CA on appeal from QBD Official Referee's Business (HHJ Anthony Thornton QC) before Butler-Sloss LJ; Evans LJ; Sir Iain Glidewell. 18th December 1996

LORD JUSTICE EVANS:

1. This appeal concerns one issue arising from a judgment of His Honour Judge Thornton Q.C. Official Referee given on 23 February 1996. That issue is the scope of a clause prohibiting the sub-contractor from assigning the benefit of the sub-contract which appears in a widely-used standard form. The matter is therefore of some general interest. Other aspects of the appeal have been stayed pending a judgment of the House of Lords in other proceedings, which is likely to be determinative of those other issues in the present case.

2. The appellants are the three defendants in the action. For the purposes of this appeal they can be regarded collectively as the contractors to the Welsh Office for the construction of the Mold by-pass in North Wales. By a sub-contract dated 24 October 1991 on the F.C.E. form, Floods of Queensferry Ltd. *("the sub-contractors")* agreed as sub-contractors to carry out specified earthworks on a *"measure and value"* basis. The sub-contractors were the plaintiffs in the action but they are not parties to the appeal. This is because the Official Referee by the Order under appeal substituted the appellant David Charles Flood for the sub-contractors as plaintiff in the action. He claims as assignee from the sub-contractors, hence the issue whether the assignment to him was invalidated by the prohibition on assignment in the relevant clause of the sub-contract.

3. The background and the reason for the assignment are not unfamiliar. A similar situation arise in different circumstances in ***Norglen Ltd. (In Liquidation) v. Reeds Rains Prudential Ltd*** [1996] 1 W.L.R. 864 which is the judgment under appeal to the House of Lords, referred to above. A company plaintiff is ordered to provide security for costs and is unable to do so. It assigns its cause of action to an individual with an interest in the outcome of the proceedings who is entitled to receive legal aid. If the assignment is invalid, the action is stayed and unless there is some change of circumstances the issue of the defendant's liability is never decided by the Court. If it is valid, the defendant is deprived of security for its costs and of any negotiating advantage which it would otherwise have if the plaintiff's resources were limited so as to restrict its ability to pursue its claim.

4. Clause 2(3) of the sub-contract reads as follows :-

   "(3) The Sub-Contractor shall not assign the whole or any part of the benefit of this Sub-Contract nor shall he sub-let the whole or any part of the Sub-Contract Works without the previous written consent of the Contractor.

   Provided always that the Sub-Contractor may without such consent assign either absolutely or by way of charge any sum which is or may become due and payable to him under this Sub-Contract."

5. It is common ground that the first sentence provides an absolute bar against assignment of *"the benefit of this Sub-Contract"* and that this extends to all contractual claims. (Whether all the claims in this action are of that description is a separate issue, to which I shall return below.) The proviso in the second sentence has the effect of permitting certain types of claim, and the issue is the scope of this proviso. It is also common ground that if any of the claims are barred by the clause and are not within the proviso then the purported assignment to the respondent was invalid.

6. The same issue as to the scope of the proviso arose in a recent appeal to this Court, ***Yeandle v. Wynn Realisations Ltd. (In Administration)*** (1995) 47 ConLR/2 (23 May 1995), where the assignment was held to be invalid. Unfortunately, counsel who appeared before the Official Referee in the present case were unaware of the judgment at the time of the hearing, and he was not referred to it. The appellants submit that it directly covers the present case and therefore is a binding authority for present purposes. The respondent submits that its facts and the ***ratio decidendi*** were distinct.

7. The assignment in the present case was by the plaintiff company *"absolutely of all its assets including the causes of action that [it] has against the Defendants"*. The question is whether the causes of action alleged in these proceedings are claims for *"any sum which is or may become due and payable"* to the company under the sub-contract. If so, they are within the proviso and therefore not precluded by clause 2(3).

8. The starting-point for any consideration of the scope of the clause including the proviso must be the judgment of the House of Lords in ***Linden Gardens Trust Ltd. v. Lenecta Sludge Disposals Ltd.*** [1994] A.C. 85. The clause there provided *"The employer shall not without written consent of the contractor assign this contract"*. Lord Browne-Wilkinson's speech dealt with two issues which are relevant for our purposes. First, it was submitted that the clause referred only to sub-letting of the (whole) contract, so that it did not prohibit an assignment of the benefit of the contract. This submission was rejected (see pages 102-3). Secondly, that the clause prohibited only assignments of the right to call for future i.e. post-assignment performance of the contract, distinguishing this right (as the majority of the Court of Appeal had done, in one of the two decisions under appeal) from *"an assignment of the benefit arising under the contract (e.g. to receive payment due under it or to enforce accrued rights of action)"* (page 104A). In this context, he referred to a Note by Professor Goode ***"Inalienable Rights?"*** (1979) 42 M.L.R. 553 which included the phrase "*the fruits of performance",* to which Lord Browne-Wilkinson added *"e.g. acquired rights of action or debts"* (page 105A). He held that such a distinction could prove difficult or unworkable in practice and that the parties "*cannot have intended to draw a distinction between the right to performance of the contract and the right to the fruits of the contract,"* although that result could doubtless be achieved *"by careful and intricate drafting"* if the parties in fact shared that intention, which would be *"perverse"*. (page 106B).

9. Mr Powell Q.C. for the respondent submits that the words of the proviso to clause 2(3) *"any sum which is or may become due and payable"* are sufficient to embrace *"the fruits of performance"* generally, and therefore, applying Lord Browne-Wilkinson's definition, they include *"causes of action"* for damages as well as claims for debt.

10. I do not find this argument persuasive. The relevant distinction in ***Linden Gardens Ltd.*** was between the right to future performance, at the time of an assignment, and accrued rights, the prime examples of which are causes of action for damages or claims in debt. It was unnecessary and irrelevant to distinguish between different kinds of accrued rights, and Lord Browne-Wilkinson did not attempt to do so. Moreover, the words which have to be interpreted here are *"sums . . . due and payable . . . under this Sub-contract",* and the question is what kinds of accrued rights are encompassed by that phrase.

11. It should be noted that Lord Browne-Wilkinson also referred with approval, or without disapproval, to ***In re Turcan*** 40 Ch.D.5 and ***Helston Securities Ltd. v. Herts. C.C.*** [1978] 3 All E.R. 262 (the subject-matter of Professor Goode's Note), both of them authorities cited before us.

12. ***Yeandle's*** case was directly concerned with the scope of the proviso to clause 2(3). The sub-contract was for site clearance and earth moving work. The sub-contractors claimed that they encountered *´hard dig'* conditions and were entitled to extra payment under clause 12. Their claim was rejected by the engineer. The sub-contract, as summarised by Hobhouse L.J. at page 4 of the report, required them to submit their claim to arbitration within three months. A letter was written within that period, but whether that that was sufficient to stop time running was in dispute (page 6). Later, the sub-contractor assigned to the plaintiff *"all monies payable . . . to the assignor pursuant to a sub-contract"* (pages 7/8). The plaintiff as assignee claimed a declaration that the letter had preserved the company's right to claim arbitration, which had passed to him ; alternatively, an extension of time within which to commence an arbitration, pursuant to section 27 of the Arbitration Act 1950.

13. Both claims were dismissed on the sole ground that the assignment was invalid under clause 2(3). Hobhouse L.J. held :-

"..... what is covered by the wording of the proviso to cl 2(3)? As I have stated at the outset, this is a short point and it is a point of construction. The permission given to the sub-contractor without consent to assign is the power to assign any sum which is or may become due and payable to him under this sub-contract. Therefore, it has to be a sum which is due and payable to him under the sub-contract or a sum which may become due and payable to him under the sub-contract. This is not a liberty to assign the benefit of the sub-contract, nor is it a liberty to assign other rights under the sub-contract.

The nature of the right which the plaintiff seeks to establish in this application and any ensuring arbitration, is the right to challenge and set aside the decision of the engineer which otherwise would be conclusive evidence of the facts found by the engineer. The conclusive evidence provision is part of the contractual machinery and relates to the - performance of the contract by the respective parties. Clause 66 and the earlier provisions in the head contract and the corresponding provisions in the sub-contract all related to matters which will normally arise during the currency of the contract and may affect the performance of the contract. They are anterior to the question whether a sum has become or may become due and payable.

The point which the plaintiff seeks to arbitrate is a point relating to the performance of the parties to the respective contracts and their rights in relation to such performance and the remuneration for it. I am, therefore, of the view that this subject matter does not come within the words ´any sum which is or may become due and payable to the sub-contractor under the sub-contract'. They relate to matters under the operational contract which are anterior to that stage. Therefore, Mr Yeandle, the plaintiff, is not entitled to appoint an arbitrator in respect of those matters, nor is he entitled to the relief which he asks for in respect of those matters. "

14. Hobhouse L.J. also quoted from the speech of Lord Browne-Wilkinson in ***Linden Gardens*** , and he commented :- *"The mischief which is referred to . . . remains that, if there is no restriction on the right of assignment, then a third party assignee may become involved in the detailed contractual machinery"* (p.12). He added :- *"The power to assign is one which is limited to sums which, as the contract says have become due and payable. In other words, it can be a future assignment",* and *"The assignee of the debt is entitled to enforce the debt, but he is not entitled to enforce the other provisions of the contract and his rights do not extend to the subject matter of the present litigation, namely the assertion of a right to re-open a decision of an engineer given within the contractual machinery"* (p.12)

15. Sir Thomas Bingham M.R. said this :- *"[The assignee] is seeking to pursue a right to challenge the engineer's rejection of a claim for additional remuneration due to adverse conditions on the site. That is not a right which can, in my opinion, be assigned under the proviso",* and with regard to wider market considerations :- *"The party to who, a contractor pays a sum which he is bound to pay may well be a matter of indifference to him. The same is not necessarily true of the party against whom he finds himself defending a claim in arbitration"* (page 13).

16. Whether that decision directly covers the present case it is unnecessary in my judgment for us to decide. The respondent can say that it was concerned with a right to arbitrate, or more generally with *"the contractual machinery"* which includes arbitration, whereas the present is a money claim, whether for unqualified damages or for a liquidated amount. On the other hand, the right to arbitrate was supplementary to the underlying substantive right to claim additional remuneration under clause 12, and if the arbitration clause had been waived (agreement would probably have been necessary) that right could have been asserted in Court proceedings. The Master of the Rolls referred to the right to claim additional remuneration rather than the right to arbitrate, and in

my respectful view he was correct to do so. His further remarks regarding the identity of the opposite party not being a matter of indifference to a party in arbitration, apply equally to litigation.

17. I should also refer to ***Helston Securities ,*** referred to by Lord Browne-Wilkinson in his ***Linden Gardens*** speech. There, the contract contained a stipulation that the contractor was not to *"assign the contract or any part thereof or any benefit or interest therein or thereunder"* without the employer's written consent (headnote). The contractor's claim which was assigned to the plaintiff lay in debt. The plaintiff argued that the clause on its true construction did not apply to debts, as distinct from assignment of the contract itself or other causes of action arising under it. The argument was rejected. Croom-Johnson, J. held :- *"The clause is obviously there to let the employer retain control of who does the work . . . . But closely associated with the right to control who does the work, is the right at the end of the day to balance claims for money due on the one hand against counterclaims, for example for bad workmanship on the other."* (p.266b).

18. The manifest intention of the proviso to clause 2(3), in my judgment, is to permit the sub-contractor to assign money claims, either for a sum already due and payable under the sub-contract, in which case there is a present assignment provided due notice is given, or which may become due and payable under it, which means an existing assignment of a future debt. Mr Powell Q.C. for the respondent submits however that claims for damages, which may be liquidated or unliquidated, also fall within these words. They too are money claims which *"may become due and payable*" under the sub-contract, notwithstanding that the amount is not quantified until the award or judgment is made. He also relied on the speech of Lord Diplock in ***Photo Productions Ltd. v. Securicor Transport Ltd.*** [1980] A.C. 827 at 848-9 for the proposition that the right to claim damages is correlative to the contract-breaker's ´secondary' obligation to pay damages upon the breach of a ´*primary'* term, and this secondary obligation arises under the contract itself.

19. In my view, claims arising under the sub-contract can be grouped under three heads. First, for a fixed amount as where an agreed price is or may become due and payable upon completion of the contract works, or as an instalment payment before they are complete. Secondly, for an amount which falls to be assessed in accordance with the contract terms. The claim for additional remuneration under clause 12 in ***Yeandle's*** case, and the claim for a *"measure and value"* price, and also for example claims for additional payment when the works have been varied, are all of this kind. Thirdly, claims for damages, which depend upon an arbitrator's or a Court's finding or an admission of breach and which if they are unliquidated also depend upon a finding or agreement before the amount is fixed.

20. Mr Powell submits that even when the claim is for unliquidated damages there is an existing (secondary) obligation to pay the amount of damages which in due course becomes fixed by agreement or otherwise, and so is presently an obligation to pay a sum which "*may become*" due.

21. I would hold that *"sum"* in the proviso to clause 2(3) means a fixed, or liquidated, amount. The amount either *"is"* due and payable at the time of the assignment, in which case there is an existing claim in debt, or "may become" due and payable at some future date. In that case, in my judgment, the assignment is of the future anticipated right to claim that amount as a debt, rather than of the existing claim or cause of action which may result in the debt becoming due and payable thereafter. If there is a claim for additional remuneration, therefore, as in ***Yeandle,*** that right cannot be assigned, but there could be an assignment of the future right to recover the sum awarded by an arbitrator or a judgment debt.

22. Similarly, in my view, a claim for damages cannot be assigned until such time as the amount is fixed and there is a finding or an admission that the sum is due. This will probably mean that the claim for damages is replaced by a claim in debt (cf. a judgment debt) but even if the cause of action continues technically as a claim for damages I would hold, when liability and amount are both established, that that amount is a "*sum due and payable*" under the sub-contract. For this reason I would not read "*sum*" as necessarily meaning *"recoverable by an action in debt",* though there may be no practical difference between them. Again, the clause permits a present assignment of the future right to recover that amount.

23. This interpretation of the proviso seems to me to be entirely consistent with the commercial purpose of the clause, and with the practical considerations referred to by Lord Browne-Wilkinson in ***Linden Gardens***_and in the judgments in ***Yeandle,*** and with the ***Yeandle*** decision itself. The contractor as the opposing party may be "indifferent" to the prospect of having to pay a particular sum to a third party assignee when it becomes due and payable under the sub-contract, but it can be important to him that he should operate the contractual machinery, or arbitrate or litigate, only with the party with whom he has chosen to contract. Even as regards arbitration and litigation, the nature and scope of the proceedings may be the same, whether or not they are conducted by or in the name of the sub-contractor, but the chances of settlement or of agreeing particular issues can be affected by the identity of the other party. To use a straightforward example, it is one thing to contemplate the sub-contractor transferring an existing or future right to receive payment of a particular sum to his bank or to a factor or a discount house ; it is another to have the transferee as the opposing party when there is a disputed claim for a sum which falls to be assessed under the contractual machinery, or as damages for breach.

24. If the sub-contractor has such a claim, then the proviso permits him to make a future assignment of the payment which will become due when the amount has been assessed, but not in my judgment to assign the cause of action which, if the claim succeeds, will then become the right to receive payment of a fixed amount.

25. In my judgment, therefore, the proviso does not permit the sub-contractor to assign all of *"the fruits of performance"* which were defined for the purposes of the issues raised in the ***Linden Gardens*** case as including both causes of action and claims in debt. The reason simply is that the proviso to clause 2(3) on its true construction refers to a narrower and more specific class.

The judgment

26. The judge dealt first with a submission which I did not understand Mr Reese to pursue actively before us. It was that the proviso permits only a limited form of assignment, whereby the sub-contractor undertakes to pay to the assignee sums which he receives under the sub-contract, but does not transfer to the assignee any right to recover those sums from the contractor even when they become *"due and payable"* under the sub-contract. This reflects a distinction drawn in ***In re Turcan*** (1889) 40 Ch.5. In my view the judge was correct to reject this argument, which attributes a degree of subtlety to the draftsman and to the parties which I do not believe they intended to show.

27. Secondly, the judge accepted the submission that *"any sum which is or may become due and payable under this sub-contract"* includes both contractual sums or debts and damages claims (page 17). In the course of doing so, he held that "all claims for debts or for money due under the contract can be expressed as claims for damages, namely as claims flowing from a breach of the obligation to pay sums due within the timeframe provided for by the sub-contract" (page 19). I am not sure that I understand this passage in his judgment. If he meant that there is a right to claim damages for the non-payment of a debt or for the non-payment of damages, then in my view that is incorrect : cf. ***President of India v. Lips Maritime Corporation*** [1988] A.C. 395 per Lord Brandon at 425A. The question in my view is whether *"sum due and payable"* includes a claim for damages or for an amount which has to be established by operation of contractual machinery or otherwise, and in my judgement for the reasons given above it does not.

28. Finally, the judge of course did not take account of the judgments in ***Yeandle*** as we have been able to do.

Claims made in the proceedings

29. The plaintiff in the action, before the amendments which substitute the appellant, David Charles Flood, as assignee, is Floods of Queensbury Ltd. The company claims as sub-contractor against the first, second and third defendants who *"were at various times the Main Contractors"* (Statement of Claim, paragraph 2). It is alleged that the first defendant issued an invitation to tender in October 1990 and thereafter a letter of intent on 11 April 1991, and that an agreement was made in late November 1991 which was expressly made retrospective to April 1991 when the work had begun.

30. The measure and value price stated in the Third schedule to the agreement was £911,066.05,

31. The claim against the first defendants as the original main contractors appears in paragraph (i) of the Prayer as *"Under paragraphs 15-21, £3,092,383.56 alternatively damages"*. Paragraphs 15 and 16 assert claims under the sub-contract or for damages for breaches of it. Paragraph 17 is expressed as a claim for "*restitution"* for alleged *"further loss and damage"* ; I do not read it as an extra-contractual claim. Paragraph 18 arises from the allegation in paragraphs 9 and 10 that the first defendants misrepresented to the company, before the sub-contract was agreed in November 1991, that they were the main contractors without revealing, it is alleged, that they had ceased to trade in April 1991 and assigned the main contract to the second defendants. This misrepresentation is said to have induced the company to enter into the sub-contract with the first defendants, and to have been accompanied by a further representation by the second defendants that they were a mere change of name from the first defendants. There is no allegation of negligence, let alone fraudulent misrepresentation, and paragraph 11 alleges that "*as a result of the aforesaid misrepresentations the [company has] suffered loss, expense and damage"*. This can only be read as a claim for damages in lieu of rescission under the Misrepresentation Act, 1967, and therefore one made against the other contracting party.

32. Then follows in paragraph 18 a claim for damages for misrepresentation to which the same comments apply.

33. Paragraph 20 reads :- *"In the yet further alternative, the combined effect of paragraphs 9, 10 and 14 above, was to entitle [the company] to a reasonable sum for the works executed by [it]"*.

34. This apparently is a claim for a ***quantum merit***, but there is no allegation that the sub-contract was rescinded and the legal basis to my mind is unclear. The reference to paragraph 14 may be a misprint, but for which other paragraph is also unclear.

35. The claims against the second and third defendants are to the effect that they should account to the company for the sums which they have recovered from their employer, the Secretary of State for Wales, as payment for sub-contract work done by the company, or alternatively they are liable on a quantum merit for the work so done (paragraphs 22 and 27). In each case, however, the company relies upon the sub-contract machinery for the assessment of the amount due (paragraphs 23 and 28). I can see that it may be difficult to make out a claim against these defendants under the sub-contract, if that was made with the first defendants only, but the company does not put forward any claim except by reference to the sub-contract terms.

36. Paragraph 29 appears to claim a declaration of non-liability, although paragraph (iii) of the Prayer includes a damages claim which may relate to it. The legal basis, however, is obscure.

Conclusion

37. For the reasons given above, I would hold that clause 2(3) of the sub-contract renders invalid the assignment by the company plaintiff of any claim which cannot be expressed simply as a present or future claim for a fixed amount due under the sub-contract. This precludes the assignment of claims for damages or for sums which fall to

be assessed under or in accordance with the sub-contract terms, except where the assignment transfers only the future right to recover the amount when it is duly established by agreement or otherwise.

38. At the conclusion of the argument before us, Mr Powell indicated that the respondent would contend that certain of the company's claims are outside clause 2(3) in any event, specifically the alleged misrepresentation damages claim. This seems to me to depend upon the scope of the prohibition in the body of the sub-clause, rather than of the proviso, and it may be important that the claims as pleaded are made apparently under the Misrepresentation Act 1967 as distinct from negligent misrepresentation in tort.

39. In these circumstances, it seems to me that we should hear further argument if either party so desires as to the appropriate terms of the order to be drawn up reflecting our judgment, including the question whether the assignment to Mr Flood may nevertheless be valid in respect of any of the individual claims made by the company in these proceedings. I would further direct, if such an issue does arise, that the precise scope and nature of each such claim should be defined for the purposes of such further submissions as may be made.

40. Subject to this, I would allow the appeal on the issue raised before us.

SIR IAIN GLIDEWELL:

41. The Statement of Claim in this action includes claims for sums alleged to be due under the contract between the parties. In the alternative, the same sums are claimed as damages for breach of the contract. The Defence denies that any sum is due, and denies the alleged breaches of contract. It will therefore be necessary for the action to be brought to a conclusion by judgment or agreement, in order to establish whether any sum is due as claimed, and whether any of the Defendants was in breach.

42. In his judgment, the Official Referee posed the question, *"Is the assignment (by Floods of Queensferry Ltd to Mr Flood of its cause of action against the defendants)" a legal assignment and if so, is it void by virtue of clause 2(3) of the .... sub-contract?"* The Defendants do not appeal against the Official Referee's conclusion that the assignment was valid and legal. The appeal is against his answer to the second part of his question, namely, that while the assignment was caught by the prohibition contained in clause 2(3) it was saved by the proviso to that clause. The Official Referee concluded that the words in the proviso *".... any sum which is or may become due and payable to him under this sub-contract"* should be construed so as to include both the claim for sums alleged to be due under the contract and the claims for damages for breach.

43. I have some difficulty in understanding how a claim for damages for breach of contract can be said to be a claim for a sum due under the contract. However, it is clear that this part of the claim can only fall within the proviso if the alternative claim for the sums alleged to be due under the contract is within the proviso. If it is, the question whether the claim for damages is also within the provision ceases to be important.

44. The basis of the submissions of Mr Powell Q.C. for Mr Flood, that the claim for sums allegedly due under the sub-contract is within the proviso is based on s.136(1) of the Law of Property Act 1925, which, so far as is material, provides that : *"Any absolute assignment by writing .... of any debt or other legal thing in action ..... is effectual in law .... to transfer ... (b) all legal and other remedies for the same ...."*

45. I might have found this argument persuasive were it not for the decision of this Court in ***Yeandle v. Lynn Realisations Ltd*** (1996) 47 Con. L.R.1, of which the Official Referee was unaware. Evans L.J. has set out in his judgment the material passages from the judgments of Hobhouse L.J. and Sir Thomas Bingham M.R. in that case, which was concerned with the proper interpretation of the very clause to which this appeal relates. That decision is, in my view, authority for the proposition that an assignment of a *"sum which is or may become due and payable to him under this sub-contract"* does not operate as an assignment of the right to take whatever preliminary steps are necessary to establish that a particular quantified sum is due and payable. In other words, if it has already been agreed or established that a given sum is, or on the happening of uncertain future events will be, due and payable, an assignment of the sum acts as an assignment of the right to recover that sum if it be not paid but not more.

46. In **Yeandle** the necessary step to establish that a sum was due and payable to the Plaintiff was the conduct of an arbitration to determine whether the engineer's certificate was incorrect. I see no difference in principle between the conduct of the arbitration in that case and the conduct of this action to establish that sums were due under the sub-contract to Floods of Queensferry Ltd in the present case. I therefore conclude that the reasoning in ***Yeandle*** applies directly in the present case. It follows in my judgment that the right to bring this action, whether for sums allegedly due under the sub-contract or for damages for breaches of contract, is not within the proviso to clause 2(3) and is thus prohibited by that clause.

47. For these reasons, which do little more than recapitulate what Evans L.J. has already said, I would allow this appeal.

LADY JUSTICE BUTLER-SLOSS:

48. I agree with judgment of Lord Justice Evans and that the appeal should be allowed.

49. Order: appeal allowed; paragraphs 2 and 3 of the order providing for substitution to be set aside; costs here and below, not to be enforced without the leave of the court; legal aid taxation of the appellant's costs; liberty to Mr Flood to apply to an Official Receiver to be added as plaintiff; stay in the proceedings to be lifted for the purpose of the company being heard on an application by Mr Flood to be added as plaintiff.

MR COLIN REESE QC & CHANTAL DOERRIES (Instructed by Messrs Morrison Skirrow,) appeared on behalf of the Appellants
MR JOHN POWER QC & MR ANDREW STAFFORD (Instructed by Messrs Winward Fearson & Co, London,) appeared on behalf of the Respondent