CA on appeal from Brentford County Court (HHDJ Finlay) before Sachs LJ; Buckley LJ; Cairns LJ. 13th April 1972

LORD JUSTICE SACHS:

1. I will ask Lord Justice Calms to deliver the first Judgment.

LORD JUSTICE CAIRNS:

2. This is an appeal from a Judgment of Sir Graeme Finlay, sitting as Deputy County Court Judge at the Brentford County Court. The Judgment was delivered on the 30th September, 1971, after a hearing which had taken some 2 ½ days earlier in that month. It was a Judgment in favour of the Plaintiff in an action for work done and materials supplied in connection with central heating installation and other work at the Defendant's house. The Judgment was for a net sum of £431.50, with costs on Scale 3. The Defendant appeals, contending that Judgment should have been given for him; and he sought to amend the notice of appeal to say that the Judge was in any event wrong in awarding all the costs to the Plaintiff.

3. The action was founded on a lump-sum contract, together with certain items of extras. The defence was that the Plaintiff had wholly failed to perform the main contract, and the Defence set out extensive particulars of defects in the work. It was admitted that a small sum was due for extras consisting of the preparation of a bathroom suite, but the Defendant contended that the consideration for the main contract had wholly failed. Alternatively, he claimed to set off a sum counterclaimed in respect of making good the defects. By his Reply, the Plaintiff conceded that there were some small defects for which the Defendant was entitled to a set-off, but otherwise he denied all the Defendant's allegations. The Defence was afterwards amended to allege further defects, and the Reply to make certain further concessions, but these involve no important change in the attitude of the parties.

4. The action had been commenced in the High Court. It was remitted, under Section 45 of the County Courts Act, to the County Court. Before the trial, the Defendant had paid £400 into Court. The formal Judgment referred to this and ordered that the balance of £31.50 should be paid within fourteen days. The Defendant afterwards challenged the form of this Judgment, but it was ordered to stand.

5. Now, the £431.50 for which Judgment was given was made up in this way: The contract price for the central heating installation was £560. The Judge held that because of deficiencies in the performance of the work the Defendant was entitled to set off against that sum £174.50, leaving a balance of £385.50. In respect of extras, the Judge held that £76 would be a reasonable price for the work, but here again there were some defects which he assessed at £15, leaving a balance of £61. Adding that to the £385.50, he arrived at a total of £446.50. Then he set off a further £15 representing damages for inconvenience to the Defendant, and that left a balance of £431.50 for which Judgment was given.

6. The notice of appeal set out the following grounds of appeal: first, that on the primary facts found by the learned Judge, the contract was not substantially performed; secondly, that upon the evidence, the Judge ought to have found that no sum was payable until the whole contract was performed, subject to the de minimis rule; thirdly, that he gave insufficient weight to the evidence of the Defendant's independent expert; fourthly, that he wrongly held that fees incurred by an expert in reporting on the installation otherwise than for the purpose of litigation were not properly claimable as an item of special damage; fifth, that the Judge's assessment of the Defendant's general damage was wholly inadequate and erred in principle.

7. The main question in the case is whether the defects in workmanship found by the Judge to be such as to cost £174 to repair — that is, between one-third and one-quarter of the contract price — were of such a character and amount that the Plaintiff could not be said to have substantially performed his contract. That is, in my view, clearly the legal principle which has to be applied to cases of this kind.

8. The rule which was laid down many years ago in the case of Cutter v. Powell in relation to lump sum contracts was that unless the contracting party had performed the whole of his contract, he was not entitled to recover anything. That strong rule must now be read in the light of certain more recent cases to which I shall briefly refer. The first of those cases is ***Dakin v. Lee,*** reported in 1916 1 King's Bench, 566, a decision of the Court of Appeal, in which it was held that where the amount of work which had not been carried out under a lump-sum contract was very minor in relation to the contract as a whole, the contractor was entitled to be paid the lump sum, subject to such deduction as might be proper in respect of the uncompleted work. It is necessary to observe that the head-note of ***Dakin v. Lee*** was based, not upon the Judgments in the Court of Appeal, but upon the Judgments that had been delivered in the Divisional Court; and, as was pointed out in the case of ***Vigers v. Cook*** (1919 2 King's Bench, 475, at page 483), that head-note does not properly represent the grounds of the decision of the Court of Appeal in that case. The basis on which the Court of Appeal did decide ***Dakin v. Lee*** is to be found in a passage of the Judgment of the Master of the Rolls, Lord Cozens-Hardy, on pages 578 and 579. I do not think it is necessary to read it in full, but I read this short passage from page 579: *"But to say that a builder cannot recover from a building owner merely because some item of the work has been done negligently or inefficiently or improperly is a proposition which I should not listen to unless compelled by a decision of the House of Lords. Take a contract for a lump sum to decorate a house; the contract provides that there shall be three coats of oil paint, but in one of the rooms only two coats of paint are put on. Can anybody seriously say that under these circumstances the building owner could go and occupy the house and take the benefit of all the decorations which had been done in the other rooms without paying a penny for all the work done by the builder, just because only two coats of paint had been put on in one room where there ought to have been three?"*

9. Then, in the case of ***Eshelby v. Federated European Bank (***reported in 1932 1 King's Bench, page 423), another case in the Court of Appeal, the position differed from that in ***Dakin v. Lee*** and the position in the present case, in that the claim in ***Eshelby*** was not against the principal to the contract with the contractor, but was against a surety. It was on that basis that Lord Justice Scrutton, giving the first Judgment, distinguished ***Dakin v. Lee.*** However, Lord Justice Greer, at page 431, took the view that that was not a ground on which ***Dakin v. Lee*** could be distinguished because, unless the principal contracting party was liable, the surety could not be liable. Lord Justice Greer dealt with ***Dakin v. Lee*** in this way: *"If the appellant in the present case had not broken his contract so as to make himself liable in damages, but had only through some trifling omission failed, as the plaintiffs in* ***Dakin v. Lee*** *were held to have failed, to recover the full contract price, then I am inclined to think that Taglioni on receiving the stipulated notice would have been liable to make the agreed payments, and that consequently the respondents on receiving the appropriate notice would have been liable in this action".*

Lord Justice Slesser agreed at the foot of page 431 and said: *"The agreement between the parties by clause 11 provides for the liability of Taglioni in certain events. He agrees with the appellant and with the respondents, and undertakes that Olympus, Ltd., shall 'subject to the works being duly executed in accordance with this agreement' make to the appellant the payments mentioned in clause 2. It has been found as a fact that the works never were duly executed in accordance with the agreement";*

and it may be material to note that in that case it was a contract for £1500, payable in four instalments. The instalment which was the subject-matter of the claim was £375; and the extent to which the work fell short of the standard required was valued at £80. That was held to be sufficient, at any rate in the judgment of Lord Justice Slesser, who deals most positively with the point, to reach the conclusion that the work had not been duly executed in accordance with the agreement.

10. Perhaps the most helpful case is the most recent one of ***Hoenig v. Isaacs,*** reported in 1952 2 All England Reports, page 176. That was a case where the plaintiff was an interior decorator and designer of furniture who had entered into a contract to decorate and furnish the defendant's flat for a sum of £750; and, as appears from the statement of facts on page 177, the Official Referee who tried the case at first instance found that the door of a wardrobe required replacing, that a book-shelf which was too short would have to be re-made, which would require alterations being made to a book-case, and that the cost of remedying the defects was £55. 18s. 2d. That is on a £750 contract. The ground on which the Court of Appeal in that case held that the plaintiff was entitled to succeed, notwithstanding that there was not complete performance of the contract, was that there was substantial performance of the contract and that the defects in the work which there existed were not sufficient to amount to a substantial degree of non-performance.

11. I do not accept that this means that the Plaintiff is entitled to payment if the defects are of such a trifling nature that they can be disregarded under the de minimis rule, but that otherwise he is entitled to no payment. Assuming for the moment that the Judge is right on the figures, certainly it could not be said here that the defects could be regarded as being de minimis. But, in my view, that is quite a different test from the test of whether it can be said that the failure to complete was substantial. I do not think that the test can be based wholly on quantum. I think to some extent it depends upon the nature of the defects.

12. The main matters that were complained of in this case were that when the heating system was put on, fumes were given out which made some of the living rooms (to put it at the lowest) extremely uncomfortable and inconvenient to use; secondly, that by reason of there being insufficient radiators and insufficient insulation, the heating obtained by the central heating system was far below what it should have been. There was conflicting evidence about those matters. The Judge came to the conclusion that because of a defective flue, there were fumes which affected the condition of the air in the living rooms, and he further held that the amount of heat given out was such that, on the average, the house was less warm than it should have been with the heating system on, to the extent of 10 per cent. But, while that was the average over the house as a whole, the deficiency in warmth varied very much as between one room and another. The figures that were given in evidence and, in so far as we heard, were not contradicted, were such as to indicate that in some rooms the heat was less than it should have been by something between 26 and 30 per cent.

13. The learned Judge, having made those findings, came to the conclusion that the defects were not sufficient in degree to enable him to hold that there was not substantial performance of the contract. He expressed that conclusion in these terms: *"The Defendant's main complaints against the Plaintiff — that is, the style of radiators, fumes from the boiler flue, and inadequacy of heat provided by the system — neither by themselves nor in combination amount to a sufficiently important part of the Plaintiff's obligation to prevent there being substantial performance".*

14. Now, certainly it appears to me that the nature and amount of the defects in this case were far different from those which the Court had to consider in the cases of **Dakin v. Lee** and ***Hoenig v. Isaacs.*** For my part, I find it impossible to say that the Judge was right in reaching the conclusion that in those circumstances the contract had been substantially performed. The contract was a contract to install a central heating system. If a central heating system when installed is such that it does not heat the house adequately and is such, further, that fumes are given out, so as to make living rooms uncomfortable, and if the putting right of those defects is not something which can be done by some quite small amendment of the system, then I think that the contract is not substantially performed.

15. The actual amounts of expenditure which the Judge assessed as being necessary to cure those particular defects were 540 in each case. Taking those matters into account and the other matters making up the total of £174, I have reached the conclusion that the Judge was wrong in saying that this contract had been substantially completed; and, on my view of the law, it follows that the Plaintiff was not entitled to recover under that contract.

16. I have reached that conclusion without taking into account an argument that was pressed upon us in this Court by Mr Mahadeva to the effect that it was a term of the contract that no payment should become due until the work had been completed to such an extent and in such a manner that he could properly sign a satisfaction note to be handed to an insurance company which was guaranteeing payment of the contract price. That contention must necessarily depend upon the existence of some implied term to that effect, because there is nothing expressly in the contract about it. If the Defendant wanted to rely upon such an implied term, I think it was necessary for him to plead it, which he did not. It does not seem that any evidence was directed at the hearing to any such implied term, and no reference to the matter is made in the notice of appeal. I therefore disregard that part of the Defendant's argument in this Court.

17. It is unnecessary, having regard to the view that I have taken on the main point, to say anything about the contention that the Judge failed to give sufficient weight to the evidence of the Defendant's independent witness. If it were relevant, my view would be that it would be quite impossible to say that the Judge, having heard two expert witnesses, was wrong in preferring, in so far as he did prefer, the evidence of one to the evidence of the other.

18. So far as the Defendant's claim in respect of fees for the report which he obtained from his expert is concerned, it seems to me quite clear that that report was obtained in view of a dispute which had arisen and with a view to being used in evidence if proceedings did become necessary, and in the hope that it would assist in the settlement of the dispute without proceedings being started. In those circumstances, I think that the Judge was right in reaching the conclusion that that report was something the fees for which, if recoverable at all, would be recoverable only under an Order for costs.

19. So far as concerns the damages in respect of the inconvenience to which the Defendant was put, the Judge, as I have said, assessed that inconvenience at £15. I must say that, on the evidence, it seems to me to be a low figure; but obviously it is a figure which is incapable of any exact assessment, and I am not prepared to say that the Judge was wrong in assessing that sum.

20. It is unnecessary to say anything about the Defendant's application for leave to amend his notice of appeal in order to advance an argument in relation to costs, because clearly the situation in relation to costs will be different after the Judgments have been given in this Court from that which it was at the end of the hearing before the learned Judge.

21. It appears to me that the result should be this, that the appeal should be allowed and the Judgment in favour of the Plaintiff should be set aside. It is not, I think, contested that there is in respect of the extras a sum of £61 which was due to the Plaintiff at the commencement of the action; that, of course, is far less than the £400 which had been paid into Court.

22. If my Lords agree with the Judgment which I have delivered, it will be for consideration then as to the exact form of the Order that this Court should make.

LORD JUSTICE BUCKLEY:

23. I agree and do not wish to add anything.

LORD JUSTICE SACHS:

24. I agree that this appeal should be allowed, for the reasons given by my Lord. Despite the fact that in so agreeing it will follow that we are reversing the learned Deputy County Court Judge, I propose to make only some brief observations. But, before doing so, I would like to express appreciation for the succinct and moderate way in which Mr Mahadeva presented his case to us this morning. I would also like to pay tribute to the great care with which the learned Deputy County Court Judge examined the many detailed issues of fact before him and made findings on a great number of individual issues in relation to particular defects, having in the course of it to compile on his own what in effect was a Scott Schedule.

25. When, however, one looks at the aggregate of the number of defects that he held to have been established, at the importance of some of those defects, and at the way in which some of them prevented the installation being one that did what was intended, I find myself, like my Lord, quite unable to agree that there was a substantial performance by the Plaintiff of this lump-sum contract. It is not merely that so very much of the work was shoddy, but it is the general ineffectiveness of it for its primary purpose that leads me to that conclusion.

26. So far as the law is concerned, I would merely add that it seems to me to be compactly and accurately stated in Cheshire and Fifoot, Seventh Edition, at page 492, in the following terms: *"The present rule is that so long as there is a substantial performance, the contractor is entitled to the stipulated price, subject only to a cross-action or counterclaim for the omissions or defects in execution";*

and, to *"cross-action or counterclaim",* I would of course add "*set-off*". The converse, however, is equally correct — if there is not a substantial performance, the contractor cannot recover. It is upon the application of that converse rule that the Plaintiff's case here fails. This rule does not work hardly upon a contractor if only he is prepared to remedy the defects before seeking to resort to litigation to recover the lump sum. It is entirely the fault of the

contractor in this instant case that he has placed himself in a difficulty by his refusal on the 4th December, 1969, to remedy the defects of which complaint was being made.

27. In these circumstances, it is unnecessary to canvass the further point to which my Lord has referred and which was ventilated at any rate in the later stages of the proceedings at first instance. The point was as to whether the Defendant could, in the special circumstances, rely on the terms of the loan contract which he secured through the good offices of the Plaintiff and by which he was to become able to pay for this lump-sum contract. There was a very arguable point available as to whether, in the special circumstances, there was an implied term of the agreement between the parties to the main contract that the lump sum should not become payable until there was that form of completion that would have enabled the Defendant to secure the implementation of the loan agreement. It seemed to me quite an attractive point; but, for the reasons given by my Lord, it is not necessary to go any further into it.

28. I merely add that I would agree with the Order proposed by my Lord, subject to canvassing whether the award of £15 damages still obtains or not. On that point, the matter now having been discussed with my Lords, I would propose that he remains entitled to his £15 damages. The form of the Order requires working out, and at the moment I think we will simply deal with any question of costs that arises.

Order: Appeal allowed with costs; Judgment set aside, there being substituted therefor Judgment for the Plaintiff for £46, with costs on Scale 1, up to the date of payment-in; Defendant to have costs of claim and counterclaim on Scale 4 thereafter; Plaintiff to repay the balance of £354 within 14 days.

The Appellant (Defendant) appeared in person.
Mr TIMOTHY STOW (instructed by Messrs Kingsley Wood & Co.) appeared en behalf of the Respondent (Plaintiff).