CA on appeal from QBD (Official Referee's business – HHJ Fox Andrews QC sitting as a High Court Judge) before Evans LJ; Hutchinson LJ; Mantell LJ. 13th March 1998

JUDGMENT : LORD JUSTICE EVANS:

1. We have heard submissions this morning on two issues. I should say at this stage that we are most grateful to solicitors and counsel for both parties for the manner in which, through correspondence with the Court, they have identified the issues arising from our judgment given on 5 February, and presented them to us for decision today.

2. The first question is whether we should answer questions (a) and (b) in the question of law as it was defined in the Notice of Motion, in the same way as we have answered question (c) in the judgment already given. The second question is whether we should give leave to appeal to the respondents so as to enable them to take this matter to the House of Lords.

3. The question, in substance, is whether the approach which we have adopted in our judgment as a matter of principle in relation to a claim for damages for defective work, should apply also to the claims for liquidated and/or unliquidated damages for delay. It seems to me, clearly, that the answer should be the same, and it follows that in none of the three cases does the fact that Panatown was not the building owner prevent it from claiming damages under any of those headings.

4. That seems clear to me as a matter of principle for reasons which I need not elaborate. It seemed to us that Panatown's entitlement to recover damages (which were suffered in fact by the building owner) should depend upon the true construction of the building contract between Panatown and McAlpine.

5. Stating the principle in that broad sense suggests immediately that there should be no distinction in the approach adopted when the claim is for one form of damages rather than another.

6. Mr Jackson has submitted, by reference in particular to the judgment of Dillon LJ in ***Darlington Borough Council v. Wiltshier Northern Limited*** [1995] 1 WLR 68, that a distinction should be drawn. A passage from the judgment of Dillon LJ in that case at page 71 of the report is quoted in our judgment. It seems to me that the fact that Dillon LJ's approach in that case, which avowedly did not take account of the so-called "*broader ground*" stated by Lord Griffith in ***St Martins ,*** may not have led to the conclusion that liquidated damages (or for that matter unliquidated damages) was not recoverable, does not in any way bear on the question whether they are or could be recoverable upon the approach which we have preferred.

7. I hasten to add that we are only concerned with a question whether the claim may be admitted under the contract at all, not unlike a question of jurisdiction. We do not attempt to say whether, under the terms of this particular contract and in the circumstances of this particular case, Panatown is entitled to recover as distinct from being entitled to claim any form of damages, whether liquidated or otherwise, or whether for delay or for defective work. Those are substantive matters, which are for the arbitrator to determine. For those reasons, I would answer questions (a) and (b) in the negative.

8. Turning to the question of leave to appeal to the House of Lords, it seems to me that we should recognise this as a question of law which is appropriate for consideration by their Lordships' House. We have, however, been pressed with two arguments, both of which are concerned with the practical consequences of granting leave to appeal, which will have the inevitable result that a period likely to be in excess of one year (on the most optimistic expectations) will pass before their Lordships' judgment is known.

9. The arbitration between Panatown and McAlpine is pending, and has been pending, for a number of years. That period will be increased, and the earliest hearing date of an arbitration will be measured in months and possibly even years after the date of a House of Lords judgment. We have explored in argument the possibility of the arbitration proceeding pending a House of Lords hearing, on the basis that it could be aborted if it proved to be unnecessary in the light of their judgment. However, that suggestion does not find favour with either party for different reasons and, without elaborating the reasons, we need say no more about that. It seems to me we have to consider the question of leave to appeal on the basis that there will be that further delay.

10. The second question is related to it. There is also pending before this Court a second appeal against an associated judgment of His Honour Judge Thornton QC which has come to be called *"the remission judgment*". The situation here seems to be this. Apart from the question of principle which we have decided in our judgment already given, Panatown has one (and possibly more than one) alternative case. They say that, even if they, as employers, are not entitled to recover substantial damages where the damages have been suffered by the building owner, nevertheless, there were contractual arrangements between themselves and the building owner in the present case which have the consequence either that Panatown is liable to indemnify the building owner, with the result that it can claim its potential liability under that indemnity as a head of its own loss suffered for the purposes of the arbitration, or that it was under a contractual liability to the building owner to procure the building contract with McAlpine, and that a contract of that nature is sufficient to enable it to recover substantial damages in the arbitration.

11. The first contention which has come to be called the "*chain of contracts issue",* was decided in favour of Panatown by the arbitrator, but his decision was reversed by the learned judge on the hearing of the appeal; hence, a further appeal to this Court. The learned judge held, to put the matter very shortly, that there was insufficient evidence in law to support the arbitrator's finding. He said at page 16 of his second judgment*: "In consequence,*

the effect of my judgment is that the only contract that the arbitrator's finding of fact discloses is a contract to procure a building contract."

12. Taking first the chain of contracts issue (meaning a chain of contracts which gave rise to a liability in Panatown to indemnify the building owner against its losses) Panatown now appeals to the Court, in essence, against the learned judge's reversal of the arbitrator's ruling. That appeal is opposed. Mr Jackson for McAlpine submits that the appeal should be dismissed, not least (or not only) on its merits, but also because of the limited terms in which leave to appeal was given by His Honour Judge Fox-Andrews QC. That issue, as things stand, remains for another day.

13. This Court has to consider whether, if leave to appeal to the House of Lords against the existing judgment is granted, that question should be decided before the appeal is heard by the House of Lords. The reason for doing so is that, if the House of Lords allow an appeal against our judgment already given, then this would become a live issue and their Lordships would find themselves in a situation where, either they would deal with the matter (a matter which has not been ruled upon by this Court) or they would have, in effect, to remit the matter to this Court with the subsequent risk, however remote, of a yet further appeal to the House of Lords itself.

14. That seems to me to be a consideration which affects, not the question whether leave to appeal should be given, but whether we should hear any, and if so what, appeal on the remission issue before such an appeal is heard. So I pause at this stage to say that, in my judgment, the practical consequences for the arbitration are not sufficient reason for not granting the leave to appeal which otherwise would be appropriate, and therefore I would grant such leave in relation to the judgment which we gave on 5 May.

15. As regards the remission issue, the helpful discussion which we have had with counsel today has suggested that this can be sub-divided under two heads. The first is the chain of contracts issue. It seems that there is an identifiable question of law which, however precisely it is defined, is clearly much narrower than the rather diffuse material which is presently before the Court. The second aspect is a much more general question which could be phrased thus: "Are there other heads of loss, not including a liability to indemnify the building owner, which Panatown is entitled to recover in its own right?". One such head of loss, which is or may be put forward, is the situation in which Panatown finds itself vis-a-vis the building owner, even on the basis found by the judge, that there was a contract to procure a building contract, but no more. There are other ways in which Panatown might seek to formulate its own loss, if it is limited to claiming substantial damages for loss which it has suffered, as distinct from the building owner.

16. In the course of argument, counsel for both parties have indicated that it may well be possible to reach agreement to the effect that the parties recognise that, if the arbitration does continue and if it is necessary for the arbitration to continue in the light of the judgment of the House of Lords, then it might be sensible for them to agree that that third question (or something equivalent to it) would be the basis upon which the matter would return to the arbitrator. On that basis, there would remain the question already identified as to whether there is a liability to indemnify under the chain of whatever contracts were made.

17. It seems to me that in these circumstances we must recognise that it is desirable for this Court to pronounce upon that issue in advance of any hearing before the House of Lords. However, that issue can be narrowly defined in a way which will mean that that aspect of the remission appeal will be much less complicated than it appears to be at present. I therefore would hold that there will have to be a further hearing before this Court which can be limited to that indemnity issue. To achieve that result it will be necessary for the parties to reach an agreement on the lines I have suggested, and I think I should take a few moments spelling out the consequences if they do not.

18. If they do not, there will remain for hearing by this Court what appears to be an extremely (I use the word again) diffuse set of issues involving a large inquiry into questions of fact and evidence, which are not really questions of law at all. It seems to me that this Court should hesitate to embark upon that appeal unless it is clearly necessary to do so. I would be inclined to think that it is not necessary. If those all remained live issues, then it seems to me the House of Lords would be unlikely to be critical of this Court for having refused to deal with them when it may be unnecessary for any Court to do so.

19. I, therefore, would permit the remission hearing to take place only if the issue is limited to the indemnity issue which I have identified.

20. The matter does not stop there because it may well be that, in the light of this judgment, the parties will recognise that the time has come to adopt what I would call a sensible and practical approach to this matter. As we said in our earlier judgment, there is an important issue of law at the centre of this dispute. All the rest, in one sense, are peripheral. Those peripheral matters have been allowed to play a dominant part, not only in the interim award, but in the appeal hearing before the judge and in the proposed appeal hearing before us. That does seem to be regrettable, and it has made a substantial contribution to the quite deplorable overall delay and costs which have been incurred in this litigation to date. This, I would suggest to the parties, is a time when they and their advisers might recognise that the essential purpose of these proceedings is to obtain the Court's ruling on the central issue, and that all other matters should return to the arbitrator so that he can make his decisions upon them. There seems to be no serious question of law (apart from the central issue) other than the one sought to be raised in relation to the indemnity contracts, and that, too, on analysis is a question of whether sufficient evidence has so far been deployed before the arbitrator. It may be optimistic to hope that the respondents will agree that that

issue should return to the arbitrator, but nevertheless I hope that what I have said will be sufficient to give them some reason at least to think about it.

21. We have not heard arguments on costs, but it may be that, since we are forced to leave the question of remission in the air to the extent that I have indicated, this is not an appropriate moment to make any formal ruling on costs, save as to the costs of the appeal in which we have given judgment.

LORD JUSTICE HUTCHISON: I agree.

LORD JUSTICE MANTELL: I also agree.

MR R JACKSON QC and MR P SUTHERLAND (Instructed by Messrs Masons, London, EC1R OER) appeared on behalf of Alfred McAlpine Construction Limited.

MR D FRIEDMAN QC and MR J NICHOLSON (Instructed by Messrs Cameron McKenna, London EC1A 4DD) appeared on behalf of Panatown Limited.