BREACH OF CONTRACT—PARTIALLY DEFECTIVE PERFORMANCE—EFFECT ON RIGHT TO REMUNERATION

"You don't need hard cases to make bad law these days."[1]

A recent decision[2] of the English Court of Appeal holds that where one hired to do certain building work has completed the work in a defective enough manner that the cost of the defects amounts to between one-third and one-quarter of the contract price, he is not entitled to any remuneration whatever, and the person who hires him gets the benefit of the work free. In reaching this decision the Court of Appeal purported to follow the classic case of *Cutter* v. *Powell*[3] and distinguished the well known case of *Dakin* v. *Lee*.[4]

To the reader approaching the subject with a fresh mind two things will probably surprise him. The first is that this new decision is reported in the first volume of the Weekly Law Reports, indicating that the editors of that series do not think it of sufficient general importance to have an edited version published in the Queen's Bench series.[5] But the greater surprise should be reserved for the fact that there could, at this day and age, be any doubt as to the point in question. One might be permitted to suppose that the question of whether defective performance of a contract entitles one to reduced remuneration or no remuneration at all would have been decided long ago.

The answer is, of course, perfectly simple or, at least, it was. The law in this area was well settled until the Court of Appeal on the 21st of July, 1972 decided to upset it by their refusal to follow the well-known case of *Dakin* v. *Lee*.[6] In their recent decision[7] the Court of Appeal held that defects in work so bad as to amount[8] to a quarter to a third of the value of the work were large enough that one could not say that the contract had been "substantially performed". And they stated that it was well known that where there is a lump sum contract, the person doing the work cannot recover any payment at all unless he has performed the whole contract, or in any event the portion which he has not performed is so trifling that one may fairly say that he has "substantially performed" his contract. They held that one-third to one-quarter of the work involved was not a minor sum and therefore there had not been "substantial performance" in the case before them.

The fallacy in that approach is that it deliberately confounds incomplete performance with complete but defective performance. The two are clearly not the same thing at all, and as Glanville Williams pointed out 30 years ago[9] in an exhaustive review of the law in this area, the

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[1] Weir, *Nec Tamen Consumebatur . . . —Frustration and Limitation Clauses*, [1970] Cambridge L.J. at 189.

[2] *Bolton* v. *Mahadeva* [1972] 1 W.L.R. 1009 at 1011 (C.A.).

[3] (1795) 6 T.R. 320; 101 E.R. 573.

[4] *H. Dakin & Co.* v. *Lee* [1916] 1 K.B. 566; 84 L.J.K.B. 2031 (C.A.).

[5] But then *Dakin* v. *Lee*, *supra*, n. 4, is not included in All England Reports Reprint, and this whole subject is not much featured in the textbooks either.

[6] *Supra*, n. 4.

[7] *Bolton* v. *Mahadeva*, *supra*, n. 2.

[8] That is to say, the owner's damages because of the defects would amount to that fraction of the contract price.

[9] Williams, *Parial Performance of Entire Contracts, I*, (1941) 57 L.Q.R. 373 at 385-87, and 494-96; *cf.* Stoljar, *Dependant and Independant Promises*, (1957) 2 Sydney L. Rev. 217 at 243-44, *Accord*, D. R. Harris, *Chitty on Contracts*, paragraphs 1148, 1149 and 1151 (23d ed., 1968).

courts have not treated the two as being equivalent, unless forced to do so by a special term to that effect in the contract in question.

The leading case of *Dakin* v. *Lee*[10] makes this distinction abundantly clear and it was only through the exercise of a good deal of ingenuity that the Court of Appeal in its recent decision[11] was able to distinguish the *Dakin* decision. They did so by suggesting[12] that the defects in the *Dakin* case were very much more minor than those in the instant case and then by the observation[13] that the headnote to *Dakin* v. *Lee* does not come from the decision of the Court of Appeal in that case. But with respect, neither of these grounds of distinction is convincing. It is impossible to conclude that the Court of Appeal in the *Dakin* case proceeded on the ground that the defects there were too minor to be concerned with for they had not before them the value of the damages attributable to those defects and ordered that the case be returned to the Court below to have these values settled. It is interesting to note, however, that while the plaintiffs there claimed some £405, the Divisional Court calculated that the sum to which they were entitled was £317. The difference between the two is once again from one-quarter to one-third of the amount in issue, which is precisely the range involved in the most recent decision of the Court of Appeal.

As to the headnote to the *Dakin* decision, that is simply a red herring, for the real question is what the judgments say. There cannot be any dispute that the Divisional Court in *Dakin* v. *Lee*[14] held that different rules govern partial completion of a contract and defective performance of a contract, and further held that complete but defective performance of a contract entitles the person rendering the services to his remuneration (less a deduction for damages) unless the work done either was of no use to the person receiving it or was so very different from that contracted for as to amount to a totally different thing. An examination of the judgments of the Court of Appeal in the *Dakin* case will show that while the Court of Appeal there did not go into detail as to when defective performance would disentitle one to any payment since the conditions for such disentitlement were not present there, nevertheless they fully supported the distinction between incomplete performance and defective performance recognized by the Divisional Court below (the appeal from whose judgment they dismissed).[15] It is true that in his initial discussion of the subject Lord Cozens-Hardy M.R. there mentioned minor defects of workmanship in the passage quoted in the recent decision,[16] but he then went on to state:[17]

> I regard the present case as one of negligence and bad workmanship, and not as a case where there had been an omission of any one of the items in the specification. The builders thought apparently, or so they have sworn, that they had done all that was intended to be done in reference to the contract; and I suppose the defects are due to carelessness on the part of some of the workmen or of the foreman; but

[10] *Supra*, n. 4.

[11] *Bolton* v. *Mahadeva*, *supra*, n. 2.

[12] *Id.* at 1012A.

[13] *Id.* at 1012B.

[14] *Supra*, n. 4.

[15] Indeed as is noted below at least one member of the Court of Appeal expressly approved the Divisional Court's judgment.

[16] *Bolton* v. *Mahadeva*, *supra*, n. 2 at 1012 C-E.

[17] *Dakin* v. *Lee*, *supra*, n. 4 at 2034-35 (L.J.K.B.), 579 (K.B.).

> the existence of these defects does not amount to a refusal by them to perform part of the contract; it simply shews negligence in the way in which they have done the work.

That statement is not limited to minor defects. He went on immediately after to say that the result was that they were entitled to recover the contract price less damages. The distinction between partial performance and defective performance was made even more strongly by Lord Justice Pickford:[18]

> I agree. We have been told that, if we affirm this judgment, we should be upsetting all the cases which have ever been decided in regard to contracts made for payment of a lump sum. To my mind our decision does not interfere with any one of them. Certainly I have not the slightest wish to differ from the view that, if a man agrees to do a certain amount of work for a lump sum and only does part of it, he cannot sue for the lump sum; but I cannot accept the proposition that, if a man agrees to do a certain amount of work for a lump sum, every breach which he makes of that contract by doing his work badly, or by omitting some small portion of it, is an abandonment of his contract, or is only a performance of part of his contract, so that he cannot be paid his lump sum. It seems to me that there would be a performance of the contract, although some part of it was done badly, and that seems to me to be the position here.

And in case one should feel that he was only referring to minor defects one should note that in the next paragraph he examined the defects there in question and decided that "they were a substantial part of the work in the specification". He concluded by saying:[19]

> There is nothing in all this that seems to me to amount to doing only a part of the work contracted for and abandoning the rest. What the plaintiffs have done is to perform the work which they contracted to do, but they have done some part of it insufficiently and badly; and that does not disentitle them from being paid, but it does entitle the defendant to deduct such an amount as is sufficient to put that insufficiently done work into the condition in which it ought to have been according to the contract.

He then went on expressly to approve the decision of the Divisional Court except as to their manner of calculating the precise amount of the deduction. The third member of the Court, Lord Justice Warrington, agreed and did not deliver a separate judgment.

In the case now under discussion the Court of Appeal relied on their previous decision in *Eshelby* v. *Federated European Bank*.[20] But there Slesser L.J., as well as Scrutton L.J., based his decision on a clause in the contract expressly requiring proper performance to make a surety liable: note the quoted words "duly executed". While Greer L.J. uttered some doubts, *obiter*, as to *Dakin* v. *Lee*,[21] he based his decision on a failure to give notice.

Finally the Court of Appeal in the present case referred to their previous "most helpful" decision of *Hoenig* v. *Isaacs*.[22] They distinguished it as being a case of much more minor defects in the work done, which fact may be true, though Somervell L.J. thought the case close to the line,[23] being about 7% or 8% of total, which is not a mere trifle. But that is not a proper ground of distinction, for that case

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[18] *Dakin* v. *Lee*, *supra*, n. 4 at 2035 (L.J.K.B.), 580 (K.B.).

[19] *Id.* at 2036 (L.J.K.B.), 581-82 (K.B.).

[20] [1932] 1 K.B. 423, 101 L.J.K.B. 255-56 (C.A.).

[21] *Supra*, n. 4.

[22] [1952] 2 All E.R. 176.

[23] *Id.* at 179H.

fully supports *Dakin* v. *Lee*,[24] despite the doubts in *Eshelby's* case, and rejects suggestions that that case should be narrowly confined, and nowhere states that it applies only to minor defects in performance.

To this point we have simply discussed the English cases which are discussed in the recent English decision[25] but there are Canadian cases on point as well, and they fully support the distinction between defective performance and incomplete performance and follow *Dakin* v. *Lee*.[26] Among such decisions one may note the Ontario Court of Appeal in *Diebel* v. *Stratford Improvement Co.*,[27] *Burton* v. *Hookworth*,[28] *House Repair Co.* v. *Miller*,[29] and *McGregor & McIntyre Co.* v. *Sterling Appraisal Co.*,[30] the Nova Scotia Court of Appeal in *Mattinson* v. *Hewson*,[31] the New Brunswick Court of Appeal in *Inch* v. *Farmer's Co-op Dairy*[32] and *Wagg* v. *Boudreau Sheet Metal Works*,[33] and the British Columbia Court of Appeal in *Hutchinson* v. *Mathias*[34] and *Holliston* v. *Zaluski*.[35] There are also a number of trial decisions to the same effect. The writer has been unable to find any Canadian decision disagreeing[36] with *Dakin* v. *Lee*[37] or *Hoenig* v. *Isaacs*.[38]

It is also instructive to turn to decisions of the Supreme Court of Canada. It is true that in *Miller* v. *Advanced Farming Systems*[39] the Court referred to "substantial performance" (which is an ambiguous phrase), but the *Dakin* and *Hoenig* decisions were followed and partial remuneration awarded for what appeared to be fairly serious defects in the work done. *Field* v. *Zien*[40] is sometimes quoted in this context but it dealt with the sale of business and it is doubtful that it is on point; in any event what was awarded in that case was a reduced payment. In *Modern Construction Company* v. *Shaw*,[41] Mr. Justice Anglin quoted the *Dakin* case and expressly distinguished between cases of bad workmanship and those where only part of the work had been done. He found that the former was the case and held that there should be reduced compensation.

Finally, the most recent decision of the Supreme Court of Canada on point is *Pratt* v. *St. Albert Protestant Separate School Board*[42] where the Supreme Court of Canada upheld the decision of the Appellate Division of the Supreme Court of Alberta[43] without extended reasons.

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[24] *Supra*, n. 4.

[25] *Bolton* v. *Mahadeva*, *supra*, n. 2.

[26] *Supra*, n. 4.

[27] (1917) 38 O.L.R. 407 at 412.

[28] (1919) 45 O.L.R. 348 at 352.

[29] (1921) 49 O.L.R. 205 at 212.

[30] [1925] 4 D.L.R. 211, especially at 216-19.

[31] (1908-09) 43 N.S.R. 339, though one judge talked of acceptance.

[32] [1941] 2 D.L.R. 27 at 38-39.

[33] (1959) 43 M.P.R. 154.

[34] [1943] 1 W.W.R. 451 at 453.

[35] [1946] 3 W.W.R. 468.

[36] *Lacroix Bros. & Co.* v. *Cook* [1926] 4 D.L.R. 747 (Sask. C.A.) distinguishes *Dakin* and bears some resemblance to the *Bolton* decision, *supra*, n. 2; but its reasoning is hard to follow and it may involve a finding of an implied term.

[37] *Supra*, n. 4.

[38] *Supra*, n. 22.

[39] (1969) 5 D.L.R. (3d) 369 at 370-71 (S.C.C.).

[40] [1963] S.C.R. 632.

[41] (1923) 35 B.C.R. 331 at 339.

[42] (1970) 7 D.L.R. (3d) 192 and 560.

[43] (1969) 5 D.L.R. (3d) 451 at 455-57.

The Alberta Court quoted with approval a passage from *Farnsworth* v. *Garrard*[44] (which was followed in *Dakin* v. *Lee*) to the effect that:[45]

> . . . if some benefit has been derived, though not to the extent expected, this should go to the amount of the plaintiff's demand, leaving the defendant to his action for negligence.

The Alberta Court then went on, in the manner of the celebrated headnote to the *Dakin* case, to consider whether the defect in work in that case had been so bad that the recipient of the work had derived no benefit from it. This was found to be the case. If substantially defective work entitled one to no compensation, it would not have been necessary to go through that exercise.

It is therefore apparent that the previous English authorities as well as the Canadian authorities are unanimous in distinguishing between incomplete performance and defective performance awarding reduced compensation for the latter.

In any court which is not bound by any of these decisions, which result should be followed? It is submitted that there can be no argument as to this point. Why should the recipient of defective but valuable work be able to take the benefit of it without paying any part of the price? If a man has a $1,000.00 garage built on his property which is defective to the amount of $200.00, why should he get it free? He can either live with the defects (if he wishes to save $200.00) or he can easily find another builder who will put them right for $200.00. On either view the work done is worth $800.00 to him. In neither event does there seem to be any justification in logic, morals, or social planning for depriving the builder of all his charges.

Indeed that is the strangest aspect of the recent English decision:[45] Why was the Court of Appeal at such pains to deprive the builder of all his remuneration?

—J. E. COTE*

[44] (1807) Camp 38; 170 E.R. 867.

[45] *Bolton* v. *Mahadeva, supra*, n. 2.

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THE ELEMENTS OF A TORRENS TITLE

The anatomy and physiology of the body of Torrens statute and case law is incredibly complex. There are perhaps three reasons for this. Firstly; the originator of this most valuable system may not have possessed a legal acumen commensurate with his reforming zeal. Secondly, the system—initially expressed in aliodal terms[1]—was imposed upon an established body of laws which was and is not always compatible with it. Thirdly, those who have administered and interpreted the system in the courts have not always been receptive to its innovations nor, with respect, clear in their conception of its meaning. The latter, in view of the drafting and composition of the respective versions of the system, is easy to understand and forgive.[2]

Due to this complexity an analysis of any aspect of the system is

[1] Hogg, *Australian Torrens System* 3 (1905).

[2] *Id.* at 24.