbitrator also stated that: "*I had closed the hearing, except for final submissions and meetings with witnesses of opinion, on 29 January, 1997. No evidence had been brought before me of any defects in the work of the Claimant which had not already been remedied. Neither did I receive evidence to persuade me that there were still defects in the work of the Respondent or its other sub-contractors which had not and would not be remedied in ample time to enable the relevant Notice of Completion of Making Good Defects to be issued substantially in advance of the publication of my second Award.*

After the close of the hearing of evidence, I heard oral closing submissions of Counsel on 14 March, 1997 and met with the 'quantum' witnesses of opinion on 7 April, 1997."

The Arbitrator then gave the account of the meeting with the experts from which I have quoted in paragraph 24 of this Judgment.

30. In those circumstances, the Arbitrator was perfectly entitled to understand, as he did, that the words "*that the matter of retention should not be taken into account in the award*" meant that Ballast Wiltshier were content that he should make his award without making any deduction for Retention Money and that the reason for that stance was that the Retention Money would be due for release on the issue of the Certificate of Making Good Defects which was expected shortly. The Arbitrator was also entitled to infer, as he did, that the Certificate would be issued and the time for payment thereafter would have expired before he published his Award: in his Further Reasons, he found that the Certificate had either been issued shortly before 22 February, 1997 or would be issued shortly thereafter "and thus many weeks before the publication of my Award". It is not open to Ballast Wiltshier to submit, as they now seek to do, that the Arbitrator was wrong to award payment of a sum including Retention Money without express evidence that the Certificate had been issued or "received" in sufficient time for the Retention Money to become payable before his Award. It would be more correct to say that Ballast Wiltshier failed to prove facts supporting their claim to make retention. In fact, the Certificate was issued on 16 June, 1997 and the Retention Money was due for release (subject to another point now taken by Ballast Wiltshier) at the latest at the end of the next two weekly period, on 27 June, 1997, before the Award was published on 30 June, 1997. Three days after the Award, on 2 July, 1997, Ballast

Wiltshier tendered the outstanding payment of Retention Money. For present purposes, it is no doubt correct to say that I am not entitled to have regard to what is now known about the date of the issue of the Certificate, but that date does show that the inference which the Arbitrator drew was in fact correct. Even if his inference had not turned out to be correct, it was an inference which the Arbitrator was entitled to draw on the material before him and his Award cannot be faulted on the ground that he drew the inference and relied on it.

31. Unfortunately, in his Further Reasons, but not in his Award, the Arbitrator did make an error of law in construing what he then had in mind as a term of the agreement between the parties. The error related to a question whether the release of the Retention Money was to be conditional upon receipt by Ballast Wiltshier of Retention Money under the Main Contract. However, he also made an error of law (probably due to an error of recollection) in thinking that the words he construed were terms of the agreement. His first error of law is therefore irrelevant.
32. In his First Interim Award, the Arbitrator found that the agreement between the parties was made in November, 1993 and was evidenced by a number of documents, some of them much later than November, 1993. One of the documents listed by him was a part completed and unexecuted form of Articles of Agreement for Domestic Sub-Contract DOM/2 (though the Conditions agreed were for DOM/1). The Arbitrator also listed some correspondence in 1994 and 1995 as relevant "*to the extent that I shall subsequently determine that they evidence the agreement which had been reached between the parties in November, 1993*". In the subsequent hearing before the second Award, the Arbitrator heard uncontested evidence *from Ballast Wiltshier* that the correspondence in 1994 and 1995 did indeed evidence the agreement that had been made, and that evidence was to the effect that the parties never had made an agreement in the terms of a manuscript entry concerning Retention Money on the unexecuted form of Articles. If the Arbitrator rejected that uncontested evidence, he was wrong in law to do so. It is more likely that he overlooked it, due to the lapse of time before he was required to give his Further Reasons.
33. Part 7 of the Articles gives the parties the opportunity to make amendments to Clause 21.5 of the Conditions as regards Retention Money. Figures for the percentages to be retained were filled in, and there is no question about that. There are then spaces in which the parties can vary the period during which the Retention Money can be held. The printed Conditions allow the retention until the Sub-Contract works have reached practical completion and in respect of those works a Certificate of Making Good Defects under the Main Contract or a certificate under clause 18.1.3 of the main contract has been issued (not "received"). In the form of Articles sent to Thomas Barnes, in the space for amendment of the period of retention there was written in manuscript:

For the first moiety: "*Certificate of Practical Completion for the Main Contract and receipt of retention from the employer*"

For the second moiety: "*Certificate of making good defects for the Main Contract and receipt of retention from employer.*"

In the correspondence between the parties in 1994 and 1995, it was made absolutely plain that the parties never had agreed that the release of the Retention Money to Thomas Barnes should be conditional on receipt by Ballast Wiltshier of Retention Money from the employer under the Main Contract. Moreover, it was not pleaded in the arbitration that there was a "pay when paid" agreement. That allegation appeared for the first time in writing in the Schedule produced at the meeting of experts on 7 April, 1997. The Arbitrator was wrong in law to embark upon an endeavour in his Further Reasons to construe words which were shown by the evidence before him never to have formed part of the agreement between the parties. For the sake of completeness, I shall show why I take the view that the Arbitrator's construction of those words was wrong, but his construction is irrelevant and does not vitiate the Award.

34. Condition 21.5 is as follows:
".1 where the Sub-Contract Works have not reached Practical Completion, ... the Retention which the Contractor may deduct and retainshall be the percentage specified in the Appendix part 7

.2 where the Sub-Contract Works have reached practical completion but in which a Certificate of Making Good Defects under.... the Main Contract Conditionshas not been issued the Retention which the Contractor may deduct and retain shall be one half of the amount that would have been deductible under clause 21.5.1 if the Sub-Contract had not reached Practical Completion

.3 where the Sub-Contract Works have been the subject of a Certificate of Completion of Making Good Defects under.... the Main Contract conditions any Retention retained by the Contractor shall be included in an interim payment to be paid at the end of the monthly period in which the relevant Certificate is issued."

35. In his Further Reasons, the Arbitrator wrote, at paragraphs 23 and 24: "I decided that, upon a proper construction of Part 7 of the Appendix to the Articles of Agreement, the manuscript insertion 'Certificate of Making Good Defects for the Main Contract and Receipt of Retention from Employer', related to the event in sub-clause 21.5.2 until the occurrence of which the quoted retention percentage of 1.5 could be applicable and that the manuscript insertion did not apply to the event in sub-clause 21.5.3 which conditions the ultimate release of Retention.

I therefore also decided that upon a proper construction of the sub-contract the payment to the Claimant of the last part of the Retention was due in an interim payment to be made at the end of the monthly period in which a main contract Notice of Completion of Making Good Defects relating to the sub-contract works was issued and that, contrary to the case put by the Respondent, the timing of the payment was not conditioned by the time at which payments were received by the respondent from the Employer."

36. That construction of condition 21 was wrong. Conditions 21.5.1 and 21.5.2 are provisions entitling the Contractor to hold and retain the Retention Money. Condition 21.5.3 is a term providing for the payment over of the Retention Money referred to in 21.5.2 once the right to retain it has lapsed. On a literal reading of the words, the manuscript words do not apply to condition 21.5.3, but to apply that literal meaning of the words in the manner adopted by the Arbitrator deprives the manuscript words of all force. The conditions and the form in Part 7 of the Appendix to the Articles are badly drafted, but the intention must have been that the manuscript words amend both 21.5.2 and 21.5.3. The Arbitrator was also in error in construing the agreement as requiring payment at the end of a monthly period. In doing so, he also disregarded evidence that the parties had agreed that payment should be made at the end of a two weekly period after the Retention Money was due for release.
37. When Ballast Wiltshier tendered payment of the outstanding Retention Money on 2 July, 1997, they had not yet received the Retention Money from the employer under the Main Contract. I am told that they did not receive it until 31 July, 1997. It is clear that Ballast Wiltshier have sought to rely on an error in the Further Reasons purely as a technical matter divorced from the realities of the merits between the parties.

F. PENALTY

38. The printed conditions contain no provision for damages for liquidated and ascertained damages in the event of failure to complete on time. Clause 12.2 provides that after notice of failure to complete on time, "*....the sub-contractor shall pay or allow to the contractor a sum equivalent to any direct loss and/or expense suffered or incurred by the Contractor and caused by the failure of the Sub-Contractor....*"
39. A provision for liquidated and ascertained damages was contained in ND 17, one of the Numbered Documents forming the agreement. That document defined the areas of the three phases and then had spaces to be filled in to show the value and dates for possession of each section, and also for each section a blank for "rate of liquidated and ascertained damages for section". For each section, figures were filled in which were precisely the same as the figures used in the main contract between Ballast Wiltshier and MAB.
40. The sub-contract Condition 2.2 provides: "*If any conflict appears between the terms of the DOM/2 Conditions and the Numbered Documents the DOM/2 Conditions shall prevail*".
41. There was some argument that there was a conflict between ND 17 and Condition 12.2. There is no appeal against the Arbitrator's decision that there was no conflict.
42. In his second Award, the Arbitrator wrote:

- "228. The parties were free to agree a liquidated sum or sums and it might be regarded as disingenuous to totally disregard the commercial intentions of the parties in a contract freely negotiated between them.
229. However, I am bound by legal precedent and must not seek to enforce a penalty.
230. It was submitted for the Respondent that the coincidence between the provisions for damages in ND 17 and those in the Main Contract was just that and that whilst the figures were the same the areas of the building to which the three sets of figures were allocated were not the same.
231. For me not to regard the figures in ND 17 as penalties I have to be satisfied that, without the benefit of hindsight, they were a genuine and reasonable estimate made, at the date of the contract, of the actual losses that would be suffered by the Respondent as a result of delayed completion of the sub-contract.
232. I FIND that, at the time at which the contract was made, the figures inserted as Liquidated and Ascertained Damages in ND 17, although they had been agreed between the parties, were not reasonable estimates of the losses and expenses that would or could be suffered by the Respondent as a result of the failure of the Claimant to complete the sub-contract works on time.
44. The Arbitrator accordingly rejected the claim for liquidated and ascertained damages and held that the Claimant was only entitled to general damages at common law or under Condition 12. Under that head, Ballast Wiltshier claimed £146,627.22.
45. As to the head of claim for general damages, The Arbitrator wrote in his Award:
"236. That claim is calculated by reference to the Respondent's own delay in completing the main contract. The Respondent alleges that its delayed completion was due to the Claimant's earlier delay in the completion of the sub-contract works and the Respondent costs its own resources during the period of its own delay.
237. I have not been persuaded that the expenses identified by the Respondent as having been incurred during the Respondent's overrun period were 'caused by the failure of the Sub-Contractor....'.
46. The Arbitrator therefore dismissed the counterclaim for general damages as well as the counterclaim for liquidated and ascertained damages.
47. Counsel for Thomas Barnes concedes that in paragraph 231 of his award the Arbitrator misdirected himself by setting the wrong burden of proof. The correct burden of proof was stated by Diplock L.J. in **Robophone Facilities Ltd. v. Blank** [1996] 1WLR 1428 at 1447: "*The court should not be astute to descry a 'penalty clause' in every provision of a contract which stipulates a sum to be payable by one party to the other in the event of a breach by the former.*
The onus of showing that such a stipulation is a 'penalty clause' lies upon the party who is sued upon it. The terms of the clause may themselves be sufficient to give rise to the inference that it is not a genuine estimate of damage likely to be suffered but is a penalty. Terms which give rise to such an inference are discussed in Lord Dunedin's speech in Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co. [1915] AC 79 at 87. But it is an inference only and may be rebutted. Thus it may seem at first sight that the stipulated sum is extravagantly greater than any loss which is liable to result from the breach in the ordinary course of things, i.e. the so-called 'first rule' in Hadley v. Baxendale (1854) 9 Exch. 341. This would give rise to the prima facie inference that the stipulated sum was a penalty. But the plaintiff may be able to show that owing to special circumstances outside 'the ordinary course of things' a breach in those special circumstances would be liable to cause him a greater loss of which the stipulated sum does represent a genuine estimate."
- Further guidance is to be obtained from the well-known cases **Dunlop Pneumatic Tyre Co. v. New Garage** [1915] AC 79 and **Philips v. Attorney General** (1993) 61 BLR 41. In particular, the issue has to be determined objectively as at the date the contract was made.
48. Counsel for Thomas Barnes submits that notwithstanding that error of law, I have a discretion whether or not to confirm, vary, set aside or remit the Award, and that I should exercise that discretion by declining to vary, set aside or remit the Award.
49. The discretion is contained in section 1(2) of the Arbitration Act, 1979. That sub-section provides that "*on the determination of such an appeal the High Court may order* " the relief there set out.

50. Counsel for Thomas Barnes submits that I should exercise my discretion in his clients' favour because even if the Arbitrator had directed himself with the correct burden of proof, it would have made no difference. He submits that the difference between the sums claimed for liquidated and ascertained damages and general damages respectively is startling. Moreover, he submits, the agreed damages cannot have been a genuine pre-estimate of the loss because not only are they exactly the same in amount as the sums in the main contract, but also they are in respect of different areas from the main contract. Counsel for Ballast Wiltshier submits that it is often reasonable for a contractor to estimate that the damage likely to be suffered from breach of the sub-contract by delay is the amount of damages payable by the contractor on the main contract, and so it is not so unreasonable that the pre-estimate of damage should be the same for each. But that submission does not account for the extraordinary alleged coincidence that the same sums are pre-estimated for both main and sub-contracts *for different areas*. There remains no convincing explanation for the enormous difference between the alleged liquidated and ascertained damages and the sum claimed as the actual loss, which in any event the Arbitrator found was not proved to have been caused by the failure of the sub-contractor. In making that comparison, one does, of course, have to guard against the use of hindsight, but the fact that the issue has to be determined objectively, judged at the date the contract was made, does not mean that what happens subsequently is irrelevant. On the contrary, it can provide valuable evidence as to what could reasonably be expected to be the loss at the time the contract was made.
51. It is not insignificant, though not conclusive, that the Arbitrator expressed his conclusion as a finding that the figures inserted in ND 17 "were not reasonable estimates". He did not say, "I am not satisfied that the figures were reasonable estimates". If he had directed himself with the correct burden of proof, his conclusion, as expressed by him, would have satisfied the test set by that correct burden of proof. The decision did not turn on the burden of proof.
52. It is also not insignificant that in paragraph 228 of his award, the Arbitrator gave due regard to the weight to be attached to the fact that the parties had reached an agreement on the figures in ND 17.
53. I believe that if the Award were remitted to the Arbitrator for reconsideration with the correct direction on the burden of proof, he would arrive at the same conclusion.

G. DISCRETION

54. In all the circumstances, in the exercise of my discretion, I decline to disturb the Award on the ground of the appeal against the finding of penalty. I have already found that the error concerning Retention Money was irrelevant, and if any exercise of discretion is required in relation to that error, I exercise it against disturbing the Award.

Paul Darling for the Appellants, instructed by Russell and Creswick
(Mr. Darling and his Instructing Solicitors were not instructed in the proceedings before the Arbitrator).
Mark Raeside for the Respondents, instructed by Dibb Lupton Alsop