COLLETT v VAN ZYL BROTHERS LIMITED (1966) ZR 65 (CA)

COURT OF APPEAL

BLAGDEN CJ, DOYLE JA, EVANS J

12th July 1966

Flynote and Headnote

[1] Contract - Building contract - Defects clause - Common law rights not taken away.

If a clause in a building contract providing that the builder will make good defects discovered within a specified period is to take away the purchaser's common law rights, it must do so in unequivocal terms.

[2] Civil procedure - Appeal - Costs only, as to - Leave required.

Where an appeal is limited to costs, leave to appeal is required. Where the appeal is not limited to costs alone, leave to appeal need not be obtained.

[3] Civil procedure - Costs - Award at discretion of judge - Discretion to be exercised judicially.

The award of costs in an action is at the discretion of a trial judge, such discretion to be exercised judicially.

[4] Civil procedure - Costs - Review of award by Court of Appeal - Where leave to Appeal required.

Where leave to appeal is required (i.e., against an order as to costs only), and such leave is granted, the order for costs can be reviewed by the Court of Appeal.

[5] Civil procedure - Costs - Review of award by Court of Appeal - Appeal made without leave.

Where an appeal is made as to costs only, and is made without leave, the Court of Appeal should entertain the application only if satisfied that the trial judge did not exercise his discretion at all.

[6] Civil procedure - Costs - Award at discretion of judge - Principles for exercise of discretion.

A trial judge, in exercise of his discretion, should, as a matter or principle, view the litigation as a whole and see what was the substantial result. Where he does not do so, the Court of Appeal is entitled to review the exercise of his discretion.

Cases cited:

(1) *Hancock v B W Brazier (Anerley) Ltd* [1966] 2 All ER 1; [1966] 1 WLR 1317.

(2) *Chell Engineering Ltd v Unit Tool & Engineering Co. Ltd* [1950] 1 All ER 378.

(3) *Childs v Blacker, Same v Gibson* [1954] 2 All ER 243; *sub nom. Childs v Gibson, Childs v Blacker, Same v Same* [1954] 1 WLR 809.

1966 ZR p66

BLAGDEN CJ

(4) *Wheeler v Somerfield* [1966] 2 QB 94; [1966] 2 All ER 305.

(5) *Ward v James* [1966] 1 QB 273; [1965] 1 All ER 563.

(6) *Ormerod v Todmorden Joint - Stock Mill Co. Ltd* (1882), 8 QB D. 664.

(7) *Evans v Bartlam* [1937] AC 473; [1937] 2 All ER 646.

(8) *Charles Osenton & Co. v Johnston* [1941] 2 All ER 245; *sub nom. Osenton (Charles) & Co. v Johnston* [1942] AC 130.

(9) *Jones v McKie and Mersey Docks and Harbour Board* [1964] 1 WLR 960; *sub nom. Jones v McKie* [1964] 2 All ER 842.

(10) *Baylis Baxter Ltd v Sabath* [1958] 2 All ER 209; [1958] 1 WLR 529.

(11) *Donald Campbell & Co. Ltd v Pollak* [1927] AC 732.

(12) In re Gilbert; *Gilbert v Hudlestone* (1885), 28 Ch. D. 549.

Statutes and rules construed:

Zambia:

Court of Appeal for Zambia Ordinance (Cap. 12), s. 25 (1) (d).

High Court Rules (Cap. 3, subsid.), order 34, rule 3.

England:

Judicature Act, 1873, s. 49.

Judicature Act, 1925, as. 31 (1) (h) and 50 (1).

Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1) (h) (i).

Supreme Court (England) Rules, order 36, rule 1 (3).

Supreme Court Costs Rules 1959, rule 2 (5).

Foster, for the appellant

Gardner, for the respondent

Judgment

Blagden CJ: This is an appeal and cross - appeal from a judgment of the High Court, Ndola (Whelan, J), in a suit brought by the respondent company, as plaintiff, on a building contract.

On the 20th June, 1956, the appellant and respondent concluded a building contract whereby the respondent was to build a house in accordance with a specification and drawings for the appellant, and the appellant, by way of consideration therefor, was to pay the respondent the sum of £3,750 plus a reasonable sum in respect of any extras the appellant might order.

Both contract and specifications were reduced to writing and these documents were produced in evidence at the trial. The contract specifically provided that the building works were to be in conformity with the specification and drawings and that these should be read and construed as forming part of the agreement.

Payment of the contract price of £3,750 was to be made by a building society loan amounting to £3,500 and the balance of £250 was to be paid off by the appellant by monthly instalments of £10. There was also provision for the payment of interest.

1966 ZR p67

BLAGDEN CJ

There was no express provision in any of the written instruments for a completion date but the learned trial judge found on the - evidence and his finding has not been challenged - that the appellant stipulated that the house should be ready for occupation by the 1st October, 1956, and that the respondent assured her that it would be. He further found that the house was not completed by that date.

The appellant and her husband went to England on leave in September, 1956, and whilst there they received a letter dated 1st November, 1956, from Mr Van Zyl, director of the respondent company, intimating that the house was finished. The appellant's husband replied on the 18th November, 1956, expressing his pleasure at this and asking if the respondent company would be prepared to wait for a while for the £10 instalments on account of unexpected expenses. The respondent company did not reply to this letter and the first instalment was not paid until the 7th July, 1957. Two further instalments were paid - the last on the 1st September, 1957 - and thereafter no more. Their receipt was never acknowledged, despite requests therefor. In July, October and November of 1957 the appellant's husband wrote to Mr Van Zyl asking for certain works in and about the house to be completed and certain defects remedied. His letters remained unacknowledged and no action of any kind was taken by the respondent company in regard to his requests. The appellant had the defects remedied by other contractors and paid no more instalments on the contract price to the respondent.

On the 25th September, 1962 - that is, nearly five years later - the respondent company issued its writ claiming £422 18*s*. 4*d*., made up of the balance of instalments unpaid plus the cost of certain extras supplied, plus charges by way of interest.

The appellant's defence was to say that, taking into account deductions in the contract price due, first, for works omitted or defectively rendered, and secondly, for the sum of £100 included in the specification as provision for contingencies which was never in fact used, she had already overpaid the respondent company. She counter - claimed for the amount of that over - payment and also for damages calculated in terms of rent lost to her, first as a result of the respondent

company's failing to complete the house by the 1st October, 1956, and secondly as a result of the building being unlettable over a further period whilst the defects were being put right.

In the result the learned trial judge gave judgment for the respondent company on its claim to the extent of £90 and for the appellant on her counter - claim to the extent of £94 10*s*. 0*d*. He gave the costs of the claim to the respondent and the costs of the counterclaim to the appellant.

The appeal and cross - appeal raised together three major and two minor issues. I propose to deal with these in turn commencing with those forming the subject of the cross - appeal.

The first ground in the cross - appeal relates to the learned trial judge's award of a sum of £37 10s. 0d. to the appellant as rent lost for the month of October, 1956, as a result of the late completion of

the building, but this was abandoned in the course of argument so I shall say no more about it.

The second ground of the cross - appeal concerned one of the works which the appellant claimed had been omitted and in consequence entitled her to a dimunition in the contract price. The item in question was the external plastering of the house with a Tyrolean finish, as provided for in the specification under the heading of 'Plasterer'. At the trial, Mr Van Zyl admitted that this particular item, together with certain others, had been omitted. He said that he had agreed with appellant to substitute the more expensive Spanish tiles in place of interlocking tiles on the roof, and that to compensate for this it was also agreed that the Tyrolean plastering should be omitted. Appellant strongly denied any such agreement. The learned trial judge expressed himself as not satisfied that the respondent had proved that the specification was varied in regard to this particular work before the contract was signed. By clause 12 of the specification, the contractor, that is, the respondent, was precluded from making any variation of the nature which he contended was agreed, without the written authorisation of 'the Engineer', who, in accordance with clause 1, was to be appointed by the appellant. In fact, the appellant never appointed any engineer and the omission of the Tyrolean plastering was never authorised in writing by anyone. The learned trial judge took the view that if it was clear that both parties had orally agreed to a variation, then it could be said that the provisions of clause l 2 had been waived. But where, as here, there was complete disagreement between the parties as to there being any oral agreement, such waiver was not established and clause 12 prevailed. Mr Gardner's contention on this ground of the cross - appeal, as I understood it, was that as the tiling of the roof and whatever was done by way of external plastering were carried out in the presence of the appellant and her husband, and without protest on their part, the need for any written variation order must be regarded as having been waived. I find it difficult, however, to find in the recorded evidence any real support for this contention. All along the appellant denied that she had ever agreed to the omission of the Tyrolean plastering and, except for a reference by the appellant's husband to the plastering having been started and nearly finished before he and the appellant left Ndola, I can find nothing to suggest that they were present when the roof was being tiled and the Tyrolean plaster omitted,

let alone that they acquiesced in that omission. The *onus* in this issue was on the respondent to show that the omission of the Tyrolean plastering was properly authorised, or that the need for its authorisation was waived and the omission itself agreed between the parties. It is clear from the learned trial judge's findings that that *onus* was never discharged. It follows that the second ground of the cross - appeal also fails.

The third ground of the cross - appeal was, perhaps, of more substance. It related to awards made by the learned trial judge in the appellant's favour in respect of £118 for internal plastering and painting, and £30 for tiling in the bathroom. These items were rendered necessary by the respondent's failure to execute these works properly or at all. The respondent also complains of the further

sum of £57 awarded by the learned trial judge in respect of rent lost over a period of six weeks when the house was unlettable owing to these plastering, painting and tiling works having to be carried out by another contractor. The respondent's case is that if there were defects which required remedying, then, in accordance with clause 14 of the specification, it was a condition precedent to respondent's remedying them that directions in writing specifying the defects and requiring their amendment within a specified reasonable time should have been served on the respondent. I think this argument begs the real question, which is whether or not the respondent was in breach of its contract to build this house in accordance with the terms of the agreement dated 20th June, 1956, and of the specifications and drawings which formed part of that agreement.

Omitting words irrelevant for the purposes of this particular issue, the contract provided that:

' The contractor shall . . . execute and perform the several works and provisions . . . described and referred to in the tender, specifications, and on the drawings . . . in conformity of the said specifications and drawings . . .'

Clause 5 of the specifications stipulated that:

' The contractor shall provide everything necessary which shall include all plant, tools, tackle, staging, scaffolding, carting, materials, goods, labour and everything of every sort and kind for the proper and complete execution of the work according to the true intent and meaning of the drawings and specifications taken together, whether the same may or may not be particularly shown on the drawings or described in the specification provided that the same is reasonably to be inferred therefrom . . .'

Part of clause 8 is also in point; it specified under the heading 'Materials and Workmanship' that:

' The whole of the materials . . . to be provided by the Contractor to the best of their respective kinds . . . and the Contractor is to be entirely responsible for the proper and efficient carrying out of the whole of the work. The work to be done in the best and most workmanlike manner . . .'

It is these provisions which the appellant complains have been broken.

A somewhat similar situation arose in the recent case of *Hancock and Others v B. W. Brazier (Anerley) Ltd* [1], where a builder sold a house in course of erection to a purchaser under a contract which provided in one clause, numbered 9, that the builder should 'prior to completion . . . in a proper and workmanlike manner erect build and complete . . . a dwelling house in accordance with the plan and specification', and also provided in another clause, numbered 11 that if the purchaser should discover any structural defects in the house and works within six months of completion and notify the builder thereof in writing, then the builder should forthwith make good such defects without expense to purchaser. Some two years

after completion the floors and walls began to crack because of the use, without negligence, of sodium sulphate in the hard core underneath the concrete ground floor, and substantial damage to the house resulted. The purchaser sued for damages for breach of clause 9 to build in a proper and workmanlike manner in accordance with the plan and specification. One of the contentions advanced by the builder in defence of the claim was that after completion the purchaser could no longer rely on clause 9 because his rights were limited to those conferred by clause 11. Diplock, LJ rejected this contention and his decision was, on 5th May, 1966, confirmed by the Court of Appeal. He found that there had been a breach of the warranty in clause 9. He said (at page 8):

' I have read clause 11 and it creates rights by providing that the builders will make good any structural defects which are discovered within six months. If that clause is to take away the rights of the purchasers which normally follow at common law in the case of a breach of contract, it must do so in very clear terms if the court is going to give it that effect.'

[1] It is true that *Hancock*'s case is distinguishable from the instant appeal in that clause 11 in *Hancock*'s case was limited to the discovery of structural defects, whereas clause 14 of the specification before us extends to ' any defects . . . or other faults'; but nevertheless I would respectfully adopt Diplock, LJ's ruling that, for a discovery of defects clause to take away the purchaser's common law rights for breach of contract, that clause must be expressed to do so in very clear terms. No such terms exist here; and I have been unable to find any reported decision which a discovery of defects clause has been interpreted to take away common law rights of action for damages for breach of contract.

In my view the defects in the internal plastering and painting, and in the bathroom tiling, which the learned trial judge found proved, and for which he awarded, respectively, the sums of £118 and £30, together with the further sum of £57 for loss of rent, constituted breaches of contract, and his award of damages in respect of them cannot be impugned. This disposes of the third and last ground of the cross - appeal, which thus fails in its entirety.

I now come to consider the two substantial issues raised by the appeal.

The first concerns the refusal of the learned trial judge to deduct £100 from the contract price of £3,750, this being the sum which related to contingencies. A clause is often inserted in building contracts for the provision of a sum for contingencies; and, apart from any special terms, it would seem that if no expenditure is required for such contingencies the provisional sum inserted therefor can be deducted (*see* 3 *Halsbury,* p. 516, para. 1026). In the instant case contingencies were provided for by clause 37 of the specifications in these terms:

' 37. *Contingencies.* Provide the sum of £100 (One Hundred Pounds) for contingencies to be used as directed by the Engineer or be deducted in whole or in part, if not directed to be used.'

1966 ZR p71

BLAGDEN CJ

The argument advanced by Mr Foster on behalf of the appellant here is that there having been no expenditure on contingencies - other than variations which were accounted for against the contract price - the whole of this sum of £100 falls to be deducted from the contract price. This assumes that this figure was included within the contract price. The evidence, however, is all against such an assumption. Mr Van Zyl said that the £3,750 was the figure he wanted to complete the job and it did not include any contingencies. The appellant, when she gave evidence, said that she expected to pay £3,750 for the house and not £3,650. Her husband agreed with her evidence on that point. But Mr Foster relied on the wording of clause 37. It was necessary, he said, to interpret what was written in the contract, and not what was intended to be written, even if this had the effect of defeating the real intention of the parties. He claimed that there was no ambiguity about clause 37 and what it meant had been explained by Mr Widlake, a chartered quantity surveyor - and thus an expert witness - who gave evidence for the appellant and who had been employed by her to examine and report on the omissions and defects in the house at the end of 1962. He was asked about clause 37. The learned trial judge's note records this as his answer:

' This is usual wording of contingency clause. Idea is to cover cost of extra work arising over the contract price. Although there is an extras clause (12) there would still be need for a contingency clause. The list of contingencies would not have to be made out. After completion, from contingency sum is deducted the value of omissions and then are added value of extras - that is final figure. The contingency sum is rather like security for costs.'

And, later, in cross - examination:

' Contingency sum is normally shown separately in a tender but forms part of lump sum price.'

And, again, in re-examination:

' Contract sum includes figure for contingencies shown separately in tender.'

But I cannot accept Mr Foster's contention that there is no ambiguity in clause 37. In my view there is a patent ambiguity. What do the words, 'Provide the sum of £100 for contingencies . . .' mean? Do they mean that there *has* been provided the sum of £100 in the contract price for contingencies? That interpretation would not accord with the evidence. Do they mean that

there *shall* be provided the sum of £100 for contingencies or that there *may* be provided such sum if and when contingencies arise? I do not think Mr Widlake's evidence furnishes an answer to these questions. The best he can say is that clause 37 is the 'usual wording' of a contingency clause and that the contingency sum is 'rather like security for costs'. I do not think this evidence resolves the ambiguity of what is meant by the words of clause 37 I have quoted. But that ambiguity, in my view, is resolved by evidence of what actually happened; and that evidence clearly shows that no sum for contingencies was ever

actually provided. In consequence the £100 does not fall to be deducted from the contract price and the appellant fails on her first ground of appeal.

The second ground of the appellant's appeal and by far the most substantial issue in the whole case, relates to the learned trial judge's award of costs. The learned trial judge awarded the respondent the costs of the claim on which it was successful, and the appellant the costs of the counter - claim on which she was successful. This might be described as the usual order, but, as Denning, LJ put it in *Chell Engineering Ltd v Unit Tool and Engineering Co. Ltd* [2]:

' .... in most of these cases it is desirable that a judge should consider whether a special order should be made as to costs because the issues are often very much interlocked, and the usual order of" judgment for plaintiff on claim with costs and for defendant on counter - claim with costs" does not always give a just result.'

In *Chell's* case it did give a just result but in the later case of *Childs v Blacker* [3], it did not. In *Childs,* the county court judge made the same type of order as in *Chell* holding that he was bound by the latter. The Court of Appeal in *Childs* held that he was not so bound. Lord Goddard, CJ said (at page 245): 'This case may draw the attention once more of county court judges to what Denning, LJ said in *Chell*'s case', and he went on to repeat the passage from Denning, LJ's judgment which I have just read.

[2] Had the appellant's appeal here been limited to costs alone she would have had to obtain leave to appeal - see Court of Appeal Ordinance (Cap. 12), s. 25 (1) (d) - but this is not necessary here where the appeal is not so limited - see *Wheeler v Somerfield* [4]. By the High Court Rules Order 34, rule 3, it is provided that:

' The cost of every suit or matter and at each particular proceeding therein shall be in the discretion of the Court or a Judge; and the Court or a Judge shall have full power to award and apportion costs, in any manner it or he may deem just, and in the absence of any express direction by the Court or a Judge, costs shall abide the event of the suit or proceeding:

Provided that the Court shall not order the successful party in the suit to pay to the unsuccessful party the costs of the whole suit; although the Court may order the successful party, notwithstanding his success in the suit, to pay the costs of any particular proceeding therein.'

[3] The award of costs is thus discretionary in the trial judge but there are certain canons to which the trial judge must conform in exercising his discretion. There is a similar discretion in England exercised by the judge under the Judicature Act 1925, s. 50 (1) and the Supreme Court Costs Rules, 1959, r. 2 (5). In the notes appearing under the Rubric, '*Discretion to be exercised judicially*' at p. 1999/218 of the 1966 *Annual Practice,* there appears the following passage:

' Wide though the discretion is, it is a judicial discretion and must be exercised on fixed principles, that is, according to rules

of reason and justice . . . and the exercise of discretion even by a Judge sitting alone must be justifiable . . . Where there are no materials on which the Judge can exercise his discretion, he is not justified in depriving a successful party of his costs . . . the materials must be those in evidence in the case . . .'

To what extent can a Court of Appeal interfere with an order made by a judge in the exercise of his discretion? This matter has come up for consideration in a number of cases. In the case of *Ward v James* [5], where the Court of Appeal was considering an appeal against an order for trial by a jury - which by R S.C. Order 36, r. 1 (3) is in the absolute discretion of the judge - Lord Denning, M.R in delivering the judgment of the court, made some general pronouncements on the powers of the Court of Appeal in England to vary an order made in the exercise of a discretion. He said (at 570):

' Whenever a statute confers a discretion on the court or a judge the Court of Appeal has jurisdiction to review the exercise of that discretion (see *Ormerod v Todmorden Joint - Stock Mill Co. Ltd* [6], save only as to costs, for then the judge has the last word: see s. 31 (1) (h) (i) of the Supreme Court of Judicature (Consolidation) Act, 1925. No rule can diminish the jurisdiction of this court so given by statute.'

[4] At first sight it would appear from this dictum that Lord Denning was saying that there was no appeal from a judge's order as to costs made in his discretion. His reference to costs was, of course, *obiter* and he did not pursue the aspect of costs any further The provision of the Judicature Act 1925, s. 31 (1) (h) which he referred to corresponds to our Court of Appeal for Zambia Ordinance, (Cap. 12), s. 25 (1) (d). The two paragraphs are almost identical. Each provides that no appeal shall lie *without leave* from an order of the High Court or a judge as to costs only which by law is left to the discretion of the court or judge making the order. Clearly the judge has the last word, as Lord Denning said, if leave to appeal is refused. Equally clearly, if leave to appeal is granted, or if, as here, such leave is not necessary because the appellant is not appealing against the order as to costs only, the judge has not got the last word, and his order as to costs can be reviewed by the Court of Appeal.

In his judgment Lord Denning then went on to deal with the review of a discretion in general terms. He said (at 570):

' This brings me to the question: in what circumstances will the Court of Appeal interfere with the discretion of the Judge? At one time it was said that it would interfere only if he had gone wrong in principle; but since *Evans v Bartlam* [7], that idea has been exploded. The true proposition was stated by Lord Wright in *Charles Osenton & Co. v Johnston* [8]. This court can and will interfere if it is satisfied that the judge was wrong. Thus it will interfere if it can see that the judge has given no weight (or no sufficient weight) to those considerations which ought to have weighed with him . . . Conversely it will interfere if it can see that he has been influenced by other considerations

which ought not to have weighed with him, or not weighed so much with him . . .'

There have been a number of cases in England which suggest that a rather more strict standard should be applied where the Judge's discretion which it is sought to impugn is his discretion in regard to an award of costs. In the notes to the Supreme Court Costs Rules, r. 2, appearing in the 1966 Annual Practice, at p. 1999/226, under the Rubric *'Appeal as to Costs'* it is stated that, in view of the provisions of the Judicature Act, 1925, s. 31 (1) (h), to which I have already referred:

'. . . No appeal against a decision on costs can be entertained unless the trial judge by taking into account some matter wholly unconnected with the cause of action or by being without material on which to exercise his discretion, had not in law exercised his discretion at all.'

The authority quoted to support this proposition is *Jones v McKie & Mersey Docks & Harbour Board* [9], but in that case the appellant was appealing as to costs only and had been refused leave to appeal. [5] The position was put clearly by Jenkins, LJ in *Baylis Baxter Ltd v Sabath* [10], when he said:

' The matter as it now stands really comes to this, that in a case of this sort - that is to say, in a case in which it is sought to appeal, without leave, from an order relating solely to costs - such an application should not be entertained, in view of the express terms of s. 31 (1) (h) of the Judicature Act, 1925, unless the circumstances are such that this court can say, in effect "In this case the learned judge did not in truth exercise his discretion at all". It is only in a case of that kind that this court has jurisdiction to entertain such an appeal.'

Then there is the passage in Viscount Cave, L.C.'s judgment in the *locus classicus* of *Donald Campbell &* Co. *Ltd v Pollak* [11], where he says at page 812:

' But when a judge, deliberately intending to exercise his discretionary powers, has acted on facts connected with or leading up to the litigation which have been proved before him or which he has himself observed during the progress of the case, then it seems to me that a Court of Appeal, although it may deem his reasons insufficient and may disagree with his conclusion, is prohibited by the statute from entertaining an appeal from it.'

But in that case, again, the appeal was limited to costs and the appellant had not; obtained leave to appeal which at that time was required by the Judicature Act, 1873, s. 49; and it followed that,

except in the circumstances the Lord Chancellor described, the Court of Appeal was precluded by the statute from entertaining the appellant's appeal.

These cases are thus not of direct application here where the appellant did not require leave to appeal and is before us on this issue as of right. Of more assistance are those cases in which leave to

appeal against an order for costs was granted. The first of these seems to have been in *Gilbert v Hudlestone* [12], where the headnote (which is substantially in the words used by Baggally, LJ at 551) reads:

' Where an appeal from an order as to costs which are left by law to the discretion of the judge is brought by leave of the judge under the 49th section of the Judicature Act, 1873, the Court of Appeal will still have regard to the discretion of the judge, and will not over - rule his order unless there has been a disregard of principles or mis - apprehension of facts.'

Now what is the position here? The learned trial judge heard argument as to costs after he had delivered his judgment. Mr Foster, who represented the appellant in the Court below, put forward to him substantially three grounds as to why the appellant should have been awarded her costs. First, because what had been litigated before the learned trial judge was in substance but one action and looked at in that light the appellant was substantially the successful party; secondly, the respondent's action was oppressive; thirdly, it was probable there would have been no need for litigation at all but for the respondent's conduct in not answering the appellant's husband's letters or taking any action upon them or keeping an appointment with him. The learned trial judge was aware of the respondent's conduct in this regard. He referred to it as 'quite remarkable' in the course of his judgment. But he did not mention it in his decision on costs. In his decision on costs he said only:

' After considering the argument put forward by counsel for the purpose, I cannot find that the plaintiff's claim could be termed oppressive. I order that the plaintiff do have costs on the claim and the defendant do have costs on the counterclaim.'

[6] I think we must accept the learned trial judge's finding that the respondent's conduct in waiting nearly five years before commencing its action was not oppressive in all the circumstances, and I think we must assume that he gave consideration to the respondent's conduct as a whole, short of being oppressive, and did not consider it justified him in depriving the respondent of its costs. But in exercising his discretion it was, in my view, essential as a matter of principle that he should have viewed the litigation as a whole and seen what was the substantial result. This he does not seem to have done. I would accept Mr Foster's submission that this was not a case involving two causes of action represented by claim and counter - claim but rather, in substance, one action only. In this respect it was very similar to the case of *Childs v Blacker,* to which I have already made reference. That was a landlord's action for rent.

The tenant did not deny owing the rent but counter - claimed for damages for breach of covenant to supply services and proffered payment of the balance which was refuted. The case was fought solely on the tenant's counter - claims and she succeeded. The Court of Appeal held that the proper order in these circumstances was that the tenant should have the costs of the action.

1966 ZR p76

DOYLE JA

In the instant appeal there was never any dispute by the appellant that she had not paid the £220 balance of instalments due on the full price as contracted between the parties. Her case was that having regard to incomplete and defective works the contract price should be diminished to a lower price; and that she had already overpaid that lower price. There was therefore little or no contest on the respondent's claim. The contest - the substantial issue in the case was that raised by the appellant's counter - claim; and on this she was substantially successful. This vital view of the case seems to have escaped the learned trial judge. He does not seem to have looked at the litigation as a whole, but rather to have divided it into two parts and considered each separately. This, in my view, was not only 'a violation in principle' but it also represented a 'misapprehension of facts', to employ the phrases used by Baggally, LJ in *Gilbert v Hudlestone.* In these circumstances I consider that this court is entitled to review the exercise of the judge's discretion here and to substitute for his order such order as will, in our view, meet the justice of the case. I would accordingly allow the appellant's appeal on the second ground raised and set aside the learned trial judge's order as to costs. Bearing in mind that the appellant was substantially but not completely successful in the litigation below, I think that the proper order to substitute should be that the appellant should have the costs of the counter - claim and that each party should pay its own costs on the claim. I would award the costs of this appeal and the cross - appeal to the appellant. I would add that Evans, J, who is not able to be present, agrees with this judgment I have just delivered.

Judgment

Doyle JA: I agree with the judgment which has been delivered by the learned Chief Justice and have little to add.

I had some difficulty with the passage in which the learned trial Judge deals with the alleged oral variation in relation to Tyrolean plastering. He said:

' Where there is no dispute as to the oral agreement the defendant is taken to have waived the need for reducing it to writing, but where, as here, the parties give completely opposite versions as to what transpired, the necessity for the authorisation to be in writing becomes apparent. In the absence of further proof, I hold the plaintiff bound by the specification, and the defendant is therefore entitled to credit for the omission of the Tyrolean plastering on the external walls and the lounge to a total of £23.'

This seems at first sight a statement that where there are two opposite versions relating to an oral variation one must *ipso facto* return to the terms of the written contract without determining the merits of the disputed question of fact. In other words where both parties give the same evidence

of an oral agreement, a waiver takes place, but if one of the parties subsequently has a different and conflicting recollection of the facts the waiver ceases to exist. I doubt the validity of such a proposition. However, it is possible that

1966 ZR p77

DOYLE JA

the learned trial judge meant that he was not satisfied that the *onus* of proof that there had been an oral variation had been discharged and with some hesitation I accept the passage in this sense.

I would also have been prepared to hold that Clause 14 had no effect at all. Its operation depended on action by the engineer, a person with multifarious duties and functions under the contract. As no appointment of an engineer was ever made it is clear that he was dispensed with by mutual consent and with him the value of any clause which depended on his existence.

Appeal allowed in part, cross - appeal dismissed