Barclays Bank Plc v Fairclough Building Ltd [1994] ABC.L.R. 05/06

CA on appeal from QBD (HHJ Havery QC) before Nourse LJ; Beldam LJ; Simon Brown LJ. 6th May 1994.

LORD JUSTICE BELDAM:

1. On 13th May 1993, in an action brought by the appellant Bank against the respondent ("the contractor") to recover damages for breach of contract, His Honour Judge Havery Q.C., official referee, gave judgment for the Bank for damages to be assessed but held that such damages should be reduced by 40% because of the Bank's contributory negligence. He summarised his decision in this sentence: *"In my judgment, the defendant is the party primarily at fault; the fault of the plaintiff is a failure to prevent the defendant from committing that fault."*

2. The fault committed by the contractor was the breach of two of the main obligations it had undertaken to perform under a standard form of building contract.

3. The Bank now appeals raising the question whether contributory negligence is a partial defence to a claim founded on breach of contract and in particular whether the employer of a skilled contractor is at fault if he fails to supervise the manner in which the contractor executes the work. In short, is the employer entitled to assume that the contractor will carry out his promise properly?

4. On 31st March 1989 by J.C.T. Standard Form of Building Contract (1984 edition) the contractor undertook for the contract sum of £133,258 to carry out and complete maintenance work at premises occupied by the Bank known as Units 1 and 2, Dallimore Road, Millbrook Industrial Estate, Wynthenshawe. The units were large industrial warehouses used by the Bank for storage of documents and records. The roofs of the two buildings were constructed of corrugated asbestos cement sheets which had become encrusted with moss, lichen and dirt. A substantial item in the contract required the contractor to clean and treat the asbestos cement sheets. Unit 1 had a double pitched roof running the length of the building with a valley gutter. Unit 2 had six shallow pitched roofs running at right angles to the length of the building with five valley gutters. The asbestos sheets were corrugated and at places there were translucent roof lights. The construction was typical of 1970s asbestos cement roof construction. The contract specification required the removal of all moss, lichen growth, dirt and debris from the asbestos sheeting. The method by which this was to be done was not laid down in the specification but it was a condition that all roofing work should be executed by a specialist firm of roofing contractors or by the contractor's own craftsmen if properly experienced in such work. The contractor sub-contracted the work to a sub-contractor who used high-pressure hoses to jet clean the sheets. Although this is a recognised method of cleaning asbestos roofs, it requires a number of simple and relatively inexpensive precautions to be taken to prevent water entering the building and causing contamination by asbestos fibres and dust. The pressure of the water can break down the asbestos cement, creating a slurry which contains fragments of asbestos. When the slurry dries out it creates an obvious hazard to health. As is now well known, great care is required in handling asbestos based materials and comprehensive statutory regulations have to be complied with when work involving asbestos is being undertaken. The sub-contractor started work cleaning the asbestos cement roof sheets on 29th April 1989. The work was completed at the end of May. On 2nd June the Bank's safety officer reported the presence of asbestos contamination to the Environmental Health Department of the Manchester City Council. The council issued prohibition notices, directing that the work must cease. Substantial quantities of slurry had entered the buildings and it is clear they had become heavily contaminated with asbestos dust. Extensive remedial works were necessary at a cost of approximately £4m. Neither the contractor, nor the sub-contractor, had taken any of the recommended precautions when using the high pressure hose method of cleaning the asbestos roofs. In this appeal the contractors accept that they were seriously in breach of the terms of the contract.

5. The water, slurry and dust had obviously resulted from the sub-contractor's operations in cleaning the roofs. The roofs were watertight in ordinary circumstances, but the high pressure jets impinging on the roof had forced the slurry containing asbestos into the building and had scattered it around so that as it dried out a residue of asbestos dust contaminated the upper levels of the building, the storage areas and the floor level.

The Contract

6. The contract works were originally put out for tender in August 1988. The contractor's was the only tender received but, as a large public construction company, it enjoyed a high reputation and it had previously carried out work for the Bank on a number of occasions. The Bank accordingly negotiated for better terms and on 14th March 1989 these were incorporated in a revised tender which the Bank accepted.

7. The contract provided for the function of the architect under art. 3 to be carried out by Barclays Bank plc, Property Services West. The contractor's obligation set out in art. 1.1 was to carry out and complete the works in accordance with the specification.

8. The relevant items in the specification, on pages 3/1 and 4/1, required the contractor to: *"(c) Remove all moss, lichen growth, dirt and debris from existing sheeting."*

9. Although the method of removal was not specified, sec. 2/11(d), under the heading "Roofing" required:
   "Workmanship.
   (d) All roofing shall be executed by a specialist firm of roofing contractors or by the contractor's own craftsmen if properly experienced in this work."

10. Further, under "*Standards of materials, goods and workmanship, sec. 13/1E"* the specification required that: "*Materials and workmanship shall be the best of their respective kinds and the work shall be executed and finished in an expeditious, efficient and workmanlike manner."*

11. By condition 3.4 of the contract, the contractor was required at all reasonable times to keep upon the works a competent person in charge and by condition 5.1 it had to comply with any statute, any statutory instrument, rule or order, or any regulation or bye-law applicable to the works. The regulations which obviously applied to the work undertaken by the contractor were the Control of Asbestos at Work Regulations 1987 S.I. 1987/2115, and in particular regs. 5(1), 8(1) and 12.

12. Other regulations applied for securing the safety of the contractor's employees and the employees of other contractors on the site.

13. Within two days of the start of the work of cleaning the roofs, some water penetration had occurred into the storage areas and a meeting was held at which Mr Owens, who represented Barclays Property Services West as architects, and Mr Anthony Forrest, the Bank's safety officer for the buildings, were present. At this meeting attention was concentrated on damage which might be caused to the Bank's records stored in the buildings by water penetration. As a result of discussion the sub-contractor carrying out the cleaning of the roofs agreed to take greater care but at that time the Bank's representatives were not told that high pressure water jets were being used or warned that the water might contain asbestos fibres or dust. At the trial the contractor contended that, as a result of this meeting, Mr Owens and Mr Forest knew of the method of work adopted and approved or condoned it but the judge rejected this suggestion accepting Mr Owens' evidence that he did not know that the sub-contractor was using water under high pressure to clean the asbestos roofs. He also held that the Bank did not consider the use of that method for the work to be carried out under this contract.

14. Apart from attending the one site meeting to discuss the water penetration and agreeing that special sheeting should be used to cover the Bank's records, Mr Owens had no occasion to visit the site before the prohibition notices were issued after the contamination had occurred. The contract contained the usual provisions for the architect's right to issue instructions, and to require variations or opening up of the work for inspection or tests. Whilst condition 3.13.1 enabled the architect to issue instructions following notification of work not in accordance with the contract, the primary obligation under that condition was upon the contractor to inform the architect of such work and to remedy the work at no cost to the Bank. It was not contended, nor did the judge find, that Mr Owens had failed to carry out any of his obligations as the nominated architect under the contract.

15. Expert evidence for the Bank was given by Mr Cotterell, a chartered building surveyor. The judge found him to be a reliable, knowledgable and careful witness and plainly accepted his evidence. The material part of Mr Cotterell's report which the learned judge quoted was as follows:

"Faircloughs allowed the asbestos cement roof sheets to be cleaned by high pressure water jetting but did not ensure that necessary precautions in respect of water jetting techniques were employed or that simple and relatively inexpensive precautions were taken to contain the spread of asbestos fibres and deal with asbestos contaminated slurry and debris arising from the cleaning works.

This resulted in asbestos fibres and asbestos contaminated slurry and debris entering both Units 1 and 2, being distributed onto surrounding paved and landscape areas and deposited on the outside of the buildings and an adjoining flat roof to Unit 1.

These omissions were in breach of the conditions of the contract and contract documents. Faircloughs were also in serious breach of the Health & Safety at Work Act 1974 and the Control of Asbestos at Work Regulations 1987.

Any competent, experienced contractor would, having carried out a preliminary inspection of the roofs to Units 1 and 2, have been aware of the details of the corrugated asbestos cement roof construction, including the eves, filler details and details of junctions of the roof sheets and the translucent roof lights. These details were typical of 1970s asbestos cement roof construction.

It is clearly evident on even cursory inspection that these details are not airtight and are only designed to resist the passage of water/moisture encountered during normal storm conditions. They are not designed to prevent water sprayed under pressure directly at the details from entering the buildings."

16. Mr Cotterell listed the steps which should have been taken if the high pressure water hosing technique was used. Essentially these involved taking precautions to see that slurry did not enter the building, that all the slurry was collected and not allowed to dry out, that the slurry was disposed of in a way which ensured that asbestos dust and fibres were not distributed into the atmosphere and by making sure that the products of water jetting did not get distributed over the site and into the atmosphere.

17. The Health & Safety Executive had issued guidance notes for work with asbestos cement, EH.36. They included this paragraph: *"Choose work methods which do not create unnecessary dust. For instance: ... (c) Do not clean asbestos cement by high pressure water jetting. Treat the surface first with a fungicide and at a later date remove it using a brush with a constant stream of water across the surface of the cement. Put any sweepings of plant growth, etc., in a strong plastic bag for safe disposal. If water jetting is unavoidable, make sure the asbestos cement is well enclosed and that all openings are sealed to prevent slurry contaminating other surfaces. Provide a safe way of handling and disposing of the slurry."*

18. Mr Cotterell, after drawing attention to these requirements, said: *"No attempt was made by Fairclough or their sub-contractor to deal with any airborne asbestos fibres or the asbestos contaminated slurry. The slurry contaminated water was allowed to enter the building either by incorrect water jetting techniques and/or lack of any precautions that would reasonably deal with the problems."*

19. The contractor called no evidence.

The Judge's Findings.

The Contractor's Fault.

20. Having accepted Mr Cotterell's evidence, the learned judge inevitably found that the contractor was in breach of its obligations under the contract. As a substantial building contractor, it ought to have known and must be taken to have known of the dangers to health of the high pressure water jetting of asbestos cement roofs. It should have foreseen that water jetting, unless carefully executed with simple and relatively inexpensive precautions, would result in the spread of asbestos fibres to other areas and that water and debris from the cleaning works would enter the building and would be contaminated with asbestos fibres. He said: *" ... I am satisfied that the defendant failed to take those precautions. In those circumstances I am satisfied that it failed to exercise reasonable care and skill in the execution of the contract works."*

21. He found that the contractor was in breach of condition 5.1 because it failed to comply with regs. 8(1) and 12 of the Asbestos Regulations. He held, too, that the contractor had sub-contracted the work without the written consent of the architect and in breach of a term that they should obtain such consent. But he said: *"Particularly in the absence of evidence in this part of the proceedings whether the sub-contractors were specialists, I am not satisfied that that caused the state of affairs which is the subject of my finding (2) above. Nor am I satisfied that there was a breach of express term 6."*

22. The judge's finding (2) referred to the contractor's failure to take any of the precautions essential if the high pressure water method was used and his reference to express term 6 was to his enumeration of the term pleaded in paragraph 8(3) of the re-amended statement of claim based on sec. 2(11)(d) of the specification that all roofing work should be executed by a specialist firm of roofing contractors or by the defendant's own craftsmen if properly experienced in this work.

23. Although no point was taken in the appeal that the judge ought to have held that the contractor was in breach of the express term that the roofing works should be carried out by a specialist firm of roofing contractors or by the defendant's own properly experienced craftsmen, his failure so to hold is surprising. Sub-contractors employed in breach of the terms of the contract adopted a method of work which could only be carried out without risk of serious contamination by taking the precautions described by Mr Cotterell as simple and relatively inexpensive. None at all were taken. The employment of sub-contractors who lacked the necessary expertise and skill was more likely to be the reason for so comprehensive a failure than the mere oversight of, or temporary failure to maintain the protection needed. Thus the probable inference was that the sub-contractor had neither the experience and skill nor the equipment necessary to carry out specialist work of this kind. The contractor gave no evidence of the sub-contractor's expertise or experience.

24. Lack of a finding that there was a breach of this term does not, in my view, affect the outcome of this appeal but in other cases in which a contractor is employed to do specialist work under less comprehensive conditions it may in the existing state of the law be important to identify the cause of a breach of warranty of due care and skill. As the Court of Common Pleas made clear in its judgment in ***Harmer v. Cornelius,*** 5 C.B.N.S. 236, the warranty given by a man employed to do work which requires skill is that he undertakes to **possess** and exercise reasonable skill in the art he professes. A person employing such a skilled man is entitled to rely on the warranty and, if it turns out that the man is incompetent, to determine his engagement. As will appear, it is at least arguable that the present state of the law produces the anomalous result that if in breach of the warranty to exercise his skill the contractor can rely on contributory negligence but if he has misrepresented that he possesses the necessary skill, he cannot.

25. Although the judge expressed his finding of the contractor's failure to execute the work in accordance with the contract conditions as a failure to exercise reasonable care and skill in the execution of the contract work, the Bank's primary contention was that there had been a breach of the express term in the specification under sec. 13/1E of *"Standards of Materials, Goods and Workmanship"* that the workmanship should be the best of its kind. The judge made no express finding that the contractor was in breach of this term. His omission to do so was the first matter raised in the appeal because, it was argued, the nature of the contractor's breach of contract was significant to the question whether the contractor could rely on contributory negligence on the Bank's part to reduce its liability.

26. The requirement that the workmanship should be the best of its kind required a standard to be achieved. It would not be satisfied by workmanship of average competence or skill or by the exercise of reasonable care to try to attain the standard. Taken in conjunction with the requirement that roofing work should only be executed by a specialist firm of roofing contractors or by craftsmen of the contractor properly experienced in such work, it is clear that the specification required the standard to be achieved not merely that reasonable care should be taken in carrying out the work. It was argued by Mr Butcher Q.C. for the contractor that it was inapposite to apply the term *"workmanship"* to an operation of the kind undertaken to clean the asbestos roofs. In my view *"workmanship"* in the context of the specification was intended to cover the whole of the works which the contractor had undertaken to perform. I consider therefore there was a clear breach of the contractor's obligation to carry out the work in accordance with the specification and to achieve the standard specified. The contractor's failure was not simply a failure to exercise reasonable care and skill, although out of caution an implied term to that effect had been pleaded on the Bank's behalf. The contractor's failure to comply with the requirements of the Asbestos Regulations in breach of condition 5.1 was likewise a breach of a strict contractual term.

The Bank's Fault.

27. At the time the contractors were asked to tender, the Bank sent to all potential contractors a document prepared by the Bank and entitled *"Safety notes for guidance when contract work is being undertaken on occupied Bank premises."* The purpose stated in the notes was to emphasise the importance the Bank attached to the Health and Safety at Work Act 1974. It said: *"When alterations are taking place in a building where the Bank staff remain in occupation it will be the responsibility of the Bank's safety officer (see below) to ensure so far as is reasonably practicable that steps are taken to prevent accidents occurring or the health of the employees of the Bank or contractor being adversely affected. Failure to achieve this could result in the Bank and its employees being in breach of the Act. This in no way absolves the contractor from liability as any investigation of an accident will weigh the evidence and apportion responsibility. The Bank wishes to avoid such circumstances."*

28. The notes set out in some detail the areas of responsibility. Where no formal division of responsibility had been agreed *"between branch operational space and contractor's activity"* the Bank had responsibility for health and safety matters but close collaboration between the safety officer of the Bank and the foreman of the contractor was essential.

29. In areas exclusively occupied and controlled by the contractor, responsibility was to remain with the contractor. After dealing with various matters of procedure and laying down the general conditions for the Bank controlled areas and contractor controlled areas, detailed responsibilities were assigned to the contractor. Of particular relevance was the provision that when a hazard of dangerous fumes, dust or fibres was present adequate steps were required to be taken by the contractor to protect the Bank staff from such adverse conditions. Special rules applied when asbestos was disturbed. Its discovery had to be reported immediately to the supervising officer.

30. In its re-re-amended defence the contractor pleaded that the loss or damage suffered by the Bank was caused wholly or in part by its own negligence and/or by its breach of the contractually binding provisions of its own safety notes. After referring to two extracts from the notes, the contractor alleged: *"Both the plaintiff's safety officer and the plaintiff's architect knew of the method of work adopted and approved or condoned the same."*

31. In support of this plea, the contractor relied only upon the fact that the safety officer had given permission for the sub-contractors to use a fire hose to supply water to their cleaning operations and the fact that on 26th April at the time of the site meeting attended by Mr Forrest and Mr Owens the sub-contractors were cleaning the roofs with high pressure jets in their presence and they did not condemn the method of work adopted. Finally reliance was placed on the fact that the safety officer, Mr Forrest, had failed to ensure so far as reasonably practicable that steps were taken to prevent accidents occurring or the health of the Bank's and the contractor's employees being adversely affected.

32. As previously noted, the judge rejected the suggestion that the Bank through its architect or safety officer knew that the high pressure water method of cleaning was being adopted and held that the Bank did not consider the use of this method of carrying out the work for this contract. He found that the cleaning of the roofs was not proceeding when the site meeting took place on 26th April. The judge made no finding that the Bank's safety notes were incorporated as part of the contract though he said both parties accepted that the notes were known to and accepted by them as applying to the work in question and accordingly their precise status did not matter. However he pointed out that the Bank had contended, no doubt rightly, that since the roofs where the cleaning operations were carried out were areas exclusively occupied and controlled by the contractor, the contractor was responsible for health and safety matters there. The judge then summarised the contractor's argument. First, the Bank was under a comprehensive statutory duty to its employees and others not to expose them to asbestos dust. The Bank was also under a similar duty at common law which was non-delegable because the operation was extra-hazardous. Secondly an obvious risk existed which precautions could have been taken to minimise or obviate. Thirdly the consequences of an escape of asbestos in a dry state were potentially catastrophic. Accordingly it must have been the obligation of the plaintiff in its own interest in common with the interests of possible victims to see that proper procedures were in place to secure that the work was safely carried out. Mr Butcher was at pains to point out that he did not stigmatise (blame?) the conduct of Mr Forrest or Mr Owens. His case was based simply on the failure of the Bank to do anything to prevent a situation in which asbestos dust could be found in the warehouses and handed to the safety officer.

33. The judge noted that the argument went *"rather wider than his pleading"*. Mr Elliott Q.C. for the Bank said that objection had been taken at trial to the line of argument because a finding of contributory negligence on this ground could not be supported by the pleading. The contractor had not applied for leave to amend. As stated, the judge had rejected the contention that the Bank contemplated the use of high pressure water jets for the work in this contract and knew the method was being used when Mr Forrest and Mr Owens visited the site. There is nothing in the judgment to suggest that if the method recommended by the Health & Safety Executive Guidance Notes was used the work was extra-hazardous. Nor that, if it was done is this way, there was an obvious risk of contamination from dry asbestos dust or fibres.

34. Moreover, if it was the intention of counsel not to stigmatise Mr Owens or indeed Mr Forrest the safety officer by these submissions, his allegation was not "rather wider" but a good deal wider than the contractor's pleading.

35. In finding that the Bank were partly responsible for the contamination of the building, the judge thought it indicative of a general attitude on its part that there had been some leakage of water into at least one of the buildings and that probably the water had asbestos in it and the Bank had taken no action.

36. It was an important point that the Bank had appointed as architect its own Property Services Department which ought to have known of the provisions of Health and Safety Executive Guidance Note EH.36. Through the architect or supervising officer the Bank:

"... should have informed itself that the high pressure jetting method was to be used; that it ought to have been aware of the dangers associated with that method, namely the possibility of the ingress into the building of water containing asbestos with the danger that ensues when the water dries out. I find that the supervising officer could and ought to have secured that proper precautions were carried out and failed to do so.

Through its safety officer and its supervising officer it should have drawn the contractor's attention to the dangers and the supervising officer could and should have insisted on compliance with the terms of the contract."

37. As earlier stated, he summarised the Bank's fault in this way: *"In my judgment the defendant is the party primarily at fault; the fault of the plaintiff is a failure to prevent the defendant from committing that fault."*

38. Although the contractor called no evidence, Mr Elliott was prepared to concede for the purposes of argument on the appeal that the underlying facts found by the judge could be based on answers given by the Bank's witnesses in cross-examination but, in addition to his main argument on the appeal, he challenges the basis on which the Bank has been found at fault on the ground that it had not been pleaded and consequently it was not open to the judge to hold the Bank at fault on that basis.

The Law applied by the Judge.

39. In his approach to the question of contributory negligence, no doubt because he had characterized one of the contractor's breaches of contract as a failure to use reasonable care and skill in the execution of the works, the judge appears not to have questioned whether the defence was available to the contractor. He did, however, consider what type of conduct on the part of the Bank would be capable of amounting to contributory negligence saying: *"I accept it as manifestly true that the plaintiff owed no duty to the defendant to protect the latter from the consequences of the defendant's own fault. But that is not the test in the case of contributory negligence. In the case of contributory negligence, the test is whether the plaintiff neglected what would be prudent in respect of its own interests."*

40. In this passage the judge was of course following the approach of Atkin L.J. in ***Ellerman Lines Ltd. v. Grayson H. & G. Ltd.*** [1919] 2 KB 514 at 535 and of Viscount Simon in ***Nance v. British Columbia Electric Railway*** [1951] AC 601 at 611. The approach holds good to the extent that contributory negligence does not necessarily involve breach of a duty of care **owed to another party** but it does consist of breach of an obligation imposed upon a party by law, a breach which can be relied upon by a defendant for his advantage in reducing his own liability. To be regarded as negligent in law, conduct must involve a failure to guard against a risk which is reasonably foreseeable. If the conduct relied on consists of an omission to guard against the failure of another person to carry out his legal obligations, it must be established that experience shows such failure to be likely. Further to be negligent the conduct must be unreasonable in all the circumstances. Generally speaking, a person could be said to have acted prudently in his own as well as in others' interests if to carry out skilled work he contracts with a reputable and experienced contractor of whose work and reputation he is aware. The nature of the contract and its terms are circumstances which must significantly affect not only the question whether the law should impose an obligation on the contracting party to act prudently in his own interest but also the nature and extent of any such obligation. The point is well illustrated by a case to which the judge himself referred, ***Becker v. Medd*** [1897] 13 T.L.R. 313. The plaintiff, an importer, employed the defendant as his sole agent in England. The defendant undertook to pay all money he received into the plaintiff's account, to keep all the relevant books of account and to render a regular statement to the plaintiff. Due to the negligent supervision by the defendant of his clerk, the plaintiff lost £951 and claimed that sum from the defendant. The defendant contended that the plaintiff had been negligent in failing to examine the accounts and statements sent to him by the defendant. The jury found both the defendant and the plaintiff at fault. On appeal the court held that the plaintiff was not bound to see that the defendant fulfilled his duty. Lord Esher M.R. said: *"The person who had undertaken the duty could not say that he had been negligent in the performance of the duty, but that the other person was guilty of contributory negligence in not finding him out."*

41. Whilst it is true that Lord Esher's reasoning proceeded on the assumption that no duty was owed to the defendant, the jury had clearly found that the plaintiff had failed to act prudently in his own interest for had he done so he would have discovered the defendant's breach of duty. Thus the failure to take steps which a prudent man would take in his own interest will only be regarded as negligent if in all the circumstances the law regards it as reasonable to impose an obligation on him to do so. A plaintiff who knows that the defendant has broken his contract is obliged to act reasonably in mitigation of damage often referred to as "a duty to mitigate". In the present case, as I have already indicated, the judge did not consider the character of the obligations broken by the contractor and dealt with the case as if the only breach of duty was breach of a duty to take reasonable care co-extensive with the breach of such a duty in tort. For the reasons I have given, I think he was wrong to do so.

Breach of Contract and Contributory Negligence.

42. The common law rule that in an action in tort a plaintiff whose own fault contributed with the defendant's to cause his damage could recover nothing was perceived to be unfair and, as a result of the Law Revision Committee's Eighth Report (Contributory Negligence) Cmd. 6032 (1939), the Law Reform (Contributory Negligence) Act was passed in 1945. Its purpose was to enable a court in actions of tort to apportion responsibility for the damage

suffered by the plaintiff where there had been fault by both parties. It is the definition of "fault" under sec. 4 which has since 1945 given rise to continuing debate and uncertainty whether the court's ability to apportion damages applies to a case in which the plaintiff's cause of action lies in contract. After nearly half a century of extensive academic analysis, inconclusive discussion in a number of decided cases and conflicting Commonwealth decisions, the position remained uncertain and in 1989 the Law Commission published a consultation paper (No. 114), "Contributory Negligence as a Defence in Contract". In this consultation paper the competing arguments based on the interpretation of sec. 4 and the state of the law as it then appeared to be were fully examined. After consultation the Commission reported its recommendations in Law Com. No. 219 in December 1993. In the light of this extensive review of the law, a short summary of the position is in my view sufficient for the purposes of the present case.

43. Sec. 4 of the Act defines "fault": *""Fault" means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would apart from this Act give rise to the defence of contributory negligence."*

44. It is generally agreed that the first part of the definition relates to the defendant's fault and the second part to the plaintiff's but debate has focused on the words "or other act or omission which gives rise to a liability in tort" in the first part and "*other act or omission which ... would apart from this Act give rise to the defence of contributory negligence"* in the second part. It has been argued that, merely because the plaintiff frames his cause of action as a breach of contract, if the acts or omissions on which he relies could equally well give rise to a liability in tort the defendant is entitled to rely on the defence of contributory negligence. Examples frequently cited are claims for damages against an employer or by a passenger against a railway or bus company where the plaintiff may frame his action either in tort or in contract and the duty relied on in either case is a duty to take reasonable care for the plaintiff's safety. Contributory negligence has been a defence in such actions for many years. So it is argued that in all cases in which the contractual duty broken by a defendant is the same as and is co-extensive with a similar duty in tort, the defendant may now rely upon the defence. An opposing view based upon the second part of the definition is that, if the plaintiff framed his action for breach of contract, contributory negligence at common law was never regarded as a defence to his claim and so cannot be relied on under the Act.

45. Under the first part of the definition, if the plaintiff claims damages for breach of a contractual term which does not correspond with a duty in tort to take reasonable care, the defendant's acts or omissions would not give rise to a liability in tort and accordingly no question of contributory negligence could arise.

46. These arguments have led courts to classify contractual duties under three headings:

(i) Where a party's liability arises from breach of a contractual provision which does not depend on a failure to take reasonable care.

(ii) Where the liability arises from an express contractual obligation to take care which does not correspond to any duty which would exist independently of the contract.

(iii) Where the liability for breach of contract is the same as, and co-extensive with, a liability in tort independently of the existence of a contract.

47. This analysis was adopted by Hobhouse L.J., then Hobhouse J., in ***Forsikringsaktieselskapet Vesta v. Butcher*** [1986] 2 AER 488 and by the Court of Appeal in the same case [1988] 3 WLR 565. The judgements in the Court of Appeal in that case assert that in category (iii) cases the Court of Appeal is bound by the decision in ***Sayers v. Harlow U.D.C.*** [1958] 1 WLR 623 to admit the availability of the defence.

48. Since I do not regard the case before the court as being in that category, I am content to accept that decision. To regard the definition of fault in sec. 4 as extending to cases such as employer's liability places no great strain on the construction of the words used. In 1945 actions brought by an employee whether framed in contract or tort were usually regarded as actions in negligence and the defence of contributory negligence was by no means uncommon.

49. On the other hand, in category (i) cases there is no decision in which contributory negligence has been held to be a partial defence. There are powerful dicta to the effect that it cannot be. See the judgment of the court in ***Tennant Radiant Heat Ltd. v. Warrington Development Corp.*** [1988] 1 E.G.L.R. 41, in ***Bank of Nova Scotia v. Hellenic Mutual War Risks Association (Bermuda) Ltd."The Good Luck"*** [1990] 1 QB 818 at page 904, and the observations of Lord Nolan, then Nolan L.J., in ***Schering Agrochemicals Ltd. v. Resibel N.V. S.A.*** Court of Appeal 26th Nov. 1992, noted in 1993 109 L.Q.R. 175 at page 177.

50. The contractor's argument that, because the Bank owed duties to its employees it was therefore under a duty in its own interest to see that the contractors fulfilled their obligations under the contract, is inconsistent with many cases in which it has been held that employers and others liable to third parties for failure of plant or equipment are entitled to rely upon warranties given by their suppliers. See for example ***Mowbray v. Merryweather*** [1895] 2 QB 640, ***Sims v. Foster Wheeler Ltd.*** [1966] 1 WLR 769 at page 777 and ***Lambert v. Lewis*** [1982] AC 225 where but for the farmer's knowledge that the trailer coupling was no longer in its warranted state he would have been able to do so. At page 279 Lord Diplock said:

51. "... Up to that time the farmer would have had a right to rely on the dealer's warranty as excusing him from making his own examination of the coupling to see if it were safe; but if the accident had happened before then, the farmer would not have been held to have been guilty of any negligence to the plaintiff."

52. If by relying upon the dealer's warranty the farmer could not have been held guilty of any negligence to the plaintiff, it is pertinent to ask whether had he himself suffered injury or loss in the same accident he could have been held to have been in part responsible for failure to act prudently in his own interest?

53. That a contracting party is entitled to rely on the other party to a contract to carry out his undertaking and to act carefully in doing so was emphasised by Lord Devlin, then Devlin J., in ***Compania Naviera Maropan S/A v. Bowaters Lloyd Pulp & Paper Mills Ltd.*** [1955] 2 QB 68 where at page 77 he said: *"...Indeed I think business whether maritime or otherwise might be gravely impeded if the ordinary principle were not allowed to operate freely - and by the ordinary principle I mean that, generally speaking, a man is entitled to act in the faith that the other party to a contract is carrying out his part of it properly. It does not lie in the mouth of the promisor to say that a promisee has no right to assume that a promise has been faithfully carried out and should make his own inquiries to see whether it is or not. If everything done under contract has to be scrutinized and tested by the other party before he can safely act upon it, many transactions might be seriously held up ..."* This passage was approved by the Judicial Committee of the Privy Council in ***Reardon Smith Line Ltd. and Australian Wheat Board*** [1956] AC 266.

The Present Case.

54. I have already stated my conclusion that in the present case the contractors were in breach of two conditions which required strict performance and did not depend upon a mere failure to take reasonable care. Nevertheless it was argued by Mr Butcher in support of the respondent's notice that the contractors could have been held liable in tort for the same acts or omissions. By creating the asbestos dust they were guilty of nuisance. Further the settling of the dust on the storage racks and floors of the Bank's building amounted to trespass. I would reject these submissions.

55. On the other hand, Mr Elliott addressed arguments to the court that the contractors would not have been found liable to the Bank in negligence for the only damage proved was economic loss. These arguments amply justified the fears expressed by the Law Commission in its report (Law Com. 219) that actions for breach of a strict contractual obligation would become unduly complex if contributory negligence were admitted as a partial defence by introducing an element of uncertainty into many straightforward commercial disputes and increasing the issues to be determined.

56. In my judgment therefore in the present state of the law contributory negligence is not a defence to a claim for damages founded on breach of a strict contractual obligation. I do not believe the wording of the Law Reform (Contributory Negligence) Act 1945 can reasonably sustain an argument to the contrary. Even if it did, in the present case the nature of the contract and the obligation undertaken by the skilled contractor did not impose on the Bank any duty in its own interest to prevent the contractor from committing the breaches of contract. To hold otherwise would, I consider, be equivalent to implying into the contract an obligation on the part of the Bank inconsistent with the express terms agreed by the parties. The contract clearly laid down the extent of the obligations of the Bank as architect and of the contractor. It was the contractor who was to provide appropriate supervision on site, not the architect.

57. Finally, though it is unnecessary to do so, I should deal with the point raised by Mr Elliott that the ground on which the judge found the Bank at fault was not pleaded.

58. Mr Elliott did not put his case upon the footing that he would have called any additional evidence had the case found against the Bank been pleaded. He frankly stated that he could not now say with the benefit of hindsight how he would have approached the allegation upon which the Bank was found to have been at fault. It is not, however, difficult to see that there might have been evidence, for example directed to the issue whether the Bank in the light of their previous dealings with the contractors ought to have regarded it as prudent to inform themselves of the method of cleaning adopted by the sub-contractor of whose employment they were not informed.

59. Mr Butcher emphasised that the judge's findings were based on the evidence of the Bank's own witnesses given in answer to questions in cross-examination.

60. As in many arguments on pleadings, the question ultimately comes down to one of degree. At one end of the scale there are arguments which could be said to be merely technical; at the other there are cases in which the party concerned is entitled to hold his adversary to the case pleaded against him. One such case was ***Esso Petroleum Co. Ltd. v. Southport Corporation*** [1956] AC 218. At page 241 Lord Radcliffe said: *"My Lords, I think this case ought to be decided in accordance with the pleadings. If it is, I am of opinion, as was the trial judge, that the respondents failed to establish any claim to relief that was valid in law. If it is not, we might do better justice to the respondents - I cannot tell since the evidence is incomplete - but I am certain that we should do worse justice to the appellants, since in my view they were entitled to conduct the case and confine their evidence in reliance upon the further and better particulars of para. 2 of the statement of claim which had been delivered by the respondents. It seems to me that it is the purpose of such particulars that they should help to define the issues and to indicate to the party who asks for them how much of the range of his possible evidence will be relevant and how much irrelevant to those issues. Proper use of them shortens the hearing and reduces costs. But if an appellate court is to treat reliance upon them as pedantry or mere formalism I do not see what part they have to play in our trial system."*

61. Whilst the departure in that case was more florid than that in the present case, it is the fact that the Bank succeeded in refuting the allegations of fault made against them in the pleadings. For my part I would hold that the ground upon which the judge found the Bank at fault so far departed from the scope of the pleaded case that

the contractor should not have been allowed to rely upon it without amending his pleaded case. The Bank objected at the trial but no amendment was made. Had it been necessary to do so, I would have allowed the appeal on this ground too.

62. For the reasons I have given, I would allow the appeal.

LORD JUSTICE SIMON BROWN:

63. The central issue raised by this appeal is clearly one of some importance: when does section 1(1) of the Law Reform (Contributory Negligence) Act 1945 apply to actions in contract? Although I agree entirely with the judgment of Beldam, L.J., I wish, in deference to the skilful arguments presented on both sides, to indicate something of my own approach. My Lord's judgment sets the scene so comprehensively that I can do so really quite shortly.

64. The respondents' case rests upon those words in the main part of section 1(1) of the 1945 Act which for convenience I now underline:

> *"(1) where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:....."*

65. By section 4 of the Act, it is provided that: *"'fault' means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence."*

66. The argument by which Mr. Butcher QC seeks to uphold the judge's finding that the appellants here were 40% contributorily negligent proceeds, as I understand it, essentially as follows:

1. There is no challenge (save only as to the sufficiency of the respondents' pleading) to the judge's finding that the damage suffered by the appellants was the result partly of their own fault.
2. Accepting, as the judge found, that the respondents' liability for that damage arose from breaches of one or more strict contractual terms i.e. provisions which did not depend upon negligence on the respondents' part, and so fall into category 1 of the three categories identified by Hobhouse, J. in ***Vesta v Butcher*** (1986) 2 AER 488 - nevertheless the respondents were entitled to the benefit of apportionment under section 1(1) provided only and always that they established that the damage resulted not only from their contractual breach but also from some "fault" (i.e. tortious liability) on their part.
3. Such tortious "fault" here consisted in:
   a. Their own breach of a duty of care at common law,
   b. Their own nuisance,
   c. Their own trespass.

67. Although Mr. Butcher's argument is clearly vulnerable at all three stages - stage 1 (the pleading point) for the reasons given by Beldam, L.J.; stage 3 because of the various technical difficulties which arise with regard to each of the suggested causes of action (such as that the appellants' loss was exclusively economic so that there could be no liability in negligence) - I prefer to focus on stage 2 because it is there that I believe as a matter of principle the argument should fail.

68. Why should it fail? Not, let me acknowledge, for any failure to bring the respondents' case within the language of section 1(1). I for my part would accept that the respondents here - assuming they could make good stage 3 of their argument - would thereby establish that the relevant damage was the result equally and concurrently of their tortious fault as of their breaches of contract. If authority be required for this view, I accept Mr. Butcher's submission that it is to be found in Hobhouse, J's judgment in ***EE Caledonia Ltd v Orbit Valve Co Europe*** (1994) 1 WLR 221. As Hobhouse, J. said in that very different context: *".....it is not correct to say in the present case that the plaintiffs were liable in respect of the death of Mr. Quinn because of the breaches of statutory duty; they were liable because of the breaches of statutory duty and the negligence of their servant. It was the concurrent effect of both those causes that gave rise to the death of Mr. Quinn and without either of those causes that death would not have occurred and the plaintiffs would not have been liable."*

69. Let it therefore be assumed, as Mr. Butcher submits, that the respondents were in breach of an exactly parallel obligation in tort coterminous with their duty in contract, to avoid the damage that in the result occurred; I would nevertheless reject their claim to be entitled to apportionment. I would, however, do so by reference rather to the proper construction of the contract than of the statute itself.

70. I for my part would accept Hobhouse, J's view expressed in ***Vesta v Butcher*** that apportionment of blame and liability is open to the court in any ordinary category 3 case, unless the parties by their contract have varied that position, because, as he explained, *"there is independently of contract a status or common law relationship which exists between the parties and which can then give rise to tortious liabilities which fall to be adjusted in accordance with the 1945 Act."* In short, the contract in such cases really adds nothing to the common law position: as Sir Roger Ormrod put it when ***Vesta v Butcher*** reached the Court of Appeal (1989) 1 AC 852 at 879, adopting the language of Pritchard, J. in ***Rowe v Turner Hopkins & Partners*** (1980) 2 NZLR 550: *"Concurrent liability in contract if any, 'is immaterial'"*.

71. But when, as in a category 1 case, the contractual liability is by no means immaterial, when rather it is a strict liability arising independently of any negligence on the defendants' part, then there seem to me compelling reasons why the contract, even assuming it is silent as to apportionment, should be construed as excluding the operation of the 1945 Act. The very imposition of a strict liability upon the defendant is to my mind inconsistent with an apportionment of the loss. And not least because of the absurdities that the contrary approach carries in its wake. Assume a defendant, clearly liable under a strict contractual duty. Is his position to be improved by demonstrating that besides breaching that duty he was in addition negligent? Take this very case. Is this contract really to be construed so that the respondents are advantaged by an assertion of their own liability in nuisance or trespass as well as in contract? Are we to have trials at which the defendant calls an expert to implicate him in tortious liability, whilst the plaintiffs' expert seeks paradoxically to exonerate him? The answer to all these questions is surely "no". Whatever arguments exist for apportionment in other categories of case - and these are persuasively deployed in the Law Commission Report - to my mind there are none in the present type of case and I would for my part construe the contract accordingly.

72. For these reasons in addition to those given by Lord Justice Beldam, I too would allow this appeal.

LORD JUSTICE NOURSE:

73. I am in complete agreement with the judgment of Lord Justice Beldam.

74. It ought to be a cause of general concern that the law should have got into such a state that a contractor who was in breach of two of the main obligations expressly undertaken by him in a standard form building contract was able to persuade the judge in the court below that the building owner's damages should be reduced by 40 per cent because of his own negligence in not preventing the contractor from committing the breaches. In circumstances such as these release, waiver, forbearance or the like are the only defences available to a party to a contract who wishes to assert that the other party's right to recover damages for its breach has been lost or diminished. It ought to have been perfectly obvious that the Law Reform (Contributory Negligence) Act 1945 was never intended to obtrude the defence of contributory negligence into an area of the law where it has no business to be.

75. I too would allow the appeal.

Order: appeal allowed with costs; figure of 100% substitued for 60% in para. 1 of the judge's order in the main action made on 13.5.93; appellants to have their costs in the court below; leave to appeal to the House of Lords refused.

MR. T. ELLIOTT QC and MR. A. WILLIAMSON (instructed by Messrs. Denton Hall Burgin & Warren, Milton Keynes) appeared on behalf of the Appellant/Plaintiff.
MR. A. BUTCHER QC and MR. M. KENT (instructed by Messrs. Beechcroft Stanleys, London EC4) appeared on behalf of the Respondents/Defendants.