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RICHMOND, VIRGINIA

IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

Record No. 740212

ROANOKE HOSPITAL ASSOCIATION,

Plaintiff-Appellant,

v.

DOYLE AND RUSSELL, INCORPORATED,
and FEDERAL INSURANCE COMPANY,

Defendants-Appellees.

JOINT APPENDIX

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TABLE OF CONTENTS

Trial Docket No. 1445

Document	Date of Filing	App. Page
Motion for Judgment	June 29, 1971	1
Final Judgment	January 29, 1974	4
Appellant's Notice of Appeal and Assignment of Errors	February 5, 1974	6
Appellee's Notice of Cross Appeal and Assignment of Cross-Error	February 14, 1974	8

ARGUMENT OF COUNSEL 10

INSTRUCTION E 12

TESTIMONY:

WILLIAM H. FLANNAGAN, Administrator Roanoke Memorial Hospital 13

J. STUART FRANKLIN, JR., Architect for Hospital Addition 67

BYRON A. YOST, Loan Officer, First National Exchange Bank of Virginia 74

WILLIAM B. CORRELL, Project Supervisor, Doyle and Russell 82

THOMAS H. SCANLON, former President, Doyle and Russell 87

A. R. TURPIN, JR., former officer of Doyle and Russell 99

RECORD NO. 74012

MOTION FOR JUDGMENT

Filed June 29, 1971

Plaintiff moves the Court for judgment against the Defendants, jointly and severally, for compensatory damages by reason of a material breach of contract by Defendant Doyle and Russell, Incorporated, and in support of said motion respectfully represents unto the Court as follows:

1. Plaintiff is a Virginia non-stock, non-profit organization with its registered office in the City of Roanoke, Virginia. Plaintiff owns and operates general hospital and rehabilitative facilities located within the City of Roanoke under the respective names of Roanoke Memorial Hospitals, Roanoke Memorial Hospital and Roanoke Memorial Rehabilitation Center.

2. Defendant, Doyle and Russell, Incorporated ("Doyle and Russell"), is a Virginia stock corporation with its registered office in the City of Richmond, Virginia. It is owned and operated as a division of Litton Industries and is engaged in the business of, and at all times and places relevant to this action was duly licensed as, a general contractor in Virginia and elsewhere.

3. Defendant, Federal Insurance Company ("Federal"),

is a New York corporation duly qualified to conduct business in Virginia. One of this Defendant's business activities is acting as corporate surety on contractors' bonds.

4. Plaintiff and defendant Doyle and Russell entered into an agreement bearing date of July 27, 1967 ("Agreement") for the construction by Defendant Doyle and Russell of a 200-bed addition to Plaintiff's general hospital at Roanoke, Virginia, in accordance with drawings and specifications dated June 9, 1967, prepared by Eubank, Caldwell, Dobbins, Sheretz & Franklin, Architects and Engineers ("Architects and Engineers"). A true copy of the Agreement (excluding plans) is hereto attached, marked Exhibit A.

5. Defendant Federal is compensated surety upon Defendant Doyle and Russell's performance bond in the full amount of the construction agreement given Plaintiff in connection with the execution of said Agreement and is liable to Plaintiff for full and punctual performance by Doyle and Russell of the Agreement. A true copy of the bond is hereto attached, marked Exhibit B.

6. Under the terms of the Agreement, Defendant Doyle and Russell promised Plaintiff that the entire work would be completed ready for occupancy by January 1, 1970, and otherwise promised to prosecute the work with a sufficient work force and with such diligence as would insure completion

within the period specified, or any duly authorized extension thereof.

7. Defendant Doyle and Russell has failed to complete the work within the time stipulated or as extended by reason of requested and allowable extensions or excusable delays, and has otherwise failed or refused to complete performance of the Agreement within a reasonable time, although importuned to do so both by Plaintiff and the Architects and Engineers.

8. By reason of Defendant Doyle and Russell's failure or refusal to complete the work within the time stipulated, or within any requested allowable extension of time for completion of performance, and by reason of its continued failure to complete the work within a reasonable time, Plaintiff has been denied the full beneficial use and occupancy of the addition, denied the full and efficient utilization of the existing structure, deprived of the availability of favorable interest rates for permanent financing for the addition lost by reason of Defendant Doyle and Russell's failure to complete the addition on or prior to October 30, 1970, and has otherwise incurred additional interest expense and additional architectural fees for the period of construction delay without offsetting revenues.

WHEREFORE, Plaintiff moves for judgment against Co-

Defendants, jointly and severally, for compensatory damages not in excess of the amount of Three Million Dollars, against which Plaintiff elects to recoup the sum of $956,000.00 held by Plaintiff as retainage, together with additions thereto, pursuant to the terms of the Agreement, together with interest and costs. Plaintiff requests trial by jury.

ROANOKE HOSPITAL ASSOCIATION

By_____
President

* * *

FINAL JUDGMENT

Filed January 29, 1974

This day came plaintiff by counsel and defendants by counsel upon the motion by plaintiff to set aside so much of the verdict of the jury returned on October 12, 1973, as found no damages against defendant as permanent interest costs and to enter up judgment for plaintiff or in the alternative to grant it a new trial and upon the further motion of plaintiff to set aside the verdict of the jury in the amount of $956,000.00 in favor of defendant Doyle and Russell, Incorporated, upon its counterclaim against plaintiff and to enter up judgment for plaintiff or in the alternative to grant it a new trial on the counterclaim of defendant Doyle

and Russell, Incorporated, and upon the motion of defendants for judgment in their favor notwithstanding the verdict against them in amount $552,500.00 in favor of plaintiff, or in the alternative to grant them a new trial, all of which motions are made a part of the record in this case.

The motions having been argued and submitted to the court for its decision, the court is of opinion that the motions should be, and they hereby are, overruled, to all of which plaintiff and defendants object and except as to their respective motions.

It is therefore adjudged and ordered that plaintiff recover of defendants $522,500.00 with interest from April 14, 1971, until paid, and that defendant Doyle and Russell, Incorporated, recover of plaintiff $956,000.00 with interest from September 3, 1971, until paid, that the costs incident to the special jury be taxed 50% against plaintiff and 50% against defendants, and that costs otherwise not be taxed against any party.

Pursuant to Rule 5:9(a), Rules of the Supreme Court of Virginia, the transcript of the hearing in this case filed this day with the Clerk of the Court is made a part of the record.

And both plaintiff and defendants having indicated their intention to apply to the Supreme Court of Virginia

for a writ of error and supersedeas it is further ORDERED that execution of this judgment be suspended for a period of sixty days from the date of the entry of this Final Judgment and thereafter until the Supreme Court of Virginia has acted upon any petition of error presented by any party, or the time for filing shall have expired, provided that plaintiff, or someone for it shall execute an appeal bond in the penal sum of at least $1,200,000.00, with surety approved by the Clerk of this court and conditioned according to law, and further provided that defendants, or someone for them, shall execute an appeal bond in the penal sum of at least $685,000.00, with surety approved by the Clerk of this court and conditioned according to law.

* * *

NOTICE OF APPEAL AND ASSIGNMENT OF ERRORS

Filed February 5, 1974

Roanoke Hospital Association, Petitioner, notes an appeal from the judgment entered in this case on January 29, 1974, and signifies its intention of filing a petition for writ of error with the Clerk of the Supreme Court of Appeals

of Virginia or with one of the Justices of that Court within the time prescribed by law.

Roanoke Hospital Association assigns as error:

1. The failure of the trial court, on motion of Roanoke Memorial, to set aside the verdict of the jury finding no damages as permanent interest costs against Doyle and Russell and Federal Insurance Company and to enter up judgment in favor of Roanoke Memorial in the principal sum of $832,300.00, with interest from June 30, 1971, until paid, or to direct a new trial to determine the proper amount of damages recoverable by Roanoke Memorial, as contrary to the law and the evidence;

2. The error of the trial court in granting Respondents' Instruction E, on the ground that it prejudicially conflicted with other instructions given by the trial court and prejudicially emphasized a questionable proposition of law supportive only of Doyle and Russell's view of the case;

3. The error of the trial court in indirectly instructing the jury during the course of the evidence that unless Doyle and Russell knew that interest rates would increase or what such rates would be in the future, when it submitted its bid and entered into the construction contract with Roanoke Memorial in July of 1967, then

damages related to increased interest costs were not foreseeable and, therefore, not recoverable; and

4. The failure of the trial court, on motion of Roanoke Memorial, to set aside a directed verdict awarding Doyle and Russell the contract retainage of $956,000, with interest, and to grant a new trial, as contrary to the law and the evidence.

A transcript of the evidence has been made a part of the record of this case by appropriate provision contained in the final order entering up judgment upon the verdicts rendered, entered under date of January 29, 1974.

ROANOKE HOSPITAL ASSOCIATION

* * *

NOTICE OF CROSS-APPEAL
AND ASSIGNMENT OF CROSS-ERROR

Filed February 14, 1974

Respondents Doyle and Russell, Incorporated and Federal Insurance Company note an appeal from the judgment entered in this action on January 29, 1974, and signify their intention of filing a petition for writ of error and supersedeas with the Clerk of the Supreme Court of Virginia or

with one of the Justices of that court within the time prescribed by law.

Respondents assign as cross-error:

1. The trial court erred in failing to grant the motion by respondent Federal Insurance Company for summary judgment at the conclusion of the petitioner's case.

2. The trial court erred in failing to set aside so much of the jury's verdict as awarded petitioner $552,500.00, with interest, against respondents, on the ground that that portion of the jury's verdict was contrary to the law and the evidence.

3. The trial court erred in giving any instructions to the jury on the recovery of consequential damages by petitioner.

4. The trial court erred in permitting, over objections, the admission of evidence on behalf of petitioner to show any monetary loss it contended it sustained because of additional or unanticipated interest or other financing charges it paid during the construction of additions or alterations to its hospital building in Roanoke.

DOYLE AND RUSSELL, INCORPORATED
FEDERAL INSURANCE COMPANY

* * * *

ARGUMENT OF COUNSEL

(p. 860)

* * * *

MR. BOOKER: And how could the people be expected to have known in '68 what the interest rates were going to be in 1970?

Their own experts said he couldn't even tell what the interest rate was going to be a year from now.

MR. HAZLEGROVE: Of course he couldn't. If I knew what the Wall Street Journal was going to give for the next week, I believe you and I could quit practicing law.

THE COURT: All right, we are down to Numbered Nine, all except the last sentence of that.

* * * *

(p. 886)

* * * *

THE COURT: D. (E)

MR. HAZLEGROVE: We object to Number Six, Your Honor, it takes a partial view of the evidence and again it invites this very conflict that we have

already discussed and Mr. Booker has accommodated us on by withdrawing the worst part of the instruction.

THE COURT: Are you insisting on Number Six?

MR. BOOKER: We do insist, this is our theory of the case. If Doyle & Russell learned something ten days later, it would be too late, it could not withdraw its bid for 30 days and when we are talking about something that was within the contemplation of the parties, we are talking about what was in the contemplation of the parties when they became bound to enter into the contract and Doyle & Russell became bound to enter into the contract on July 17, 1967.

THE COURT: I think they would be entitled to

(p. 887)

Number E, it will be given.

MR. HAZLEGROVE: And we object for the reasons assigned.

THE COURT: Yes, sir. Seven is Number F.

* * * *

INSTRUCTION E

The court instructs the jury that once the bid of Doyle and Russell was opened on July 17, 1967, Doyle and Russell could not withdraw or otherwise modify its bid for a period of 30 days, and that during that time, the Hospital could and did accept the bid of Doyle and Russell.

Contract between Roanoke Hospital Association and Doyle and Russell, General Conditions, Section 14

City of Newport News v. Doyle and Russell, Inc., 211 Va. 603, 179 S.E.2d 493 (1971)

TESTIMONY
of
WILLIAM H. FLANNAGAN

Administrator and Chief Executive Officer
Roanoke Memorial

(p. 19)

* * * *

Q Mr. Flannagan, how was the project financed by Roanoke Memorial?

A It was financed through loans of the First National Exchange Bank, Life Insurance of Virginia, Shenandoah Life Insurance Company and three million dollars from the Hill-Burton Fund and the balance was provided by the hospital.

Q Now, how was the Hill-Burton money to be paid to the hospital?

A We were award three million dollars to be paid over, I think a period of four years, $750,000, but each stood on its own, the money was committed only for the Federal fiscal year.

Q And how much credit, permanent credit did you have available to you from the lending institutions that you have described?

A Five million five hundred thousand dollars.

(p. 20)

Q And the difference, well, let me ask you this

Mr. Flannagan: What was the projected overall cost of the addition and related work?

A The architects' fees and site improvement and equipments, it was about thirteen and a half million dollars.

Q So you had available to you five and a half million of permanent credit, three million dollars of Hill-Burton funds and the remainder was made up out of funds generated by the hospital?

A That is correct.

Q Was the project approved by Hill-Burton, if you recall?

A In December, I believe, 1966 or late November.

Q How were the permanent financing arrangements made with the lenders?

A Well, the permanent financing arrangements really started in 1965 when we anticipated being under construction in 1966 and we had permanent loan commitments at that time for the type of building we expected to erect and it continued on as our project drew on but our approval for Hill-Burton funds was turned down in 1965 for our building in 1966.

It was approved the next year in 1966 which gave us the go-ahead for the year 1967. At that time, prior

(p. 21)

to filing any Hill-Burton application, we had permanent commitment loans with our application to Hill-Burton.

Q Are you testifying that it was required to show the Hill-Burton representatives that the hospital had financing or funds available to take up the slack in the projected cost of construction?

A That is right.

Q Now, did you have commitments in writing from the lenders during the period of years that you have described?

A Yes, sir.

Q And I believe you stated that the first written commitment or the first commitment was back in 1965?

A Yes, sir.

Q From whom was that commitment received, do you recall?

A We received a commitment from the First National Exchange Bank which was acting as the central agency to consolidate these funds from the Life Insurance Company of Virginia and Shenandoah Life Insurance Company.

We also had commitments through the Colonial-American Bank and the Virginia National Bank for further commitments.

* * *

(p. 28)

* * * *

Q Mr. Flannagan, please read the Exhibit that is the letter from Mr. Hicks to the hospitals.

A This is addressed to Mr. Charles P. Lunsford, President of the Roanoke Hospital Association:

"Dear Mr. Lunsford: We are pleased to advise that the following participating lenders have agreed to provide $5,000,500 of funds for the addition to the hospital facility:

"First National Exchange Bank of Virginia,

(p. 29)

$2,500,000; Life Insurance Company of Virginia, $2,500,000; Shenandoah Life Insurance Company, $500,000," totaling "$5,500,000.

The details of the loan will be provided in a new commitment to be issued by the above but will contain the terms substantially as included in the commitment dated April 27, 1967, which you now hold, except the rate of interest is to be six and three-eighths percent.

"This letter should enable you to proceed with your plans and we will furnish the final commitment as soon as practicable. Yours sincerely, Byron A. Hicks, Executive Vice-President."

The letter is dated July 27, 1967.

Q What is the date of the construction contract, Mr. Flannagan?

A July 27, 1967.

Q Now, do the commitments that you have before you provide when the financing must be availed of?

A The April 27, 1967 shows on there the 31st day of October, 1969 which was later amended to October 4, 1967 commitment which has the 30th day of June, 1970.

Q So under the terms of the commitment, the commitment expired and funds would not be made available after the 30th day of June, 1970?

(p. 30)

A That is right, sir.

Q Was that commitment subsequently amended to provide additional time for the completion of the financing?

A It was amended further with a higher interest rate.

* * * *

(P. 34)

* * * *

Q After the bids were opened in July of 1967, did you have occasion to discuss with the representatives of Doyle & Russell the requirement for completion as it related to your financing?

A Yes, sir.

Q Would you describe the circumstances under which that conversation took place?

A At that time, Doyle & Russell was the apparent low bidder and, in speaking of them, we brought out - -

MR. BOOKER: If Your Honor please, who is the "we"? I object to that.

THE WITNESS: The architects, engineers - -

MR. BOOKER: Object to what somebody else said, only what he said is admissible.

THE COURT: I think you can testify as to your conversation, Mr. Flannagan, the architects can testify to theirs. To whom did you talk, sir?

THE WITNESS: In talking to the representatives of Doyle & Russell present at the bid opening, I brought out, in my conversations as representing the owner, that the building must be completed by

(p. 35)

the date specified in the contract or else our financial arrangements would have to be redone or rearranged and would cost, evidently cost, supposedly cost the hospital a higher rate of interest.

* * * *

* * * *

(p. 39)

* * * *

Q Now, referring you to the month of January, 1970, what generally was the status of the progress at that time, Mr. Flannagan?

A Well, it had already become evident in late 1969 that the job would not be completed by January, 1970. It was debated between the architects and the engineers and owners whether or not the contract should be ended and a new contract entered into with another construction firm. At that time, however, we were able to persuade the bank to give us an extension and, therefore, the extension was granted to Doyle & Russell to June 30, 1970, to complete the job.

We also pledged to give them all our support in pushing the job and there were several things they brought out we could do and things they brought out that they could do.

Q You speak of things they could do?

A Doyle & Russell could do and the architects and the engineers could do and the owners could do.

At the time it was suspected that the electricians were holding up the job and the owners agreed to pay for overtime work on Saturdays and Sundays out of their own pocket to get the electricians to move ahead on the project.

(p.40)

Q Now again referring you to this month of January, 1970, did you have a conversation with the representatives of Doyle & Russell and perhaps the architects and engineers?

A I met with Mr. Scanlon who was then President of Doyle & Russell and told him of our concern and deep concern for the slowness of the job, the way the project was being handled.

Subsequently a letter was written by our architects and engineers to Doyle & Russell and - -

Q Let me ask you, if you recall, whether or not there was an indication by way of a progress schedule from Doyle & Russell as to the completion date of the hospital when you met in 19, January of 1970?

A I can't recall, there were several projected schedules all through that period all being changed and updated and I can't remember one specifically at that time.

Q At what date was the hospital urging completion

of the addition for occupancy in the month of January, 1970?

A We were hoping to have it completed by mid-1970.

Q Had a previous progress schedule submitted by Doyle & Russell indicated that that would be accomplished?

A Yes, sir.

(p. 41)

Q Did they subsequently revise the progress schedule to show a completion date of late September, 1970?

A Yes, sir.

Q Do you know whether that schedule was outstanding when the conversation was had with Mr.Scanlon in January of 1970?

A No; I can't recall.

Q Now you describe an effort on the part of the hospital to pay for extra electrical work on the hospital?

A Yes, sir.

Q How did this come up?

A This came about because the Doyle & Russell representatives brought out that the job was being held up because of the subcontractors and the main one who was holding up the other subs were the electricians.

Q Now, in the month of January do you recall seeing or receiving a copy of a letter from Mr. Franklin

on behalf of the architects, to Doyle & Russell advising of the possible damages that would result from failure to complete by the third quarter of 1970?

A Yes, sir.

Q Do you have a copy of that letter in your possession? I show you a letter and ask you whether that is the letter to which you refer?

(p. 42)

A Yes, sir; that is the letter.

Q Is it dated?

A January 17, 1970.

MR. HAZLEGROVE: I show this to opposing counsel and ask that it be admitted into evidence as Hospital's Exhibit Eight.

THE COURT: So admitted.

(Thereupon the letter dated January 17, 1970 addressed to Mr. T. R. Scanlon from Mr. J. Stuart Franklin, Jr. was marked as Hospital's Exhibit Number Eight and entered into the Record.)

BY MR. HAZLEGROVE:

Q Would you please read that letter, Mr. Flannagan.

A The letter is addressed to Mr. T. H. Scanlon and is dated January 17, 1970.

"Dear Mr. Scanlon: Knowing of your concern relative to the progress of the work at Roanoke Memorial Hospital, I am taking this opportunity to say that it is painfully obvious that construction is not keeping up with the latest revised Progress Charts. It is, however, my opinion that progress can be put back on a schedule; and, I can't urge you too strongly to see that the completion date, September 30, 1970, is met.

(p. 43)

"Mr. Flannagan has advised me that the insurance company, providing the loan that was necessary to supplement the Hill-Burton Grant, has notified the Board of Trustees that no further extension can be given. When your proposed completion date of January 1, 1970 was moved back to June 12, 1970, the lending agency graciously agreed. Again, when the date was moved from June 12, 1970 to September 30, 1970, they agreed.

"Now the agency states that any delay beyond that date will mean an increase in the interest rate from six and three-eights to eight and one-half percent. This will mean, throughout the life of the loan, an increased interest cost to the hospital of just under $1,000,000. Needless to say, the Trustees are most concerned; and knowing these gentlemen as I do, I am sure they will use every

legal means at their disposal to see to it that the hospital does not suffer this loss.

"Let me iterate that progress can be upgraded, and please know that we stand ready to do anything in our power to assist in meeting this completion date.

"Your comments concerning the above information will be appreciated. Very truly yours, J. Stuart Franklin, Jr."

Q Now, to your recollection did that letter

(p. 44)

precede the date on which you met with Mr. Scanlon?

A I think so. I will have to check back on my schedule. I believe it did.

Q Do you know on what date in January the meeting that you have described, the conversation that you have described with Mr. Scanlon took place?

A I don't have it here. I don't recall the exact date.

Q But your recollection is that it was after the date of that letter?

A Yes, sir.

Q And what did Mr. Scanlon say, if you recall, concerning the expected completion of the addition in the January meeting?

A At that time we expected to complete it in mid-June of 1970 and then it was later updated to September 30th, 1970.

Q Now, have you described the situation where Doyle & Russell requested the hospital to pay the premium time to the electricians for Saturday work?

A Yes.

Q Was any adjustment made in the prime contract to reflect the fact that you were paying the prime time of the electricians?

(p. 45)

A No, sir; not that I know of.

Q So this was a payment over and above the lump sum contract price?

A That is correct.

Q During the early Spring of 1970 or late Winter of 1970, did you or did the general contractor, Doyle & Russell, experience a labor dispute over the food service subcontractor, Grant E. Key?

A Somewhere in that time, there was a labor dispute about Grant E. Key.

Q What was the nature of the dispute, if you recall?

A Doyle & Russell's dispute with the kitchen

equipment supplier was that Grant E. Key was a non-union company and the Doyle & Russell union men refused to work if the Grant E. Key men were on the job.

The hospital then, to speed the work offered to pay for union supervision in order that they allow Grant E. Key's men to come on the job and place the equipment in place.

Q Was this a suggestion that came from the hospital or from Doyle & Russell that this arrangement be made?

A I think it came from the hospital.

Q Did you actually, did the hospital pay to

(p. 46)

Doyle & Russell the cost of the hiring of union labor to replace the non-union labor employed by Grant E. Key?

A That is right.

Q Was any adjustment made in the lump sum contract price on that account?

A Not that I know of.

Q Do you know whether any adjustment was made in the contract between Doyle & Russell and Grant E. Key?

A No, sir.

Q What was the purpose of paying extra for electricians and paying extra for union labor for the food service subcontractor, Mr. Flannagan?

A It was our belief that we could expedite the job in any way possible, then we would have an early completion date and, therefore, we would not have to enter into this eight and a half percent interest and we would avoid a new loan commitment.

Q Referring you to the late Spring or early Summer of 1970, what was the status of the progress of the job at that time, if you recall?

A The job then was still dragging, there wasn't enough work force on the job for the fifteen floors, you could find very few people working. The job itself was in a disruptive state of affairs and uncleanliness, the

(p. 47)

Fire Marshall chastised us.

MR. BOOKER: If Your Honor please, I object to anything that the Fire Marshall said.

THE COURT: That would be hearsay.

THE WITNESS: May I say it was a fire hazard. We spoke to Doyle & Russell representatives several times but there was very little work being performed during this period of time to see that the job was completed.

BY MR. HAZLEGROVE:

Q Did it appear in May and June of 1970 that

Doyle & Russell could complete the addition by June 30, 1970?

A Then it appeared that they would not complete the job by September, 1970.

Q Did you have occasion to address a communication or letter to them concerning the further, the impact of the delay of the completion on your permanent financing?

A Somewhere in there a letter was written, I can't find it.

MR. HAZLEGROVE: If it please the Court, May I have the discovery deposition of Mr. Flannagan?

THE WITNESS: June 30, 1970, is that the one, counsel?

(p. 48)

BY MR. HAZLEGROVE:

Q Yes, do you have a copy of that letter in your possession?

A Yes, sir.

Q Let me see it please. This letter is dated June 30, 1970 and is addressed by you to Doyle & Russell?

A Yes, sir.

MR. HAZLEGROVE: I ask that this be admitted into evidence as Hospital Exhibit Number Nine.

MR. BOOKER: No objection, Your Honor.

THE COURT: All right, it will be so admitted.

(Thereupon the letter on the stationery of the Roanoke Memorial Hospitals dated June 30, 1970 and addressed to Doyle & Russell, Incorporated from William H. Flannagan, Director was marked as Hospital's Exhibit Number Nine and entered into the Record.)

BY MR. HAZLEGROVE:

Q Please read that letter and read it more slowly than the others so that the Reporter can stay with you.

A. The letter is on the letterhead of the Roanoke Memorial Hospitals, Roanoke, Virginia. The letter is dated June 30, 1970 and addressed to Doyle & Russell, Incorporated, attention Mr. T. H. Scanlon, President.

(p. 49)

"Gentlemen: Mr. Franklin of the architects for the above project has transmitted to us your letter of June 23, 1970, over the signature of Mr. W. B. Correll, wherein you advised that Doyle & Russell will proceed immediately to make the necessary arrangements to present to arbitration the claim of Doyle & Russell and certain of its subcontractors for additional compensation for a period

of job delay resulting from several causes, possibly including a partial redesign of the foundation made necessary by subsurface conditions encountered at the site in late January and February of 1968. Your expressed intention to seek redress by arbitration is accepted by the hospital as an indication that no further discussions are desired.

"Although we are not unmindful of the difficulties encountered by Doyle & Russell and its subcontractors in establishing the foundation for the addition, it is the position of Roanoke Memorial that the decision of the architects to allow by Change Order Number 14, $34,741 for the extra or additional foundation work is correct and that no additional compensation is due Doyle & Russell or any of its subcontractors. We leave the matter by advising that we shall take such action as we deem expedient to properly protect the interests of Roanoke Memorial should Doyle & Russell demand arbitration.

(p. 50)

"Mr. Franklin of the architects has also forwarded to us a copy of Doyle & Russell's letter of June 24, 1970, again over the signature of W. B. Correll, whereby the architects are advised that if Roanoke Memorial is willing to incur considerable additional costs, it is possible that Doyle & Russell will be able to complete the hospital

addition, ready for beneficial occupancy by the 'deadline of October 1, 1970, barring unanticipated complications and delays.'

"Needless to say, the implications of this letter are alarming and the consequences which will attend failure to complete the addition promptly are grave.

"The agreement for the construction of the addition stipulated a completion date of January 1, 1970. Completion or a substantial completion is adequately defined in the Contract Documents. To date, Roanoke Memorial has received no formal notice from Doyle & Russell of excusable causes of delay or requests for time extensions for performance of extra or additional work. Only in the case of additional work covered by Change Order 15, has Doyle & Russell indicated a job delay. But even here, no formal request for an extension of performance time was made and the assertion by Doyle & Russell of a delay of from four to six months is altogether unconvincing in light of the concurrence or precedence of delays resulting from unexcusable

(p.51)

causes, such as the delay experienced in providing adequate protection for the foundation of the existing structure.

"In January of 1970, several weeks after the completion date for the addition had passed, the architects

advised Doyle & Russell of its concern over the progress of the work and strongly urged Doyle & Russell to take whatever action appeared necessary to complete the addition by September 30, 1970, the completion date according to the revised progress schedule prepared by Doyle & Russell. More importantly, the architects advised Doyle & Russell that the availability to Roanoke Memorial of permanent financing at an annual interest rate of six and three-eighths percent would be lost as of September 30, 1970, if the addition were not then completed and that permanent financing of the addition would move to an interest rate of eight and one-half percent, costing the Roanoke Memorial over the life of the loan increased interest costs alone of approximately one million dollars. Actually the terminal date for permanent financing at six and three-eights percent expires on October 30, 1970, but it is obvious to all concerned that an intervening period of time between actual completion and consumation of permanent financing must be available to Roanoke Memorial in order that it may comply and obtain certification of compliance with the many conditions to the

(p.52)

loan.

"In addition to the grave prospect of adding $1,000,000 to the cost of the addition through interest

charges alone, the breach of the construction agreement by Doyle & Russell by reason of delay of performance has denied to Roanoke Memorial for the period of unexcusable delay efficient utilization of the existing structure and any beneficial use whatsoever of the addition.

"Should Doyle & Russell desire to examine our permanent loan commitment, as modified and extended by reason of job delay, together with the alternate procedures available to Roanoke Memorial should you not complete performance by September 30, 1970, they will be made available on your request.

"As you must be aware, Roanoke Memorial is a non-stock, non-profit hospital corporation. Its Board of Trustees is charged with both the responsibility of providing hospital services to the community at the lowest reasonable expense, and of faithfully and diligently administering community property and funds entrusted to it. For this reason, Roanoke Memorial Hospital has and will continue to treat full and punctual performance of the construction agreement as of the essence, and assert any just claim against Doyle & Russell for damages resulting in your failure

(p. 53)

to comply with the construction agreement for the addition,

reserving its contract right to accept continued performance by Doyle & Russell without waver of its claim for damages. Very truly yours, William H. Flannagan, Director."

Q Now Mr. Flannagan, on October 30, 1970, the addition had not been completed to the point where it could be certified by the architects to comply with the requirements of your permanent financing commitment, had it?

A It had not been completed.

* * * *

(p. 77)

* * * *

Q Would you have before you, please, Exhibit Four, Five and Six which you have previously identified? Exhibit Four appears to be a commitment from the Life Insurance Company of Virginia, Financial Department, dated April 27, 1967, does it not?

A Yes, sir.

Q And that is said to be "in lieu of commitment dated December 1, 1965".

A That is correct.

Q When did the commitment dated December 1, 1965 expire?

A I would have to refresh my memory, I don't remember.

Q Did it expire before April 27, 1967?

A I would assume so but I don't know.

Q I direct your attention now to the paragraph checked down here which says, "This approval must be accepted in writing on or before the . . . "

Can you tell us what date that is?

A The one slashed out says the 15th day of May, 1967 and it has a 19 over the top of it.

Q So this commitment expired on May 19, 1967, is that correct?

(p. 78)

A It seems so.

Q Do you have any different recollection?

A It says " . . . in writing on or before the 19th day of May, 1967 and shall become null and void after the 31st day of October, 1969" and that is slashed through and it has "1970" written by it.

Q Very well, did the hospital accept this commitment in writing on or before the 19th day of May, 1967?

A I think so.

Q And do you have a copy of that acceptance?

A I don't know, probably in our files we do.

Q What makes you think that you accepted it? You didn't even have the contract at that time, did you?

A No; the contract wasn't entered into. This was all done prior to the filing of the Hill-Burton application, this was done when we thought we would get Hill-Burton funds in 1966 which we did not, but these documents must be filed with the Hill-Burton application.

Q Did you accept that in writing on or before the 19th day of May, 1967?

A I think so.

* * * *

(p. 79)

* * * *

(BY MR. BOOKER - Cross)

Q This is a letter which you wrote on May 18, 1967 to the bank and in which you said that you accepted the commitment with the changed dates as set forth in this letter, is that correct?

A That is correct.

Q And that gave the commitment which would expire on October 31, 1970?

A That is correct.

Q In a total amount of how much?

A $4,900,000.

Q Now that wasn't enough money to do the job, was it, that is not a commitment for $5,500,000, is it?

A No, sir; it is not.

Q So when the bids were opened in July of 1967, how much money did you need to borrow?

A We knew we had to borrow more than that prior

(p. 80)

to the bid opening.

Q Prior to the bid opening, what made you know that you were going to have to borrow more than $4,900,000?

A Because of the estimated cost of construction and what our Engineers projected along with Hill-Burton's advice that that would not be a sufficient amount of money.

Q So you knew that your commitment was not enought to do the job?

A That is correct.

Q When did you seek a commitment for enough money which would do the job?

A Negotiations were going on prior to the bid letting and were finalized prior to the opening of the bids.

Q So when was the opening of the bids?

A July 17, 1967.

Q You did not have sufficient money to accept any of the bids, did you?

A We had a commitment, yes, sir.

Q But it wasn't for enough money?

A I believe it was.

Q Well, you were looking for more money?

A We had to have it firmed up by legal papers.

Q Did you have a commitment in writing prior to July 17, 1967 in the amount of $5,500,000 at any interest

(p. 81)

rate?

A I think so.

Q I call upon you to produce that.

MR. HAZLEGROVE: The Record speaks for itself, the commitment of April 17, 1967 at $4,900,000 about which he has testified as being accepted, he has testified was outstanding on July 17.

BY MR. BOOKER:

Q Perhaps I didn't say my question right. I meant to ask you: Did you have a commitment in writing in the amount of $5,500,000 prior to July 17, 1967?

A I don't recall.

Q As a matter of fact you didn't have that commitment, did you, Mr. Flannagan?

A I don't know.

Q I call upon you to produce any commitment in writing in the amount of $5,500,000 dated prior to July 17, 1967. Do you have any such document?

MR. HAZLEGROVE: From which lenders?

MR. BOOKER: From anybody.

MR. HAZLEGROVE: For permanent financing?

MR. BOOKER: He has testified that he had such a commitment, I don't know where it came from, I want to see it.

(p. 82)

MR. HAZLEGROVE: The commitment that he is testifying about is the commitment for $4,900,000 from the two lenders.

MR. BOOKER: Can we agree between us that there was no commitment in the amount of $5,500,000, that is as of July 17, 1967?

MR. HAZLEGROVE: I will agree that there was no commitment from the lenders described in the April 26th commitment for five and a half million dollars as opposed to four million and nine hundred thousand.

MR. BOOKER: That there was no such commitment?

MR. HAZLEGROVE: For permanent financing.

BY MR. BOOKER:

Q All right now, when the bids were opened on July 17, 1967, did you realize that you would have to get a further commitment for additional monies from the bank in

order to accept the lowest bid?

A At that time we knew that we could get the other commitment.

Q You knew you could get it?

A Yes, sir.

Q You didn't have anything in writing, though,

(p. 83)

at that time?

A Yes, sir.

Q What did you have in writing that you could get the additional commitment?

A Aside from the commitment, we had four million nine hundred thousand dollars from the First National Exchange Bank and the Virginia Life Insurance Company. We had commitments from the Colonial American Bank and the American National Bank for additional sums if we wanted to use them.

Q So then you knew you could get the money from some source at the time that the bids were opened?

A That is right.

Q In that case, why did you bother to get another commitment dated July 26, 1967, if you already had the money?

A Because the lenders wanted to consolidate under one commitment, they did not want to deal with other banking firms.

Q What was the rate of your commitment in 1967?

A It was six and a quarter or six and three-eighths.

Q I wonder if you would refer to the letter and tell us which it was.

MR. HAZLEGROVE: Refer to the commitment, if you will, it says.

(p. 84)

THE WITNESS: Six and a quarter percent.

BY MR. BOOKER:

Q When was the next written commitment that you received dated?

A October 4th, 1967.

Q For how much money?

A Five million and five hundred thousand dollars at six and three-eighths percent.

Q So between April and October, you went to the lending institutions and got an increased commitment which raised the amount of money from $4,900,000 to $5,500,000 and it raised the interest rate from six and three-quarters to six and three-eighths, is that correct?

A That is right.

Q Why did you go and get more money from the bank?

A This was our share plus the Hill-Burton share plus everything else that we needed to fulfill our contractual agreements.

Q And prior to the commitment dated October 4, 1967, did you obtain anything in writing from any of the lending institutions to the effect that they were willing to undertake to give you the new commitment you sought?

A I believe so, yes, sir.

(p. 85)

Q Is that the letter dated July 26, 1967 which has been marked as Hospital Exhibit Five?

A Yes, sir.

MR. HAZLEGROVE: You are incorrect on your date.

MR. BOOKER: Excuse me, July 27, 1967, is that the commitment to which you have just referred?

THE WITNESS: Yes, sir.

BY MR. BOOKER:

Q Or the letter saying they were going to commit it. I note that this says that it:

". . . will contain the terms substantially as included in the commitment dated April 27, 1967, which you now hold, except the rate of interest is to be six and three-eights percent." The amount was different?

A Right.

Q The interest rate was different?

A Right.

Q Do you know how else, if at all, the commitment in October differed from the commitment in April?

A It became null and void after the 30th day of June, 1970 on the October 4, 1967 commitment and the 19th day of May, 1967; the 31st day of October, 1969 which was later extended to 1967 on another document.

(86)

Q So the commitment dated in April of '67 gave you until October of 1970 to complete the hospital, did it not?

A No, well, 1970.

Q When was it changed, it was changed in your letter of acceptance, was it not?

A I don't recall.

Q Let's look at your letter of acceptance which you had here a moment ago. In that, did you not say that the commitment was changed from the 31st day of October, 1969 to the 31st day of October, 1970?

A That is right.

Q Did the bank agree to the change from October 31, 1969 to October 31, 1970?

A Evidently they didn't because the next one says the 30th of June, 1970.

Q But the next one, which was granted some six months later, actually ended some three months sooner, did it not?

A By this, yes, sir.

Q So that means that you actually had nine months less under your October commitment to complete the hospital than you did on your April commitment?

A By this, yes.

(p. 87)

Q Can you tell us why that happened?

A No, sir.

Q Why did you question the date of October, 1970 in your April, 1967 commitment?

A We wanted all the extension time we could get to make sure that the job was completed, apparently.

Q Was that a reasonable estimate in April of 1967 as to how soon it would take to complete the hospital, that is October, 1970?

A No; the reason was, we wanted as much leeway as we could get at the lowest interest rate we could get.

Q Why did you not put out your invitations for bid in order to take advantage of the April commitment?

A I don't know.

Q The Architects began to work on the drawings, I believe you testified, in 1965, is that correct?

A Preliminary drawings, yes, sir.

Q Weren't these drawings ready for bidding by the Spring of 1967?

A Yes, sir.

Q Do you know why the bid opening was delayed until June of 1967?

A Well, you have to give so many days for them to be studied by the prospective bidders.

(p. 88)

Q But at the time you got the commitment in April of 1967, didn't you think that acceptance by May of 1967 was realistic?

A No.

Q You did not?

A No.

Q When had you originally hoped to put the plans out for bid?

A I know of no other date in the Spring of '67.

Q You had originally hoped that the document would go out for bid in the Spring of 1967?

A Yes.

Q When did they actually go out for bid?

A I don't know.

* * * *

(p. 89)

* * * *

Q Did you ever seek a commitment either in April or October of 1967 which expired on January 1 of 1970?

A Yes; I think so.

Q Weren't you always trying to get the most possible time?

A Yes, that is right.

Q So you never sought a commitment that ended then, did you?

A No; we tried to get as much leeway as possible.

Q In October of 1967 when you actually did get the commitment, did you try to get the commitment for any date longer than June 30, 1970?

A We were trying for October, 1970.

Q In other words in October, six months after the April commitment, you were still trying to get the lenders to stick with what they had agreed to in April,

(p. 90)

were you not?

A That is right.

Q And they wouldn't do it?

A That is right.

Q Did they tell you why?

A They said they could lend money at higher rates of interest on the market now.

Q So you knew in October of 1967 that the most you could get was until June 30, 1970?

A No; I don't know if I knew it or not.

Q Did you read the commitment?

A That is what the commitment said.

Q You saw the commitment at least at the time you got it?

A That is right.

Q So in October of 1967, you were in position to know what your commitment was, what the interest rate was and what, when the commitment expired, is that correct?

A That is right.

Q And the basic information had been relayed to you as to what the commitment would be, the amount and the interest rate in the letter of July 27, 1967, was it not?

A Yes, sir.

(p. 91)

Q But that letter did not specify when the commitment would expire, did it?

A I don't believe so.

Q Would you look at it just to make certain?

A It does not.

Q When, between July 26 of 1967 and October 4

of 1967, did you find out that the commitment would expire?

A I don't know.

Q Do you have any present recollection at all of that?

A No.

Q What day was the contract between Doyle & Russell and the hospital signed?

A July 27, 1967.

Q That is the same day you got the letter indicating that there would be a commitment for the funds you needed?

A That is correct.

Q Why did you delay from July 17 to July 27 to grant the contract?

A I know of no reason. At the time, to be sure we had all of the things along with the application, with Hill-Burton you must prove that you have a sufficient amount of funds and that the contract documents are in order, and

(p. 92)

everybody has to review them and you revise them, maybe in part, and then it is submitted and I would believe that this was due primarily to the method of applying for the Hill-Burton funds.

Q In other words you wanted to make certain that

you had the financing that it would take to build a hospital and that is why you delayed until June 27th, is that correct?

A No; that is not correct.

Q Isn't that what you started to say?

A I stated that that was one part of it.

Q And there were other things also?

A We already had sufficient commitments from other lenders that we could have gone through with it if we did not consolidate the loan which we did.

Q At what interest rates were those other commitments?

A They were at six and a quarter or six and three-eighths.

Q When did this expire?

A There wasn't any expiration date because they were by letter, we didn't have any commitment for them.

Q You didn't have a commitment?

A No loan commitment.

(p. 93)

Q What did you have?

A A letter from the authorized loan officers of the banks.

Q Do you have those letters?

A Yes.

Q May I see those, please?

A Let's see what the dates are.

Q Now, you have handed me a letter dated July 27, 1967 in which the First National Exchange Bank says, "It is our understanding that it is possible that additional money might be needed and in this case we are pleased to advise you that we will participate in the amount needed above five million and five hundred thousand dollars but not to exceed six million dollars." In other words their commitment to you was for a commitment up to $6,000,000 if needed for permanent financing, so this letter doesn't have anything to do with committing up to $5,500,000, that is for an amount you would need in excess of that? Here is another one for $442,000 in 1965, that was dated June 9, 1965, was that ever accepted?

A No.

Q It had no expiration date either?

A No.

Q Did you understand that that was still in

(p. 94)

effect in 1967?

A Yes, it was confirmed before and after, that actually ended up at $487,800.

Q Let's see what you are referring to.

A I am referring to my notations here.

Q This is a line of credit which you hold, expected to get which the aggregate total of this was $5,387,000 but that of course was not the $5,500,000?

A We didn't need it.

Q You didn't need that in 1966?

A The five million - -

Q You didn't need the five, five until you started the building in 1967?

A No; we needed it before that, it was just a question of how we were going to get it.

Q And you got a commitment for that amount on July 27, or a letter indicating that on July 27, 1967 and on October 4, 1967 you actually received a commitment?

A That is right.

Q And as far as you know, that is the first time you knew when that commitment would expire although you knew the interest rate and the amount as of July 27, 1967?

A Yes, sir.

Q You requested, did you not, that Mr. Galloway

(p. 95)

or someone at Doyle & Russell write a letter to the bank to explain what the financing would be, what the drawdowns would be over a period of time?

A That is correct.

Q And you have introduced that as an exhibit in this trial?

A I believe so; yes.

Q I show you a letter dated July 27, 1967 and ask you whether that is that letter?

A That is the letter.

Q That appears to be dated the same date that the contract was signed and also the same day that you got the letter of commitment from the bank, is that correct?

A This is in answer to a question, however, from Tuesday, July 25th.

Q At that time had any work begun by Doyle & Russell?

A No, sir.

Q So this was actually, you had requested Doyle and Russell to let the hospital know when it would be needing money before you had entered into the contract with Doyle & Russell?

A That is right.

Q And before the banks had told you that they

(p. 96)

would give you a commitment of $5,500,000 at six and three-eighths percent?

A It wasn't contingent upon that.

Q But I am asking you in the sequence of time, you made the request on July 25, on July 27 you received a letter from First National Exchange Bank, you executed the contract with Doyle & Russell, is that correct?

A That is correct.

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(p. 98)

* * * *

Q Did the bid documents provide that Doyle & Russell would have to keep its bid open for thirty days?

A I believe that has been testified to.

(p. 99)

Q I am asking you whether you know that of your own recollection?

A I think so.

Q I now ask you to look at a document that has been introduced as Hospital's Exhibit Eight. This appears to be a letter written by Mr. Franklin, do you remember receiving a copy of that letter?

A Yes, sir.

Q Did Mr. Franklin discuss that letter with you before he sent it?

A Not specifically, I knew that such a letter would be going out.

Q How did you happen to know that the letter would be going out?

A Because I had informed Sheretz, Franklin and Shaffner that something had to be done, that we were getting very impatient with the slowness of the job.

Q And it is your recollection that this letter went out before your meeting with Mr. Scanlon, is that correct?

A Yes, sir.

Q I now ask you to look at the letter dated June 30, 1970 which has been introduced as an exhibit in this case. I ask you whether on Page 3 of that letter where

(p. 100)

you are referring to something occuring in January of 1970 you are talking about the same meeting which was held where Mr. Scanlon was present?

A Here I am referring to the letter of January 17th.

Q But in that letter do you not, are you not, in the first full paragraph on Page 3, referring to the fact that the Architects advised Doyle & Russell, I am asking whether you had reference to the meeting with Mr. Scanlon or whether you were referring to a letter dated January 17, 1970 when you say, "The Architects advised Doyle & Russell . . ."?

A That is what I stated previously. I am referring to the letter of January 17th, 1970.

Q And you were not referring to the meeting?

A No, sir.

Q And the meeting took place later than the letter?

A I assume so.

Q Was the meeting not in response to the letter, as a matter of fact?

A It could have been.

Q And at that meeting, I believe you testified if I remember correctly, that Mr. Scanlon said they thought

(p. 101)

they could finish in mid-June, is that correct?

A Yes, sir.

Q I refer to the letter dated January 17, 1970 and I direct your attention to the second full paragraph where it says, "Again, when the date was moved from June 12, 1970, to September 30, 1970, they" and that is the lending agency, "agreed". By June 17 of 1970 the Architects knew that the building wasn't going to be completed, according to Doyle & Russell, by September 30, 1970, isn't that correct?

A That was the leeway factor, Mr. Scanlon said

he hoped to have it done by mid-June, 1970.

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(p. 107)

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BY MR. BOOKER:

Q In your letter of June 30, 1970, which has been made an exhibit here, on Page 3 you say at the bottom of that first full paragraph, "It is obvious to all concerned that an intervening period of time between actual completion

(p. 108)

and consummation of permanent financing must be available to Roanoke Memorial in order that it may comply and obtain certification of compliance with the many conditions to the loan." When did you receive that certification of compliance with the many conditions to the loan?

A I don't know.

Q Did you ever receive a certification as to compliance with the many conditions of the loan?

A I don't know.

Q So far as you know, did the Architects ever certify that the building was completed?

A They certified it.

MR. HAZLEGROVE: Would you qualify your question by saying for what purpose?

BY MR. BOOKER:

Q For any purpose.

A For the purposes of occupancy?

Q Did the Architects certify it as complete for occupancy?

A Yes, sir.

Q When was that?

A In April of 1971.

Q Do you know the date in April of 1971 when the Architects made such a certification?

(p. 109)

A No; not the exact date.

Q And was that a pre-requisite to the getting of the loan and the financing in June of 1971?

A That is right.

Q Was it wround the middle of April, 1971?

A It was April is all I can recall.

Q Do you recall what form that took?

A I believe it was just a statement as such.

Q Was it a letter to the hospital?

A It was probably to the lending agency, the hospital and to the Federal and state authorities who also had a certification.

Q Do you have a copy of that here with you today?

A No; I do not.

Q So far as you know, is the letter of January 17, 1971, the first time that Doyle & Russell was told, in writing, the terms and conditions of the loan commitment which the hospital had?

A As far as I know, yes.

Q You have referred to a meeting you had in 1967 with certain representatives of Doyle & Russell on July 18, was that the day of the bid opening?

A The bid opening was July 18th, if it was July 18th, then it would have been, the bid opening was July 18th.

(p. 110)

Q And did you have a meeting with Doyle & Russell representatives at that time?

A That is right.

Q Now you seem to be referring to some notes, can you tell us what kind of notes you are referring to? What are these notes?

A Just notes to refresh my memory.

Q Did you make these notes?

A Yes, sir.

Q From what records did you make these notes?

A Any records I have available.

Q The first note you have, "July 18, 1967, bids

opened," and, "Personnel informed of need to have building completed by January 1, 1970." Can you tell us again which Doyle & Russell representatives were present?

A As I mentioned before, Mr. Galloway, Mr. Turpin, probably Mr. Correll and I don't recall who else, possibly the estimators who estimated the project for Doyle & Russell.

Q Can you tell me, with as much precision as you can recall, exactly what you said and what anybody else said about finishing the building by January and about the loan commitment?

A I told them it was necessary that the job be completed by the date specified and have occupancy of the

(p. 111)

building then and I was informed by the representatives of Doyle & Russell that there would be plenty of leeway to occupy the building by January 1, 1970. I did make reference to our financing.

Q What did you say about the financing?

A That it was necessary for our financing that this be done.

Q Did you tell them any more about the financing than that?

A No; I didn't think it was their business.

Q Furthermore you didn't even know at that time?

A Certainly I knew.

Q You didn't get the commitment letter until July 27th.

A We already had plenty of assurance from '65 on to assure us that we could build the building.

Q You didn't know when these commitments were to have ended, some of them were open ended.

A That is right.

Q They could have run out in 1980 as far as you know.

A No.

Q What termination did they have?

A I don't know.

(p. 112)

Q Those other commitments, they didn't have any termination date, did they?

A The ones I have shown you had termination dates.

Q But the other financing of what was it, four million and something?

A That is a letter saying what they would so, not a legal document. I believe that was a line of credit.

Q That line of credit didn't specify any amount?

A Yes; it did.

Q You have shown me a letter dated in June of 1965.

A That was a note of mine.

Q You have shown me a letter made in June of 1965, oh yes, that doesn't show any interest, does it?

A No.

Q Did you assume you would get it without an interest rate?

A Oh, no.

Q You didn't know what the interest would be?

A I thought they would give it to us as a gift.

Q And you were wrong?

A He didn't say whether it would be or not.

Q Did you assume that it was a gift?

(p. 113)

A I did not.

Q Was it or was it not? I would like for you to tell me the truth.

A All I know is that it was a line of credit.

Q Have you ever received a line of credit before or since when you didn't pay interest on the money you borrowed?

A None whatsoever.

Q And you pay the interest rate that is current at the time that you get the money, do you not?

A That is correct.

Q And that has always been the practice in the past as far as you know, isn't that true?

A Yes, sir.

Q And I notice that in your notes you say, "July 27, 1967, Contract signed, Doyle & Russell personnel informed of need to have building completed by January of 1970 because of our loan commitment," and at that time again you did not tell them what your loan commitments were, did you?

A I did not.

Q And you figured it was none of their business?

A That is right.

Q So the first time you told Doyle & Russell

(p. 114)

about your loan commitments would have been in January of 1970?

A Formally, yes, sir.

Q When did you first tell them informally about the loan commitments?

A All during the time, whenever a conversation came up about their progress schedule we would tell them that our financial arrangement depended on that, that we would have to go back and get an extension of our loan commit-

ment - - whether I said loan commitment or financial arrangement I do not know.

Q So the first time you told them of your loan commitment was in January of 1970 both in the letter of January 17 and at a meeting later on, is that correct?

A That is correct.

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(p. 120)

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(WILLIAM H. FLANNAGAN - Redirect)

BY MR. HAZLEGROVE:

Q I show you another letter, Mr. Flannagan,

(p. 121)

and ask you to identify it.

A The letter is on the letterhead of Doyle & Russell, Incorporated dated June 29, 1970 addressed to Eubank, Caldwell, Dobbins, Sheretz & Franklin, Attention Mr. J. Stuart Franklin, Jr.

Q Who signed it?

A Mr. W. B. Correll, Project Manager

MR. BOOKER: No objection.

MR. HAZLEGROVE: I ask that it be admitted into evidence as Hospital's Exhibit Number Thirteen.

THE COURT: It will be so admitted.

(Thereupon the letter on the stationery of Doyle & Russell, Incorporated dated June 29, 1970 addressed to Eubank, Caldwell, Dobbins, Sheretz & Franklin, Attention Mr. J. Stuart Franklin, Jr. and signed W. B. Correll, Project Manager was marked as Hospital's Exhibit Number Thirteen and entered into the record.)

BY MR. HAZLEGROVE:

Q Please read it slowly.

A Yes.

"Gentlemen: It is apparent from your letter of June 25, 1970, that you have misunderstood my letter of June 24, 1970. No reference was made in my letter to the

(p. 122)

requirements of the contract documents relative to completion, acceptance, and final payment by the Owner. What we are concerned with, insofar as my letter is concerned, is what requirements have to be met to protect the loan commitment which the hospital has for permanent financing. The requirements for the loan commitment and the contract completion and acceptance may be the same, but, if they are, this has never been made clear to us.

"We were given to understand sometime ago that it was very important to the hospital to protect that commitment and that, if this entailed extra ordinary expense, the hospital was willing to stand the extra costs as long as they were kept within prescribed limits. This is what has been done to date, and it has contributed substantially to the overall progress, however, the steps taken to date will not, in our opinion, insure final completion by October 1, 1970.

"To date, the target has been beneficial occupancy of the new building. We believe this is the best we can hope for unless an all-out effort is made. We state again that this calls for two decisions. First, can final completion be achieved by October 1st even with an all-out effort, and, this involves factors over which we have no control, such as the availability of information and the

(p. 123)

coordination of construction work with hospital activities. Second, if an all-out effort is to be made, it will involve considerable additional costs. The responsibility for this cost must be established. While we will cooperate in every practical way, as we have been doing, which includes making a contribution to extra cost, we do not believe that our

contractual responsibility obligates us to accept primary responsibility for it.

"With reference to our obligation under the contract, we categorically declare that we have prosecuted this work with all the diligence possible throughout the duration of the job, and we take violent exception to your repeated inferences to the contrary.

"There have been innumerable delays during the course of the job over which we have had no control, and it has been an accepted fact since early in the job that the completion date called for in the contract would not be met. To date, we have not made a point of documenting the cause and extent of all delays, because we did not think it would serve any purpose except to provide another source of irritation; however, we are prepared to document delays which will extent the contract time well beyond our anticipated completion date.

"We hope this letter will clarify our position,

(p. 124)

and that any further action on this matter will be taken in accordance with our original intent.

"Yours very truly, Doyle & Russell, Incorporated, W. B. Correll, Project Manager."

That was under date of June 29, 1970.

Q And it was not until August 19, 1971 that they undertook to document the delays, was it, Mr. Flannagan?

A That is right.

Q That letter that you have read indicated to you that the addition would be completed, ready for occupancy, by October 1, did it not, sir?

A Yes, sir.

Q And that letter was written on June 29, 1970?

A Yes, sir.

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J. STUART FRANKLIN, JR.

Architect for Hospital Addition

BY MR. HAZLEGROVE: (Direct)

(p. 141)

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Q Did the precontract test logs indicate that acceptable subsurface materials with required bearing characteristics would be found rather close to the surface?

A In general they did and we could not guarantee the findings and so stated in the specifications that we did not guarantee the findings.

Q Were the caissons placed on rock or strata of a high density material?

A Yes, sir; all footings were.

Q All footings were on rock footings?

A Yes, sir.

Q When did it first become apparant to you that, let me restate that: When did Doyle & Russell first advise you that they were having difficulty establishing the dug footings at the indicated elevations?

A Well, we encountered, let me answer your question there: As I recall, it was in January of 1968.

Q And do you recall the circumstances under which they brought this matter to your attention?

A Well, one particular footing was giving us a lot of trouble and it was indicated that we would have trouble

(p. 142)

in others or were experiencing some trouble in others, finding the material that we hoped to find to build on so in order to get this, to find this material we had to develop a new foundation system to incorporate that which we were actually finding.

Q What was the manifestation of the difficulty that they were having, were they digging excessively deep to find the material?

A Yes, sir; they were having to dig excessively deep and they were having to relieve the water in the foundation that we found.

Q Did the specifications require the Contractor to keep the caisson holes and foundation free of water?

A Yes, sir.

Q I gather that you concurred that some modification of the foundation was in order when this difficulty was experienced by Doyle & Russell?

A Yes, sir.

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(p. 197)

Q Referring you to the month of January, 1970, did you have occasion to discuss with Doyle and Russell's representatives or their President, Mr. Scanlon, the future progress of the job?

A Yes, sir; I wrote Mr. Scanlon a letter on January 17, 1970 and as a result of that letter, Mr. Scanlon came to Roanoke and met with Mr. Flannagan and me and we met in Mr. Flannagan's office on January 20th.

Q Now at that time was there a progress schedule

(p. 198)

outstanding indicating completion by the third quarter of 1970?

A Yes, sir.

Q I think there was a progress schedule promulgated in October of 1969?

A October, yes, sir.

Q Do you have any recollection as to whether you

felt that Doyle & Russell could comply with that revised completion schedule in January of 1970?

A Yes, sir; I was concerned about it but Mr. Scanlon felt that if everybody could cooperate, we could complete it.

Q And what efforts did you make in the aftermath of that meeting to see that everyone did cooperate?

A I instructed our consultants and the personnel in my office that we were to do anything possible to see that all information would reach the Contractor at the earliest possible date.

Q Now Mr. Franklin, what appeared to be delaying progress in the Winter and Spring of 1970?

A I think primarily it was a lack of man power.

Q And the lack of man power was affecting what trades, if you can recall?

A I think it was the mechanical contractors,

(p. 199)

electrical contractors.

Q Was an arrangement made to pay to Doyle & Russell the premium time for extra electrician's time on Saturday?

A Yes, sir; it was. This was done as an action by the hospital and suggested by the Contractor to expedite

the work due to the shortage of electricians that were available in the area.

Q Was that shortage both qualitative and quantatative?

A I think primarily it was a quantitative shortage.

Q And it was in this period of time that the food service people went out on strike, is that correct?

A Yes, sir.

Q And - -

A Not the food service people, the other trades relative to that because of the food service personnel.

Q What provision was made to avoid future disputes of that nature?

A Well, the hospital agreed to pay for union personnel to accomplish the installation of the equipment under the supervision of the food service equipment supplier subcontractor.

(p. 200)

Q Do you know how much it cost the hospital more in premium time to pay the electricians and to engage union personnel for the food service subcontractor than was required under the lump sum contract?

A Some $10,000 is my recollection.

Q For each category or - -

A For the electricians. The food service equipment - -

Q Was that in the neighborhood of $6,000?

A That was say $6,400, $6,500, I believe.

Q Did Doyle & Russell ever indicate the number of days by which the construction schedule was shortened, quickened by that extra help?

A No, sir.

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(p. 217)

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Q When did Doyle & Russell go on the job?

A In August of 1967.

Q About what time in August?

A This letter?

Q What time in August did Doyle & Russell go on the job?

A I believe it was the 7th of August.

Q And this letter was written approximately two months later?

A Yes, sir.

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(p. 218)

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Q Let me show you a letter which has been marked as Hospital's Exhibit Eight. Do you recall writing that letter?

A I had just learned that the hospital was going to have to have a change in their commitment relative to their permanent loan and I thought that it was appropriate that I tell Mr. Scanlon that this was a serious situation.

Q When did you first find out that the hospital had to change its, might have to change its permanent loan commitment?

A I don't know exactly, but I would imagine it was just prior to my having written that letter, I don't imagine I had that knowledge long without having written it.

Q And did you, at the very outset of the contract, have any knowledge of the financial arrangement which the hospital had made with its lending institutions?

A No, sir; I did not.

Q So obviously you weren't in a position to discuss them with anyone?

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(p. 219)

A No, sir.

* * * *

BYRON A. YOST

Loan Officer, First National Exchange Bank of Virginia

BY MR. HAZLEGROVE:

(p. 314)

* * * *

Q Is it correct to say that in the Summer of 1967 your bank and the insurance companies that you mentioned were committed in writing to Roanoke Memorial to lend it five and a half million dollars at an annual rate of six and three-eighths percent?

A Yes, sir.

Q And to what date was that commitment good as far as completion of construction of the project was concerned?

A Originally it was June, '70, which was amended by agreement among the lenders to October of '70.

Q Now was the commitment for funds at six and three-eighths taken up by the hospital?

A Yes, sir.

Q And was construction financing provided to the hospital at six and three eighths?

A Yes, sir; the commitment covered both construction and permanent financing.

Q And the hospital was unable to complete the construction of the building within the time provided for

(p. 315)

for the availability of the six and three-eighths permanent financing commitment?

A Yes, sir.

Q Now, have you calculated the increased amount of interest that Roanoke Hospital Association will pay over the life of the loan at eight and a half percent increase as compared to the original rate of six and three-eighths percent increase?

A Yes, sir; I have made these calculations through the use of real estate mortgage tables and the difference between a loan of five million, five hundred thousand at six and three-eighths percent and five million, five hundred thousand at eight and a half percent repayable monthly over a fifteen-year period is $1,185,159.95 according to my calculations.

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(p. 316)

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Q Now with regard to the gross differential, the $1,185,159.59, do you propose any adjustment in figuring for purposes of establishing a proper amount of claim?

A Well, it is my personal opinion that some investment factor should be considered. I have made some calculations and I think perhaps one should seek out a sum

of money which, at a certain interest rate, would produce a million, one hundred and eighty-five thousand over fifteen years, for example, at a five percent interest rate, if $832,000 were invested at five percent, this would produce over a fifteen-year period, principal and interest of approximately a million, one hundred and eighty-five thousand dollars.

Q So if the hospital had in hand $832,000 and invested that at five percent interest and used the principal and interest to repay the $1,185,000, that sum would be sufficient for that purpose over the term of the loan?

A Yes, sir; if they repaid the $1,185,000 monthly.

Q Is that, at that interest rate, the present

(p. 317)

value of that future obligation?

A Yes, sir.

Q Now have you also made a calculation of what the present value of the sum of $1,185,159.59 is at six percent interest?

A Yes, sir; according to my calculations, if $780,000 were invested at six percent, it would produce a total of approximately one million, one hundred and eighty-five thousand dollars for a fifteen-year period.

Q What was that figure again?

A $780,000.

Q I gather that the amount to be invested decreases as the rate of interest increases?

A Yes, sir.

Q Have you made a calculation of what the present value of the future sum would be if you invested it at eight and a half percent interest?

A Yes, sir; $675,000.

Q Do you have annuity or yield tables that would tell you what the present value of one million, one hundred and eighty-five thousand dollars is at any selected rate of interest?

A I have mortgage tables in my presence which go from four and a half to twelve percent, other figures,

(p. 318)

I am sure, could be sought outside that range.

Q Now, you are familiar with the hospital and its operation, are you not?

A Yes, sir.

Q Mr. Yost, you are also familiar with interest rates on investments available to entities such as the hospital, are you not?

A Generally, particularly loan rates.

Q Do you have an interest figure in mind at which the hospital could reasonably be expected to earn on an investment of money?

A Well, I would feel that a rate of at least five percent or a rate of five percent would be in order. Currently money market rates, loan rates are, particularly short-term rates are at historical highs but a good many of these investments such as mortgages reflect a risk at which it would not be appropriate, being a charitable institution, to undertake whereas if we looked at savings accounts, Government bonds of some sort, I think the five percent rate would perhaps be more representative; for example, our bank's Common Trust Fund A has earned approximately five percent over the last five years on the average basis and that trust fund is composed of about fifty-five percent fixed income securities such as bonds and about forty-five percent stocks.

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(p. 328)

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Q During the period between 1967 and 1971, what was the trend in money rates for long-term and short-term obligations?

A The trend was, on long-term obligations, rates were fairly low when this loan was consummated or at least

in today's terms.

Long-term rates increased in 1969 and 1970 to historical highs even beyond, I think, on a long-term basis beyond what they are today.

Then in, I would say, the latter part of 1970 and into 1971 rates again began to soften, long-term rates, short-term rates reflected, I think, this same general trend.

The prime interest rate reached a historical high at that time of eight and a half percent on approximately June 9, 1969.

It declined to eight percent on March 25, 1970 and showed modest but consistent declines thereafter.

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(Cross - by Mr. Booker)

(p. 333)

* * * *

Q Mr. Yost, did you have occasion to go out and examine the hospital itself in May of 1971?

A Yes, sir.

Q Why was that?

A The hospital indicated that the facility was complete and has requested that the lenders prepare to close

(p. 334)

the loan, the permanent loan and on behalf of the lenders

I visited the hospital and toured the facility to observe.

Q And you were satisfied that it was complete insofar as your interests in the hospital were concerned?

A Yes, sir.

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(page 335)

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Q When you made the calculations as to the amount of money at present which would yield the amount of interest over a period of fifteen years at five percent, six percent and so on, was that simple interest or compound interest?

A Simple.

Q Why did you not compound it?

A Well, the reason I didn't compound it was because the owner of those funds would have to leave the entire gross amount of the principal invested in order to receive or to consider a compounding factor.

Q If you had compounded it, would the original amount required have been less?

(p. 336)

A Yes, sir.

* * * *

Q What is the prime rate which your bank is now charging to its better and most preferred customers?

A Ten percent.

(p. 337)

Q What will be the prime rate on October 1, 1974?

A I don't know, sir.

Q How long have you been a banker?

A Eleven years.

Q What is your educational background?

A I was graduated from Virginia Tech in 1961, joined the bank in 1962 and have been there ever since.

Q Have you ever had any advanced studies in banking?

A Yes, sir; I have attended the Virginia-Maryland Banker's School and am a graduate of the Stoner Graduate School of Banking at Rutkers University.

Q And with all of that, you can't tell us what the prime interest rate will be on October 1, 1974?

A No, sir.

MR. HAZLEGROVE: I object, it is just about like asking what the Wall Street Journal is going to say next week or in two weeks, there is no way for him to say.

THE COURT: He says he can't say.

BY MR. BOOKER:

Q Why can't you tell us what the prime interest rate will be on October 1, 1974?

(p. 338)

A There is no way to predict the factors that it is based on.

Q It could be higher or lower, couldn't it?

A Yes, sir.

MR. BOOKER: No further questions.

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WILLIAM B. CORRELL

Project Supervisor - Doyle & Russell

(p. 578)

BY MR. HAZLEGROVE:

* * * *

Q Now Mr. Correll, I am going to show you a series of job reports between 18 February, 1970 and October 31, 1970 and ask you whether or not they generally relate to the failure of Ocean Electric to properly man the job? For instance 18 October, 1970, a notation about Ocean is what?

A "Ocean Electric needs more men on the job to maintain progress."

Q And you show by your own handwriting that you wrote a letter to Ocean on 2-20-70?

A Yes, sir.

Q And several days later you say, "Ocean Electric still unable to maintain job progress."

A Yes.

Q And then we get over into the October period, excuse me, into July 30, 1970 and what does it say there?

A "Permission granted this A.M. by Mr. Flannagan through Mr. Franklin to work electricians Saturday, August 1st. Premium time to be reimbursed by owner."

Q So at that stage the owner stepped in and was paying its own money to provide premium time or for payment

(p. 579)

for these electrical workers?

A That is correct.

Q How was that arrangement worked out, Mr. Correll?

A Well, they, the contractor was not able to get man power and this is a Union situation, apparently the Union didn't have men available within the local within the area and they would not clear men from outside.

The force that Ocean had on the job couldn't keep pace with the progress that was being made by the other trades so, to take advantage of the progress being made by the other trades, the owner agreed to underwrite this extra overtime expense.

Q Wasn't that rather an extraordinary proposal to make to the owner that he should be paying your subcontractor's labor that you were required under your contract to have them perform without premium pay?

A I don't know, I think everybody had a stake in this trying to get the job completed and Ocean's crew was probably adequate, was probably equivalent to the crew that he would probably have had to furnish the job if the job hadn't previously been delayed by other causes.

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(p. 639)

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Q When Mr. Scanlon met with Mr. Franklin over in January of 1970 and there was an exchange which indicated that the hospital would be completed with six floors by the middle of June and the rest of it by the third quarter of September of 1970, did you know that this job was going to be completed, was going to be behind five, six or seven hundred days at that time?

A I hadn't really analyzed it at that time from that point of view.

Q Well, did you analyze it from the point of view that the owner had to have possession to get its entitlement to its permanent loan commitment, that was a mat-

ter you were well aware of in June, wasn't it?

A We didn't find out about it until January.

Q Are you saying, is it correct to say that you knew at that time that you couldn't complete the work by the time you had promised?

(p. 640)

MR. BOOKER: At what time, I object to the question.

BY MR. HAZLEGROVE:

Q By September 3, 1970.

A In what time did I not know?

Q In January, 1970.

A No, sir; I didn't know it could be completed then, I thought we had a good chance of completing it by then if it hadn't been for subsequent delays.

Q What credit have you given to the owner for the extra amount of money that he put in to buy electricians for the week-ends?

A I thought this was an added part for which he was picking up the tab.

Q In terms of days, did you give him any credit for it?

A Not specifically.

Q In January, did you know that the owner was going to give you that extra money for that extra labor?

A I don't think so.

Q You wouldn't have, Mr. Correll, consciously misrepresented to the owner in January, and the circumstances then prevailed, the date that you felt, in good faith, you could complete that work?

(p. 641)

A No, sir, but we would not have obviously, could not have taken into consideration delays that hadn't happened and we didn't have any way of knowing about them.

Q Hadn't all the major delays really occurred prior to January, 1970? Your foundation was finished, your underpinning problem was behind you, you just came off a six or seventh-month period when you couldn't get the plumbers to work?

A What we based our projection on was the hope that we could get the subcontractors to put forth the necessary additional effort over and beyond what was really, what they originally anticipated.

Q And then you got over into June of 1970 and said, "If you want it by September 30, and we can't give you a turn-key job," which meant, "We can only give you the addition, we think we can do it but if you want a turn-key job it is going to cost you a whole lot more money," isn't that what you said in June?

A We said it would require some extra effort which would cost money.

Q Which the owner had not indicated the willingness to provide?

A This was their decision.

Q And he had already paid a sum of money to the

(p. 642)

electricians to buy off more delay. What had he gotten for his money?

A He got some overall improvement.

Q He got a building that continued from September of 1970 over into September of 1971, didn't he?

A Even after that date, we were delayed substantially.

MR. HAZLEGROVE: I have no further questions.

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THOMAS H. SCANLON

BY MR. BOOKER: (Direct)

(p. 670)

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Q Mr. Scanlon, please state your full name and address.

A My name is Thomas H. Scanlon, 7845 Wawasee Drive, Indianapolis, Indiana.

Q What is your present employment?

A I am Vice-President for Baker, McCliney & Bishop, an industrial contractor in Indianapolis.

Q Were you at any time employed by Doyle & Russell, Incorporated?

A Yes, sir.

Q During what period of time?

A From, I have forgotten the month in 1967 through the spring of 1971.

(p. 671)

Q What was your position at Doyle & Russell during that time?

A I was President.

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(p. 673)

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Q Do you recall coming to a meeting in March or April of 1969 in connection with this job?

A Yes, I do.

Q As far as you know, is that the first time you had ever had any formal meeting with anyone representing either the hospital or the architects about the job?

A That is the first meeting I recall.

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(p. 674)

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Q What was the general course of that meeting and what were the results of the meeting?

A The results were pretty unsatisfactory in my mind because I had, incidentally, previously to the meeting I had had a few calls, two calls, specifically, from some associated Litton Companies telling me that they were unwelcome in the hospital where they had previously done business and wanted to know what the problem was, why they weren't able to get in.

I wanted to talk to Mr. Flannagan about that. I bring that up because it was part and parcel about the facts of the extras.

The meeting was resolved or the results of the meeting were that Mr. Franklin, I am sorry, Mr. Flannagan, told me that they didn't feel that they should pay for, specifically, the extras that we had or any extras.

He felt, as he explained to me, that he had retained an architectural firm that had experience and was a good architectural firm, knew how to design hospitals and they expected a good design from them and when Doyle & Russell

(p. 675)

had bid, they hadn't taken any exception to the bid and

that we had experience in building hospitals and as far as he was concerned, he didn't want to be bothered with any extras unless they were promulgated or originated by him and if he had wanted another floor on the building or new rooms, he would be perfectly willing to pay for it, but if they weren't in that category, if there were problems, he didn't contemplate doing anything about it.

He further stated that I should consider the relation between the companies in my tendering the requests for the extras.

I think he specifically mentioned Royal McBee, that at the time he was doing some business on some business cards with them and he didn't feel he could really do business with Litton Companies as long as we were taking the position we were on the extras.

Q During the course of that meeting, did you have any conversation with him about the schedule of the work or how the progress of the work was going?

A Not that I can specifically remember. We may have talked about it on a casual basis but nothing of any specific complaint or comment on it.

Q At that time, did he describe to you the hospital's financing schemes?

(p. 676)

A He did not.

Q Did you have occasion to come to Roanoke for another meeting with the hospital or the architects in connection with this job?

A Yes, sir; I was called here, well, I was at two other meetings, one with the building committee on the same subject and I don't remember the date of that, but I was called here in January of '70 to talk about job progress.

Q Referring to the time you met with the building committee, was that meeting limited to the changes?

A That is all it was about.

Q Did that meeting have anything to do with the hospital's financing and problems?

A None at all.

Q Describe the meeting in January of 1970, who was present and what went on?

A This meeting was with Mr. Flannagan, Mr. Franklin and myself. I am not sure at this time if a Mr. Ben Parrott was at that meeting or not, but at that meeting Mr. Flannagan indicated he was unhappy with the progress of the hospital and that he wanted to know what could be done to get it sped up.

I commented that we weren't happy with the progress of it either and felt that it could be sped up,

(p. 677)

that a good portion of the onus on speeding up the job was on the hospital and that there were things he could do that would probably be more productive than things we could do.

I felt that we were, at that point in time, doing everything we knew how to do within the scheme of the contract to push the job.

I said that I would again make a personal effort to accelerate the job but it would be a lot more effective if there was something that he would do.

Q What were some of the problems which Doyle & Russell was encountering at that time?

A Well, as I explained to him, a big problem on the job was morale, that we were having a hard time inspiring the subs to any unusual or extra effort because they weren't inclined, really, to do much for the hospital for several reasons: Principally they felt that they were being dealt unfairly with in terms of retention.

I think that they had felt that generally the contract provisions of limiting retentions to five percent, if certain provisions were met, were met here, but the hospital deemed that they would continue to hold the ten percent retention.

Q And did the contract provide that the retention could be reduced from ten percent to five percent?

(p. 678)

A Yes, it did.

Q And had the hospital done that up to that point?

A They had not.

Q Was there any particular instance that seemed particularly unfair?

A Yes, there was. The mechanical contractor had a heavy investment in the boiler house and the boiler house at that meeting was under use by the hospital for many months, in fact it was operational.

The hospital still had retention of ten percent of all of the funds expended for the boiler house and I think the mechanical contractor was particularly hurt there because of the large equipment expenditures.

Generally, and some of the people have long been off the job and the work had been finished early and these were subs that the hospital still had ten percent retention of their money and the reason that we were told that the retention was being held was because the hospital said they didn't contemplate paying it.

They didn't really say we weren't living up to the contract, but they did imply it.

Also the subcontractors were under the opinion that the punch lists on the job were going to be initially

(p. 679)

severe if we didn't accelerate the work.

They were unhappy over the fact that there was or seemed to be an interminable and unusual length of time to have their requests for extras approved and they were upset about it.

They also generally were upset over the fact, the seeming fact that there were a lot of engineering decisions pending, maybe not so much at that time, but the history was that as they brought the questions up, it took an interminable amount of time to get them resolved.

I discussed these with Mr. Flannagan, that if he could offer some relief on these things, I would go to these subs personally and discuss it with them and see if we couldn't get them to put a strong effort into the job.

I said, in addition to that, that we would be willing to go to the extent that we would get the subs to work extended hours or overtime on it, that we would work our forces comparable hours or whatever hours it took to do this and keep them going without issuing compensation.

Q Would that men you would pay your forces overtime without affecting a change order?

A Yes, sir.

Q As a result of the discussions back and forth, what decisions were made and what flowed from them?

(680)

A They did agree to give some relief on the retentions. Mr. Flannagan agreed that he would do this. He then instructed us not to withhold any more on a retention, in fact I think he refunded a number, around $30,000, as I remember it, in other retentions on the boiler house.

Q Did he say anything about trying to secure better or faster approvals from the engineers?

A Well, Mr. Franklin was there, as I recall, Mr. Franklin did agree to do that and I believe he did talk or at least write to his consultants and ask them to do everything they could do to resolve all unanswered questions and be prompt on future questions.

Q During the course of that meeting, was there any conversation about the hospital's financing plans and deadlines that they were facing?

A No; there wasn't.

Q Did you make any estimate as to when, in your judgment, the hospital would be finished at the time of that meeting?

A No, I did not.

Q Why didn't you make any such estimate?

A I didn't really know, I don't know enough to sit and make a commitment. I don't recall when the earliest

(681)

schedule was that we had given before that but I hadn't seen anything that we had done recently that would recast that schedule.

Certainly I think that if we were to, if these things were to happen, we would have.

At the time I tried to have a rescheduling but at that point in time I had no idea what the schedule was going to be.

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(p 684)

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Q Was there any time when you had any conversations with any, either a representative of the hospital or of the architects in which they told you that they would look to Doyle & Russell for any increase in interest which they had to pay?

A No.

Q When was the first that you knew about that?

A In a letter to our bonding company advising us, and a copy to us advising that, I am not sure what that actually said, but it was to the effect that they were looking

(p. 685)

to us for it but that was the first I had heard about it.

Q Had you ever, in your experience in contracting, ever heard of any such claim as that before?

A. No.

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(p. 690)

Q Now when you left in May of 1971, what was the status of the contract so far as Doyle & Russell's payment to the subcontractors?

Did you have any knowledge of that?

A I didn't have any specific knowledge, I think I can guess what it was, it was nothing unusual at that point in time.

Q What was the procedure for retaining payments as against subcontractors, Mr. Scanlon?

A Well, it is customary, with our subs and in the industry, that we hold the subs' retainage as long as

(p. 691)

it is withheld from us.

There are some exceptions, there are some people that really can't afford that and we pay early but it is an exceptional basis.

Q Your statement is that you would sometimes pay your retainage?

A To a small subcontractor that did some work way up front in the job or something like that.

Q So to the extent of percentage, subcontract work subbed out, that amount of retainage would be laid off against the subs?

A This was our practice.

Q If the records show that there is $900,000 and some odd dollars of retainage that is outstanding, would that mean that there is a slightly lesser amount that has not been paid by Doyle & Russell to the subcontractors?

A A slightly lesser amount.

Q I understand that only thirteen percent of this work was work that was really generated by Doyle & Russell and the other eighty-seven percent was subbed out?

A You mean now or when I left?

Q When you left.

A I would assume that was so.

Q And you do not know what has occurred in the

(p. 692)

subsequent period?

A No; I do not.

* * * *

A. R. TURPIN, JR.,

BY MR. BOOKER: (Direct)

(p. 727)

Q Mr. Turpin, would you please state your name and address.

A Roy Turpin, 300 Tuckahoe Boulevard, Richmond, Virginia.

(p. 728)

Q By whom are you employed?

A Hyman, Doyle & Russell Company which is a branch of George Hyman Construction Company of Virginia.

Q What is the relation of George Hyman Construction Company of Virginia with Doyle & Russell?

A George Hyman is a management organization to complete work under Doyle & Russell's corporate name.

Q Is Doyle & Russell actively engaged in soliciting new work?

A Doyle & Russell is engaged in completing work under contract at the present time and, as far as I know, is not contemplating any new work.

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(p. 729)

Q And what was your first knowledge of the

(p. 730)

Roanoke Memorial Hospital job?

A Well I don't recall specifically but all the jobs that we were bidding in the office were of pretty general knowledge and I knew we were bidding.

I assume that some weeks before we bid the job then I probably knew we were bidding on it.

Q Were you present at the bid opening?

A I wasn't, I was present in Roanoke the day the bids were opened, we had some rooms at a motel where we prepared the bid.

Q Did you have any conversation with any representatives of the hospital that day?

A I did not.

Q Did you have any conversation with anybody connected with the hospital the following day?

A I did not. The next time I had anything to do with Roanoke Memorial Hospital, as far as I can remember, was on the 3rd of August when we had an opportunity to sit down and look at the job conditions.

Q Did you, on the 3rd of August, did you have any conversation with anybody connected with the hospital or with the architects?

A To the best of my knowldge, I didn't, but I can't recall, I remember the purpose of my visit was to come

(p. 731)

with Mr. Correll to look at the job site and it might be that Mr. Franklin was there but I don't recall anything specifically.

* * * *

Q At the time you were preparing the bid, did you contemplate that you would ever be called upon to pay any financing charges that the hospital might incur?

A I did not.

Q When was the first time that that ever came to your attention?

A Well, approximately nine months before this October date that everybody has been discussing, I forget, October of '70, approximately nine months before that, Mr. Correll came to me with a letter which he had in which the hospital mentioned that the hospital, if it wasn't completed

(p. 732)

by a certain time, they would have to refinance.

Q Did you have any discussions with Mr. Flannagan or Mr. Franklin or anybody else from either of their offices in 1968 until 1970 at which time the financing plan

of the hospital was discussed?

A I did not.

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(p. 753)

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BY MR. HAZLEGROVE:

Q Mr. Turpin, in response to interrogatories propounded during the pendency of this litigation, I believe that you, Mr. Correll prepared a list of subcontractors

(p. 754)

the date of the subcontracts, the subcontract amounts, changes and a description of the scope of work and I hand you that and ask you whether that is not the answer to the interrogatory?

A I presume it is. The subcontractors that are listed here I recognize, I did not prepare the list, I presume it is the list of the subcontractors.

Q Now under the terms of your subcontract, Mr. Turpin, you were not required to pay the subcontractors unless and until the owner paid you, is that correct?

A I believe that would be correct.

Q And I believe Mr. Scanlon alluded to that and also stated that was applicable to the retainage also?

A Normally we don't pay the retainer until we have been paid.

Q If it is the procedure that the retainage is

not owed by Doyle & Russell to these subcontractors until it has been paid by the owner, then Doyle & Russell has no outstanding money paid to the subcontractors upon which interest is claimed, is that right?

A If this happened to be the case, you would be correct, maybe, but in this particular case we have paid the vast majority of our subcontractors with the exception of two or three.

(p. 755)

Incidentally, we paid them out of our own pocket due to the owner, the owner's failure to pay us. Incidentally the two or three we have not paid is due to a dispute with them.

Q Can you say which subcontractors have not been paid and how much is owed by Doyle & Russell to them?

A I could probably name two of them but I don't know the names of all of them and I am not familiar with the amounts that have been retained so I would rather not say.

Q Can you tell us when Doyle & Russell paid the subcontractors and whether any interest was paid on the retainage?

MR. BOOKER: If Your Honor please, I object to that, that has nothing to do with this particular case.

MR. HAZLEGROVE: We feel it is very vital.

THE COURT: What is the vitality of it?

MR. HAZLEGROVE: To the extent that these people or Doyle & Russell claimed interest, the law is that it is not, as I understand it, allowable interest except on the amount that is incurred or paid and if the retainage has not been paid and there is no interest due to the subcontractors,

(p. 756)

then that affects the claim of Doyle & Russell for injuries against the hospital.

MR. BOOKER: If Your Honor please, the relationship, the contract is between the hospital and Doyle & Russell. As we have so often said throughout this litigation, Doyle & Russell is entitled to its money under that contract.

As Mr. Turpin testified, Doyle & Russell has had to borrow money from other sources to pay and we say it is irrelevant, the hospital has had this money for two years at interest and surely they are not entitled to a windfall.

MR. HAZLEGROVE: We are not asking for a windfall, we think we are entitled to know how much

money is owed because it is the general responsibility of the general contractor to pay the subcontractors and we don't know when those payments were made and if they were made then there could not be an incurrence of interest expense on Doyle & Russell and it would then be receiving a windfall because they would be recovering interest on money that they did not expend.

THE COURT: As far as the Court remembers the evidence, your client has had the retainage and it

(p. 757)

is set up in a special account and there has been testimony by the witness from the bank to that effect and any issues between the contractor and the subs is not before this Court and I sustain the objection as not being relevant to the issues before the Court.

MR. HAZLEGROVE: I would except, Your Honor, and does Your Honor understand the basis of my objection?

THE COURT: I understand the objection you noted and I overruled it.

BY MR. HAZLEGROVE:

Q Mr. Turpin, are you familiar with the provisions

of the contract relating to the obligation of the owner to pay Doyle & Russell?

A I have read it, I certainly couldn't quote it to you. If you want to show it to me, I will be glad to read it over again.

Q I wish you would read Paragraph Twenty-eight, subcontract E.

A "(C) Payments for work under sub . . ."

Q E.

A E, I beg your pardon.

"(E), release of claims - - neither the final

(p. 758)

payment nor any part of the retained percentage shall become due until the contractor shall deliver to the owner through the architects a complete release of all claims against the owner arising under and by virtue of this contract, including claims of all subcontractors and suppliers of either materials or labor, other than such claims, if any, as may be specifically excepted by the contractor."

Q Now has Doyle & Russell presented releases of subcontractors' claims relating to this project?

MR. BOOKER: Object to that as irrelevant, that isn't what the clause says. It is claims by the subcontractors and there is no evidence that there is any claim by the subs against the owner.

THE COURT: Sustain the objection.

MR. HAZLEGROVE: Your Honor, again we want to show that the time for payment, under the terms of the contract, of the retainage, has not come about. May I ask whether, may I ask the question, Your Honor, well, I will ask it and it may be objected to.

BY MR. HAZLEGROVE:

Q Haven't there been claims, mechanics' lien claims filed against the project naming the owner, Roanoke Memorial, therein, Mr. Turpin?

(p. 759)

MR. BOOKER: I object to that, not for the reasons previously stated, but the filing of a mechanic's lien doesn't do anything, the lien might be perfected by suit within six months.

If the question was: Were any suits perfected under the mechanic's lien - -

MR. HAZLEGROVE: I asked that.

THE WITNESS: I don't know whether there have been suits perfected under mechanics' liens, there have been suits, that is all I know, I don't know how they were perfected.

BY MR. HAZLEGROVE:

Q Do you know whether there are suits at this time pending naming the hospital and Doyle & Russell as

(p. 760)

Defendants?

A To the best of my knowledge, there are not, I could be mistaken.

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