A View from the Tower

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This is the fourth anniversary of this column and its view from the Tower. I have tried, particularly in the first year, to write about nonpractical, cultural topics. They were ones that did not relate directly to solving or commenting upon day-to-day problems faced by construction lawyers. I hoped to deepen your intellect. I wanted you to go beyond the practical. I gave you information about construction law in other countries and in international transactions. I wanted to make the Tower different from the run-of-the-mill stuff one finds in practitioner-directed legal writing.

In this anniversary column I go back to the nonpractical, to the intellectual. I again want to look at another country, in this case England.

I regularly read (or at least scan) two English periodicals, the *Construction Law Journal* and the *International Construction Law Review*. I was drawn to a paper by Rosalind M. M. McInnes, "The Yellow Brick Road: Ruxley Revisited" in the *Construction Law Journal*.[1] Her paper, as have many others, dealt with *Ruxley Electronics v. Forsyth*,[2] a classic owner measure of recovery case for construction that did not comply with the contract requirements.

Forsyth entered into written contracts under which Ruxley was to build a pool and another contractor to erect a building to enclose it for some £ 70,000. During the construction work Forsyth asked Ruxley to increase the deep end depth from six feet to seven and one-half feet. (Forsyth was a large man.) Ruxley agreed to do so without any change in the contract price. (No preexisting duty problem was discussed, the English seeming to limit that rule to promises to pay more money for the same work. This, though, did involve a promise of more work for no price increase, getting something for nothing.)

After the work was completed, Forsyth discovered that the maximum depth was six feet, nine inches, and the depth at the point swimmers would dive into the pool was just six feet. The contractors sued for the balances due. After Forsyth fired his lawyers, Forsyth defended by pointing to the swimming pool depth deviation.

The trial court judge found that actual depth was quite safe, that the deviation did not reduce the value of the pool, that to achieve a pool of the required depth would require £ 21,560, that Forsyth would not use any money awarded to rebuild the pool (he would live with it), and that the cost to reconstruct was disproportionate to the disadvantage of a six-foot instead of a seven-and-one-half-foot pool. He awarded Forsyth £ 2,500 for "loss of amenity."

The Court of Appeal awarded the cost of replacing the pool, an amount of £ 21,560. The House of Lords reinstated the decision of the trial court, Lord Jauncy of Tullichettle citing the famous Cardozo opinion in *Jacob & Young v. Kent*. The Law Lords held that the starting formula for measuring the contractor's breach of a construction contract is the cost of correction. But if cost of correction is unreasonable, taking into account the value that would be added by the cost of correction, diminution in value is awarded. If this amount, as in *Jacob & Young v. Kent*, was very small or nil, the court could, as did the trial judge, award some minor amount to compensate the owner for not receiving all he was entitled and expected to receive, even though this encompassed a loss of a subjective personal preference, "a pleasurable amenity."

So what is the big deal? We have many such cases in American law. I looked up section 27.03(D) in the fifth edition of my *Legal Aspects of Architecture, Engineering and the Construction Process*. (The sixth will be out this June.) There I found that American courts had employed a variety of rules in such cases. In a unitary jurisdiction, like England, there must be a rule. But the pluralistic, federal American system can survive with a number of marginally different rules, the only losers being writers who try to state an American rule or an uncommitted jurisdiction searching for the majority rule.

But I suspect that the outcome of American cases will not be much different, the courts trying to find a reasonable solution to the dilemma of overcompensating if it uses the cost of correction (creating economic waste or windfall) or undercompensating if it uses diminished value and rewarding a contract-breaker.

Is there a third way? My friend Ian Wallace, a leading English text writer, plugged hard for a third measure, the cost saved by the contractor.[3] He would allow the court to award the difference between what it did cost the contractor and what it would have cost had he done the work properly. In any event the House of Lords did apply another third way, a somewhat flexible use of cost of amenity if loss of correction is way out of line and diminished value gives the owner nothing. It allows the trial court to award a consolation prize for disappointment, despite the usual barring of such damages in commercial transactions.

Let me comment briefly on a paper in the *Construction Law Journal*, "Investigating the JCT

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mance bond issued covering that contract is rendered a nullity, even if performance has taken place thereunder. The original contractor in this case abandoned the project. The authority convinced the surety to complete the work under its performance bond. Consequently, the surety engaged a replacement contractor to complete the work by means of an assignment and delegation of the original contract. The completion agreement stated that the assignment would become effective only if the authority consented in writing to the assignment. The replacement contractor provided a performance bond of its own.

The contractor performed a portion of the work under this assignment. The authority agreed that the replacement contractor was acceptable but did not specifically agree to an assignment of the original contract. Eventually the replacement contractor abandoned the project over nonpayment and sued to recover for its performance. The original contractor's surety counterclaimed against the replacement contractor and its surety for reprocurement costs.

The court held that since the original surety did not obtain the written consent of the owner to the assignment, the completion agreement was invalid. As a result of this finding, the court also held that the replacement contractor's surety under the completion agreement was "off the hook." The court's ruling, however, did not prevent the replacement contractor from submitting claims against both the authority and its surety on a quantum meruit theory.

Aniero Concrete Co. v. New York City Constr. Auth., No. 94 Civ. 9111, No. 95 Civ. 3506, 1998 WL 148324 (S.D.N.Y. Mar. 30, 1998).

Termination for Default

The U.S. Court of Federal Claims converted a termination for default into a termination for convenience on a government contract. The contract required the removal and replacement of the exterior surface of a wind tunnel belonging to NASA. The contractor encountered substantial delay and disruption to its work as a result of NASA's application of emissions standards and tests by NASA that were in excess of those specified in the contract. The more restrictive tests and standards caused substantial delay and impact to the job.

NASA argued that, during the prebid conference, NASA had mentioned the level of lead emissions containment that it expected on the project. The court, however, held that any communications prior to contract formation were "without legal effect."

NASA allowed the contractor to continue performance after the contract completion date without setting a new completion date or objecting to the contractor's delay. In a subsequent modification, NASA established an unrealistic completion date. Nine months after the original completion date, NASA terminated the contract for default.

The court stated that when the government allows a delinquent contractor to continue performance past the completion date, it surrenders its right to terminate unless it establishes a specific and reasonable date for completion of the work. By allowing the contractor to proceed past the completion date, the inference is that time is no longer of the essence.

The court noted that termination for default is a drastic sanction, and should be sustained only for good grounds and on solid evidence. The court stated further that the government has the burden of proof to justify the default. The issue for the court is whether the contracting officer exercised proper judgment. The court, however, will not substitute its judgment for that of the contracting officer. Finally, the court noted that the contracting officer must exercise his or her independent judgment in terminating the contract for default. If his or her judgment is clouded by improper influence from another party, it would constitute an abdication rather than an exercise of judgment.

The court found that NASA improperly terminated the contract for default. The government failed to establish a new completion date when the original date passed. When it unilaterally established a new completion date, it was unrealistically short. Finally, the government failed to timely discover the misapplication of the air monitoring requirements. As a result, the termination for default was converted to a termination for convenience.

SIPCO Services & Marine, Inc. v. United States, 41 Fed. Cl. 196 (1998).

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Standard Forms of Agreement for Collateral Warranty," by David Lewis.[4] Except for a brief flirtation with tort law, the English do not let a subsequent purchaser or user use tort to sue the contractor. They are not connected by contract. To deal with this, the practice arose of having the architect, prime and subcontractors give a collateral warranty to those who would use the project after completion. Now the practice is so well established that there are standard English forms for doing this.

In light of the chronic confusion of American law when it deals with third-party claims in construction disputes, would this technique be useful to us? How about extending it to the frequent claims by primes and subs against design professionals? Can we imagine an owner demanding that his design professional give a collateral warranty in favor of primes and subs? (I can hear the outraged screams of the AIA and professional liability insurers at the mere mention of such a scheme.)

You can and should sharpen your intellectual skills and become a better lawyer if you know what is happening in other legal systems.

1. 14 CONSTR. L.J. 33 (1988).
2. [1966] 1 A.C. 344, [1995] 3 All. E.R. 268 [1995] 3 W.L.R. 118.
3. Ian Wallace, *Cost of Repair or Diminution of Value: An Intermediate Measure?*, 13 INT. CONSTR. LAW REV. 338 (1996).
4. 13 CONSTR. L.J. 305 (1997).

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