Neutral Citation Number: [2020] EWCA Civ 545

Case No: A3/2019/1675

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
CHANCERY APPEALS (ChD)
MR JUSTICE FANCOURT
[2019] EWHC 1749 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/04/2020

Before:

Lord Justice Patten
Lord Justice Moylan
and
Mr Justice Mann

Between:

Mr Jas Bains	**Appellant**
- and -	
(1) Arunvill Capital Limited	**Respondents**
(2) Hollbeach Solutions LLP	

Mr N Davidson QC (instructed by **Spector Constant & Williams Ltd**) for the **Appellant**
Mr A McCluskey (instructed by **Macfarlanes LLP**) for the **Respondents**

Hearing dates: 13th February 2020

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Approved Judgment

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Lord Justice Moylan:

1. The claimant, Mr Jas Bains, appeals from the order made by Fancourt J on 5 July 2019 dismissing the claimant's appeal from the order made by HHJ Dight CBE on 26 July 2018.

2. The proceedings initially had a much wider compass but, in so far as relevant to this appeal, concern the interpretation and operation of a material breach clause in a consultancy agreement ("the Agreement") between the claimant and Arunvill Capital Ltd ("Arunvill"). The core issue raised by this appeal is whether the claimant, as he alleged, had remedied a material breach within the required, 21-day, period. If he had not, Arunvill was entitled summarily to terminate the Agreement; if he had, the claimant was entitled to a termination payment equal to 6 months' remuneration.

3. HHJ Dight found that the claimant was in material breach of the Agreement in that, in summary, at [130], his "refusal to provide the services in clause 2.1" was a "refusal to work". He also determined that a letter written on 20 April 2016 by solicitors on behalf of the claimant, in which it was said that the claimant "confirms that he does intend to perform his contractual obligations", did not remedy the breach. The "proper remedy" was, at [130], "not merely the communication of an intention to work in an unspecified way, but it is to continue to provide the services which the claimant was contracted to provide under" the Agreement.

4. In his first appeal, the claimant did not challenge the determination that he had been in material breach of the Agreement. He challenged the judge's conclusion that the breach had not been remedied. Fancourt J dismissed the appeal, rejecting the argument that the letter of 20 April 2016 had remedied the breach. He decided, at [21], that "a remedy of the breach required the appellant not just to write a letter saying that he would perform in the future, and then wait to be asked to do something, but to resume work within the 21-day period".

5. The sole ground of appeal is that the courts below were wrong in law to conclude that the letter of 20 April 2016 had not remedied the claimant's material breach of the Agreement.

6. The claimant is represented on this appeal, as he has been throughout, by Mr Nicholas Davidson QC. Arunvill has been represented by Mr Alec McCluskey, who has also acted throughout.

Background

7. I need only set out a very brief summary of the background in part because Fancourt J's judgment is reported at [2019] EWHC 1749 (Ch).

8. Under the Agreement the claimant was appointed, by clause 2.1, as a consultant "to provide the Services" ("Services"). They were defined as: "Structuring and implementation of various equity finance strategies within the Company, or elsewhere within the Recipient Group, and management of various Newly Created Strategies". "Newly Created Strategies" (NCS) were defined as: "Strategies which are devised, created and managed by the Consultant, or strategies which are based substantially on intellectual property produced by the Consultant …".

9. The Agreement could be terminated in a number of ways including as provided by clause 3.4, a material breach clause:

> "This Agreement may be terminated by either Party in the event of the other Party having materially breached any of the provisions of this Agreement and not having remedied such breach within 21 days after the service of written notice by the first Party requiring the same to be remedied."

10. By letter dated 5 April 2016 Arunvill wrote to the claimant as follows:

> "I am writing to advise you that Arunvill … believes, that by your actions, you are in material breach of the Consultancy Agreement …
>
> In particular it has come to the attention of the Directors … that you have both verbally and in writing, advised of your intention not to perform your contractual obligations under the Agreement (namely, the provision of Services to the Company, as set forth in Clause 2.1).
>
> The Company therefore submits that you are in breach of Clause 3.4 of the Agreement. By this letter the Company hereby serves you notice and requests that you remedy such breach within the timeframe set forth in the Agreement, such timeframe commencing as of the date of deemed receipt of this notice."

11. By letter dated 20 April 2016, solicitors acting for the claimant replied as follows:

> "Mr Bains does not accept that he advised Arunvill … both verbally and in writing of an intention not to perform his contractual obligations …
>
> Without prejudice to the above, Mr Bains confirms that he does intend to perform his contractual obligations under the … Agreement and therefore you should consider a breach (if any) remedied."

12. As set out in HHJ Dight's judgment, at [108]: "It is common ground that notwithstanding the claimant's assertion of an intention to perform his obligations under the Arunvill Agreement, no further services were provided by the claimant and no further fees or expenses were paid by the defendants".

13. The claimant commenced proceedings in October 2016. In the Particulars of Claim, it was pleaded that: the alleged breach by the claimant of clause 3.4 as set out in the letter dated 5 April 2016 "gave … (vague and wholly insufficient) particulars"; that "the alleged breach by the claimant of clause 3.4 as referred to in the 5 April 2016 letter … never in fact happened. The allegation was … wholly without truth or substance"; and that "even if the claimant had acted in breach of the … Agreement – which as aforesaid is denied – such breach was effectively remedied by" confirmation in the letter dated 20 April 2016 that the claimant intended "to perform his contractual obligations".

14. In the Defence, it was asserted: that the "particulars" in the letter dated 5 April 2016 were "clear and wholly adequate to enable the claimant to identify his breach of contract (namely his refusal to perform his contractual obligations by providing Services to [Arunvill]"; and that the claimant "took no steps to remedy his breach of the … Agreement. He asserted that he intended to perform his obligations under the contract, but took no steps whatsoever to do so".

The Judgments Below

15. HHJ Dight gave a detailed judgment, much of which dealt with aspects of the proceedings which are not relevant to this appeal.

16. In respect of the issue of whether the claimant was in material breach of the Agreement, he recorded, at [116], that the claimant's case was "that at all material times he was working and remained willing to do so". Arunvill could not "prove that the claimant refused to work" and, "if contrary to his primary case he had refused to work, nevertheless the alleged breach was remedied by his assertion that he intended to perform his obligations".

17. Arunvill argued, at [115], that the claimant was in material breach of the Agreement because of his "refusal … to work" and because of "his failure to structure and implement the NCS".

18. The judge gave eight reasons for concluding that there had been a material breach of contract. These included, at [118], that on "24 February 2016 the claimant clearly refused … to provide any further services …" and, at [119], that "the NCS were not structured or implemented". He also explained, at [126], that "in any event if one stands back, the claimant really was evincing an intention no longer to perform his obligations under the contract, to use the old expression, and his refusal could properly be classified as a repudiatory breach of contract".

19. The judge next considered, from [128], whether, as alleged by the claimant, the letter of 5 April 2016 did "not of itself identify the particular act or acts and the breach said to be the cause of the right to terminate … under clause 3.4" and whether any breach had been remedied.

20. Arunvill's case, as summarised by the judge, was that:

> "129 … the claimant was plainly not ready, willing and able to work, and his empty assertion of his readiness was not sufficient to remedy the breach. He had actually to provide some services. He was a retained consultant whose role … and status were such that he was not to be directed by his employers on a daily basis. On the proper construction of the Arunvill Agreement the services which the claimant was to provide to the first defendant were services the precise nature and extent of which he was, in a sense, to determine himself. They submit that there is no evidence of him having done any further work after service of the notice …"

21. The judge considered that the letter of 5 April 2016 contained "a clear assertion of a breach of an obligation under the contract", as explained as follows:

> "130 … The fact that it refers to a refusal to provide services in the future does not mean, in my judgment, that it is incapable of constituting a breach of the agreement. A refusal to work is, in my judgment, a refusal to provide the services in clause 2.1, identified in the notice. There was, therefore, a breach of clause 3.4 of the Arunvill Agreement and it was right, therefore, that the defendant ask the claimant to remedy the breach. The proper remedy in the circumstances of this case is not merely the communication of an intention to work in an unspecified way, but it is to continue to provide the services which the claimant was contracted to provide under the Arunvill Agreement."

He then considered what had happened and whether the claimant had provided the services he was contracted to provide within the 21-day period. His conclusion was as follows:

> "131 The evidence shows that the claimant did not in fact work, nor attempt to do so: he did not provide the "Services". The real cause may be that, of course, for the reasons I have already explained, it was not possible for him to provide the "Services" because the NCS were not capable of being effectively structured or implemented. Perhaps the truth of that suggestion lies in the fact that when Mr Davidson described what the claimant had been doing in the course of his retainer, no emphasis at all was placed on the structuring or implementation of the NCS but on other things he was doing, but he did not, in any event, do those other things either in the period after the notice of termination had been served. In those circumstances, the Arunvill Agreement terminated on 26th April, 21 days after service of the notice."'"

22. The claimant appealed from the judge's determination that the material breach had not been remedied within 21 days and from another aspect of HHJ Dight's judgment which is not relevant to this appeal. Both aspects of that appeal were dismissed by Fancourt J. The claimant sought to appeal Fancourt J's decision on both issues but was only given permission to do so in respect of the former.

23. The grounds of appeal as advanced before Fancourt J on the former issue were as follows, as set out at [15] of Fancourt J's judgment:

> "i) The material breach of contract, viz. refusing to continue to provide the Services, was remedied by letter from the appellant's solicitors dated 20 April 2016, stating that he did intend to perform his contractual obligations, and that the Judge was wrong to conclude that performance of the Services was also required within the 21 day period in order to remedy the breach;

> ii) Alternatively, if that did not amount to a remedy, the Judge was wrong to conclude that the appellant had to provide the Services thereafter, in order to remedy the breach, because Arunvill did not require him to provide any services, having rejected the strategies that he had previously devised. "

The latter argument was not pursued in the appeal to this court.

24. In his submissions to Fancourt J, at [17], Mr Davidson challenged HHJ Dight's conclusions (as set out in paragraph 21 above) as having failed "to have regard to the extent of the material breach that was specified [in the letter of 5 April 2016] and as [having given] an impractical effect to clause 3.4 of" the Agreement. The letter "complained only of the appellant having stated his intention not to perform his contractual obligations in future, not that the appellant had not performed in the past or was not performing at the date of the notice". This meant that the "only breach specified was therefore remedied" by the letter of 20 April 2019.

25. Mr Davidson gave, at [19], the "example of a jockey who is retained and paid by a trainer to ride his horses whenever requested to do so". He submitted that a jockey, who said that he would no longer ride for the trainer but then withdrew this assertion and said he would continue to ride for the trainer, had remedied his breach by his later "assurance". It "is not necessary, nor is it appropriate, to wait until the jockey is next invited to ride for the trainer to see whether he does".

26. Fancourt J rejected Mr Davidson's submissions. I quote his reasoning at length:

> "20 I reject the argument that the letter of 20 April 2016 remedied the breach and do not accept the equestrian analogy. The background to the breach notice as found by the Judge was the following. First, the obligation of the appellant to provide the Services was not dependent on any cooperation or input of Arunvill. Second, Arunvill had declined to make use of the NCS that the appellant had devised, on the ground that they amounted to a fraud. Third, the appellant had been doing other work for Arunvill, since the rejection of the NCS, though Arunvill had refused to accept that the expenses of his trip to Hong Kong in early 2016 were their responsibility on the ground that he went there for his own purposes. Fourth, Arunvill had decided by early 2016 that it was unwilling to continue to employ the appellant. Fifth, the reason why the appellant said that he would not perform his contractual obligations was that Arunvill would not pay his bonus, a profit share and/or his expenses. Sixth, the appellant made an unequivocal statement in a meeting of 24 February 2016 that he would not provide any more Services to either of the respondents until he was paid the sums that he claimed were due. The Judge found that he "plainly showed an intention no longer to perform his obligations for either Hollbeach or Arunvill unless he were paid …" There is no challenge by the appellant to any of these conclusions.

> 21 The breach notice was therefore given to the appellant at a time when he had already ceased to perform his contractual obligations and was refusing to provide the Services. He should have been, but was not, providing the Services to Arunvill. The notice stated that, by his actions, the appellant was in material breach, in particular by advising of his intention not to perform his contractual obligations. The material breach specified is therefore not, properly construed, simply that the appellant had indicated that he would not work in future. It is that the appellant was refusing to resume work for Arunvill. In those circumstances, a remedy of the breach required the appellant not just to write a letter saying that he would perform in future, and then wait to be asked to do something, but to resume work within the 21-day period. The letter was a statement intended to countervail previous contrary statements and was asserted to be a remedy of the breach, but it was at best (if taken at face value) an indication that the appellant would work if and when asked to do something.
>
> 22 There was a live issue at trial as to whether the appellant was only obliged to provide the Services with the input or cooperation of Arunvill or whether his obligation was freestanding. The appellant's case was the former, but the Judge found for Arunvill. Accordingly, to remedy the refusal to work, the appellant had to start providing the Services, not wait for Arunvill to instruct him to do something.
>
> 23 Mr Davidson's equestrian analogy can therefore be seen to be a false analogy. The true analogy is with a jockey whose contract obliges him to exercise the trainer's racehorses on a daily basis, not just to ride in races as and when requested to do so. In such circumstances, the jockey would not remedy his breach of contract by stating that he would perform but not in fact doing so. By the end of the 21-day period, it would be apparent that the letter was no more than a piece of paper and that the breach had not been remedied at all."

27. Fancourt J also dealt with an additional submission that the claimant "could not be expected to perform any services in circumstances in which it was clear that the NCS had been rejected by Arunvill and so Arunvill would not accept the appellant's work or require him to do anything. There was nothing for the appellant to do". Fancourt J rejected this argument because the "Services" which the claimant was required to provide under the Agreement were not confined to the NCS but included other services. He concluded that "Arunvill's non-acceptance of the NCS did not mean that the appellant could not provide the Services"; the "fact that the appellant had done other work for Arunvill after its rejection of the NCS and before his refusal to work further shows that he could still perform his obligations".

28. The claimant's appeal was, therefore, dismissed because, at [27], "the judge was right for the reasons he gave. Remedy of the specified breach required the appellant to resume provision of the Services, not just to write a letter of intent to do so".

29. Fancourt J disagreed with the judge on one small point which was that, in [131] in HHJ Dight's judgment, he had suggested "that it was not or may not have been possible for the appellant to provide the Services because the NCS were not capable of being implemented". Fancourt J explained that: "For the reasons I have given, that wrongly treats the Services and the NCS as being co-extensive, so far as the appellant's obligations were concerned, when the Services were a broader category". It is not clear to me that this was, in fact, the effect of [131] because HHJ Dight specifically referred to "other things" the claimant had been doing and which "he did not … do … in the period after the notice of termination had been served". In either event, this difference, if any, is not material to this appeal.

Submissions

30. Mr Davidson argued that this case raises significant issues of principle concerning the application and interpretation of material breach clauses. He submitted that the judgments below have "devalued … this contractual remedy", the value of which "lies in the clarity it brings to an area which, in contracts without such provision, is often opaque and commercially very inconvenient". The "material breach procedure is simple to operate if, but only if, (a) the material breach is clearly specified and (b) it is equally clear what needs to be done to remedy it". The decisions in this case, he submitted, "departed from the simplicity of looking at the specified breach (here, making a threat) and its remediation (here, withdrawal of threat)". In support of these submissions, Mr Davidson relied on *Griffon Shipping LLC v Firodi Shipping Ltd* [2014] 1 Lloyd's Rep. 471.

31. At what could be said to be a more prosaic level, Mr Davidson submitted that both HHJ Dight and Fancourt J were wrong when they decided how the material breach clause operated in the circumstances of this case. They should have decided that, as a matter of law, the 20 April 2016 letter remedied the breach by withdrawing the claimant's refusal to work. This was because the material breach had been a threat as to "*future* behaviour" which could be, and was, remedied by the threat being withdrawn.

32. In the course of his oral submissions, Mr Davidson acknowledged that the outcome in this case depended on what the documents meant and how they applied to the events which happened. However, he submitted that both HHJ Dight and Fancourt J had misunderstood what was required to remedy the breach when the former concluded, at [130], that the claimant had "to provide the services which [he] was contracted to provide" and the latter, at [22], that the claimant "had to start providing the Services", rather than simply withdraw his threat.

33. Mr Davidson also submitted that it was not clear what the claimant was required to do because this was "ill-defined" and "vague".

34. Mr McCluskey submitted, in summary, that the judges below were right for the reasons they gave. A refusal to work was, he submitted, "not merely a statement of intention" but "a state of affairs". Both judges had, therefore, been right to decide that the claimant had to do more than "simply writing a letter saying that he would work" and had to provide the contracted Services.

35. Mr McCluskey referred to *FL Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, at pp. 249-250, and *Force India v Etihad* [2011] ETMR 10 at [108]. The

former in support of his submission that a party in material breach of a continuing positive obligation must remedy the breach by putting it right for the future. The latter as demonstrating that the assessment of what is involved in putting a breach right involves a practical, rather than an unduly technical test. In this case, the claimant had refused to perform his ongoing obligation to provide the contracted Services, the remedy for which was to resume performance of and provide those Services.

Determination

36. I agree with Mr Davidson that one of the principal advantages of a material breach clause is that it avoids the need for parties to become embroiled in fine arguments, or as he put it "to squabble", about whether what has happened is or is not sufficient to amount to a repudiatory breach.

37. However, with all due respect to his submissions, I do not consider that this case raises any issue of principle concerning the application and interpretation of material breach clauses. Nor do I consider that the judgments below undermine the efficacy of such clauses or the "valuable contractual remedy" they provide as referred to in *Griffon v Firodi*.

38. Indeed, in my view, both HHJ Dight and Fancourt J did exactly what Mr Davidson rightly submitted they should do, namely look at, or determine, (i) the specified "material breach"; and (ii) whether it had been remedied. The specified breach, as described by HHJ Dight, was the "refusal to work" which was "a refusal to provide the services in clause 2.1". This was, as Mr McCluskey submitted, an actual state of affairs. The remedy was, as set out by both judges below, for the claimant to provide the required Services, which he did not.

39. I consider that both judgments were right in respect of each of these issues for the reasons each judge gave. HHJ Dight's conclusions were plainly open to him on the evidence. I also do not consider that either judgment contains any error of law in respect of the conclusion that the letter of 20 April 2016 did not remedy the claimant's breach. I agree with HHJ Dight that the breach identified in the letter of 5 April 2016 was "sufficiently clear" in that "a refusal to provide services in the future" was a "refusal to work". As Patten LJ observed during the hearing, the fact that the claimant was not doing any work was part of the material breach on which the defendants relied. It had not merely been a theoretical threat of how the claimant might, or proposed to, act at some point in the future; it was a threat which he had carried out, and as found by the judge continued to carry out until the expiry of the 21-day period, by not providing the contracted Services.

40. Accordingly, the claimant stating, in the letter of 20th April 2016, that "he does intend to perform his contractual obligations" did not remedy the breach in this case. To repeat, what was required, as expressed by Fancourt J at [22], was that the claimant "had to start providing the Services" within the 21-day period which, (I repeat again) as found by HHJ Dight, he did not.

41. That is, in my view, the end of this appeal but before concluding this judgment I propose to consider in a little more detail whether, as submitted by Mr Davidson, *Griffon v Firodi* supports his submissions as summarised in paragraph 30 above.

42. That case concerned a claim by sellers to recover an unpaid deposit following the termination by them of a contract for the sale of a ship, the *Griffon*. The relevant clauses of the contract, a Memorandum of Agreement ("MOA"), provided as follows:

> "2. Deposit
>
> As security for the correct fulfilment of this Agreement the Buyer shall pay a deposit of 10% (ten per cent) of the Purchase Price within 3 (three) banking days after this Agreement is signed by both parties and exchange by fax/email. This deposit shall be placed in the Sellers' nominated account with the Royal Bank of Scotland PLC, Piraeus and held by them in a joint interest bearing account for the Sellers and the Buyers, to be released in accordance with joint written instructions of the Sellers and the Buyers …
>
> 13. Buyers' default
>
> Should the deposit not be paid in accordance with Clause 2, the Sellers shall have the right to cancel this Agreement, and they shall be entitled to claim compensation for their losses and for all expenses incurred together with interest.
>
> Should the Purchase Price not be paid in accordance with Clause 3, the Sellers have the right to cancel the Agreement, in which case the deposit together with interest earned shall be released to the Sellers. If the deposit does not cover their loss, the Sellers shall be entitled to claim further compensation for their losses and for all expenses incurred together with interest."

43. The deposit was not paid by the due date and the sellers cancelled the contract the following day. The issue in the litigation, as described by Teare J, at [15] of his judgment reported at [2013] 2 All ER (Comm) 246, was "whether payment of the deposit can be enforced by the seller notwithstanding the termination of the contract". The sellers argued that their right to be paid the deposit had accrued before the contract was terminated. The argument advanced by the buyers was that the contract, properly construed (in particular clause 13), meant that the sellers had no such right and were only entitled to claim "compensation for their losses". This had been accepted by an arbitration tribunal which had decided, at [17], that clause 13 had "the effect of depriving the sellers of their right to claim the deposit which had fallen due before the MOA was terminated so that, on the true construction of the MOA as a whole, the deposit did not fall due unconditionally". This was because clause 13 "excluded the implied term in favour of forfeiture (or its equivalent) that might otherwise have been derived from clause 2".

44. Teare J disagreed with this conclusion:

> "[23] In my judgment the language of the MOA does provide that the sellers might recover the amount of the deposit in any event. That intention is to be found in cl 2 of the MOA, which expressly describes the payment as a deposit for the purpose of

> providing security for the correct fulfilment of the MOA. That indicates that when the deposit accrued due, as it did on 5 May before the MOA was terminated on 6 May, it accrued due unconditionally. The rights provided by cl 13 of the MOA are in addition to the right to claim the deposit as a debt."

45. The buyers appealed, arguing that, on a proper construction, the contract did not provide for "the deposit being forfeitable before payment", 1 Lloyd's Rep. 471 at [8]. This was because clause 2 did not provide for forfeiture and clause 13 dealt with the circumstances in which the deposit would be forfeited.

46. In the course of his judgment Tomlinson LJ rejected the buyers' argument and explained the effect of clause 13:

> "10. The basic fallacy in this argument is that limb 1 of clause 13 does not prescribe what is to happen if the deposit is unpaid. It does no more than to afford to sellers an express contractual right or rights exercisable in the event that the deposit is not paid. These contractual rights are to be distinguished from those which arise under the general principles governing discharge by breach. The right to cancel given by limb 1 of clause 13 is not dependent upon proof that failure to pay the deposit on time is repudiatory in nature. Indeed, until the decision of this court in *Samarenko v Dawn Hill House Ltd* [2013] Ch 36, it would not have been clear that a failure to pay the deposit on time is, without more, repudiatory of the buyers' obligations. Limb 1 of clause 13 therefore confers upon sellers a valuable contractual remedy over and above the remedy which they already enjoy at common law, the availability of which latter remedy is however attended by uncertainty. That uncertainty was greater before the decision of this court in *Samarenko*, and thus at the time when limb 1 was introduced. Whatever the position now, a contractual remedy of termination which has no need to characterise the defaulting buyers' conduct as repudiatory is a valuable addition to sellers' armoury. The circumstances out of which buyers' repudiation must be spelled are not always clear cut. A contractual right of termination exercisable upon the happening or non-happening of an event usually brooks of less argument. The express entitlement to compensation together with interest for losses and expenses is also at the least a valuable clarification of a right to which the sellers were in any event entitled at law, which is henceforth made available as an express term of the contract."

47. Despite Mr Davidson's reliance on it, I do not consider that that decision provides any assistance in the determination of the present appeal. Tomlinson LJ was addressing a different contract and his observations were concerned with an issue that does not arise in the present case, namely the relationship between common law rights and contractual rights (as provided by the MOA in that case). It was in that, latter, context that he said that the express right to terminate the contract provided by clause 13 was in addition to any common law rights available to the sellers. This was also the context for his general observation that a contractual remedy of termination is valuable because the availability

of the common law remedy is "attended by uncertainty". Neither of these observations impact on the approaches taken by the judges below nor do they support the submission that the judgments in the present case undermine, or devalue, the "valuable addition" provided by a contractual remedy of termination.

48. In conclusion, in my view, for the reasons set out above, this appeal must be dismissed.

Mr Justice Mann:

49. I agree.

Lord Justice Patten:

50. I also agree.