Cleveland Bridge UK Ltd : Cleveland Bridge Dorman Long Engineering v Multiplex Constructions (UK) Ltd

CA on appeal from High Court, QBD, TCC (The Honourable Mre Justice Jackson) before May LJ; Dyson LJ; Smith LJ. 27th April 2007

1. **LORD JUSTICE MAY**: On 20th December 2006 Lady Justice Smith and I gave Cleveland Bridge Dorman Long Engineering Limited permission to appeal Mr Justice Jackson's decisions on 5th June 2006 in the Technology and Construction Court on issue 4 and part of issue 7 in Cleveland Bridge's multiple disputes with Multiplex Construction UK Limited about the steelwork subcontract for the rebuilding of Wembley Stadium.

2. Our judgments on the permission application, which set out a summary of the facts, may be found at 2006 EWCA Civ 1834. My judgment there then referred to Mr Justice Jackson's judgment which may be found at 2006 EWHC 1341 TCC .

3. I do not propose to rehearse again matters which may be found in or are referred to in my earlier judgment. The issues on this appeal, important as they are to the parties, are issues of one-off construction of a written Supplemental Agreement of 16th June 2004. These issues raise no point of principle and it is not therefore necessary to fashion a potentially reportable judgment. The following enlargement of the facts summarised in my earlier judgment is however necessary.

4. The original subcontract (see paragraph 2 of my judgment) provided for Multiplex to pay Cleveland Bridge the net VAT exclusive sum of £60 million or such other sum as should become payable in accordance with the subcontract, article 2.

5. The subcontract works were the carrying out of the structural steelwork and roofworks package as defined in numbered documents which included volume 3, number 3, pricing document. This incorporated documents called payment breakdown, agreed pricing schedule, payment profile, neutral cashflow procedure and measurement protocols.

6. The numbered documents were subcontract documents which, if there were a conflict, ranked fifth in the order of precedence in the original subcontract. (See clause 2.2 of the subcontract conditions).

7. When the Supplemental Agreement was entered into it itself was inserted by amendment into clause 2.2 as the first-ranking document. Clause 1.8.1 of the subcontract conditions provided as follows:

   "The Subcontract constitutes the entire agreement between the Parties and supersedes all prior negotiations, commitments, representations, communications and agreements relating to the Subcontract, either oral or in writing except to the extent they are expressly incorporated herein. The Subcontractor confirms that it has not relied upon any representation inducing it to enter into the Subcontract (whether or not such representation has been incorporated as a term of the Subcontract) and agrees to waive any right which it might otherwise have to bring any action in respect of such representation. The Subcontractor further confirms that there is not in existence at the date of the Subcontract any collateral contract or warranty of which the Subcontractor is the beneficiary which might impose upon the Contractor obligations which are in addition to or vary the obligations expressly contained in the Subcontract and which relate in any way to the subject matter of the Subcontract. The Subcontractor's only rights arising out of, or in connection with, any act, matter or thing said, written or done, or omitted to be said, written or done, by or on behalf of the Contractor (or any agent, employee or subcontractor of the Contractor) in negotiations leading up to the Subcontract or in the performance or purported performance of the Subcontract or otherwise in relation to the Subcontract are the rights to enforce the express obligations of the Contractor contained in the Subcontract and to bring an action for breach thereof. Nothing in this clause 1.8 is intended to exclude liability of the Contractor for fraud or fraudulent misrepresentation."

8. Clause 4.6 of the subcontract conditions enabled the contractor, Multiplex, to instruct variations, and there was a many-worded procedure for the parties to agree, if possible, the time and cost consequences of the variations. If they did so, there was to be an adjustment to the subcontract sum.

9. Clause 4.7 provided:

   "Valuation of Variations.
   Subject to the proviso to clause 4.6.2.2, Valuations for Variations which have not been agreed pursuant to the procedures under clause 4.6 shall be valued on a fair and reasonable basis consistent with the values included in the build up of the Subcontract Sum in the Numbered Documents for work or services of a similar character after making allowance for any significant change in the quantity of the work or services carried out or in conditions under which it is to be carried out. If no work or services of a similar character are included in the build up of the Subcontract sum such other basis as is fair and reasonable shall be used and such value shall be added to or deducted from the Subcontract sum."

   And 4.7A:
   "*All work executed by the Subcontractor in accordance with the directions of the Contract as to the expenditure of Provisional Sums included in the Subcontract Documents shall be valued in accordance with clause 4.7."*

10. The essence of this, as can be seen, was that variations should be valued on a fair and reasonable basis with reference, where possible, to the component parts of the subcontract sum in the numbered documents.

11. Clause 21 of the subcontract conditions provided for payment to the subcontractor. There were to be monthly applications for payment which were required to specify (see clause 21.3.2) the total amount claimed by reference, among other things, to "the value of the works properly completed" (see clause 21.3.2.1) as amended from the standard form, the total value in accordance with clause 4.6 of variations properly completed and materials on site.

12. Clause 21.3.2.1 was an inexpert amendment to the version of that subclause in the printed form. The printed version was "The Gross Valuation", each of those words having an upper case initial letter, ("as defined in clause 21.4)".

13. The amendment was inexpert because, although "Gross Valuation", with initial upper case letters, was deleted by amendment from 21.3.2.1, that expression remained unamended and in literal terms hanging in the air in clause 21.4 in two places.

14. Clause 21.4 provided that the "Gross Valuation" should be the lesser of "the amount specified for the relevant month in the Maximum Cumulative Monthly Amount column as shown in the payment profile" and "the gross value" (this time with lower-case letters) of the works claimed in accordance with clause 21.3.2."

15. The payment profile provided a progressive cashflow cap. Subject to that, Cleveland Bridge were entitled to be paid the value of the works properly completed.

16. Clause 21.4.2 provided: *"For the purpose of paragraph 21.3.2.1 the value of the works properly completed shall be ascertained by allocating to each activity bar in the Payment Programme a monetary value equal to the same percentage of the total amount attributed to the whole of that activity bar in the Payment Programme as the percentage of the total work represented by the said bar as has been properly completed on Site and in accordance with the Subcontract prior to the end of the Relevant Month, and aggregating the said monetary values for all activity bars."*

17. The activity bars had the effect of giving a specified lump sum payment for the activity to which they related. It was provided in the payment programme at page 150 of the bundle before us that its purpose was to show the values of the various elements of the works for the purposes of valuation and payment pursuant to clause 21 of the subcontract conditions.

18. Mr Bompas Queen's Counsel on behalf of Cleveland Bridge makes the point that the valuation provisions of the subcontract did not contemplate a final payment for part of the work.

19. I referred to the Heads of Agreement in paragraph 6 and 7 of my earlier judgment. In elaboration of what I there said, the Heads of Agreement provided in paragraph 3 that the deal included *"settlement of all claims and disputes to date"*.

20. Paragraph 11 of the Heads of Agreement was in these terms: *"A valuation will be compiled up to 15-2-04 (after which the arrangements described in the foregoing will apply) including £25k for overtime for week ending 15-2-04. This valuation will be checked by an independent QS. Payment will be made on the basis of this valuation, less paid to date. The valuation will include an approximate deduction for site office rent. Should CBUK dispute any deductions made by MPX, in this valuation, then the value of the deductions, only, may be referred to Dispute Resolution."*

21. In the context of the later Supplemental Agreement, the Heads of Agreement is not entirely clear as to whether the settlement that it envisaged embraced disputed variations. Clause 11 is also silent as to the basis on which the valuation to which it refers was to be compiled.

22. In the context of variations and valuation generally, Mr Bompas drew our attention first to a letter from Multiplex to Cleveland Bridge dated 4th February 2004, page 191 of the bundle. This was written shortly before the Heads of Agreement were entered into and shortly before the cut-off of 15th February in paragraph 11 of the Heads of Agreement and subsequently in the Supplemental Agreement.

23. The letter enclosed a variation notice and build up in respect of change notices 1 to 720 in a value of £2,884,712. The variation notice was stated to exclude a change notice, number 541, for additional cost of changes to arch supply and fabrication, which was the subject of adjudication, and another change notice, number 597, for variation to cranage system which was the subject of informal procedure.

24. The build up showed apparently that Cleveland Bridge had claimed these two items at sums together amounting to more than £4.7 million.

25. With reference to this letter, the judge said at paragraphs 552 and following of his judgment the following:

> *"552. Multiplex contends that the sums totalling £5.25 million which were payable under section 6 of the Supplemental Agreement were in settlement of inter alia all disputed variations. CB contends that this is not so and that substantial additional payments are due in respect of variations.*

26. In order to understand Multiplex's case more fully, I asked Mr Stewart (a) which were the disputed variations that on his analysis were settled by the Supplemental Agreement and (b) which were the undisputed variations which were not so settled. In answer to this question, Mr Stewart said that the variation in respect of the vomitory was agreed and therefore fell into the latter category. He then turned to the batch of variations which Multiplex valued at £2,884,712 on 4th February 2004. He pointed out, correctly, that Mr Underwood regarded that valuation as too low. However, Mr Stewart also accepted, on checking Mr Underwood's oral and written

evidence, that Mr Underwood's discontent was not conveyed to Multiplex. After some further research, Mr Stewart submitted that two variation items in the 4th February batch were disputed, namely arch lighting bracketry (which Multiplex had assessed at £170,304) and drawing rework (which Multiplex had assessed at £343,680). The documents support that submission. However, the remaining variations in that batch (valued at £2,370,728) were not disputed. Mr Stewart accepts that this is the position on the evidence before the court: see Day 16, page 96."

27. The build up of the amounts to which this letter referred showed that the arch lighting bracketry was a valuation dispute with Cleveland Bridge claiming a sum of £198,702 and Multiplex allowing £170,304 and that the drawing rework was included by Multiplex at £343,680, whereas according to the document itself, Cleveland Bridge had not claimed anything.

28. More significantly perhaps, although the judge was told that there were disputes which reduced the 2.8 million to 2.37 million, the full 2.8 million was included in the change notice itself as being approved. The effect of Mr Stewart's submission was that such an agreement or approval could result, under condition 4.6, in an increase in the contract sum, and he struggled before us to give any obvious answer as to why in those circumstances the full amount of 2.8 million or thereabouts should not be taken.

29. The judge's reference to the variation in respect of the vomitory can be related to the single item in the measured variations part of an assessment by the WT Partnership, the quantity surveyor to whom the valuation under the Heads of Agreement was referred, which was agreed by Multiplex without any deduction from Cleveland Bridge's claim.

30. Mr Bompas further drew our attention to the following: firstly, that measured variations did feature in discussions between the parties after 16th February 2004 and that, although Cleveland Bridge had reduced to some £8 million a claim for a larger amount for the period up to 15th February 2004, they continued to claim some £5.6 million for measured variations after that date.

31. Secondly, that in a document attached to a letter of Multiplex dated 21st April 2004 there was an explanation of how the subcontract did not provide for or had difficulties in providing for the kind of valuation which the Heads of Agreement required.

32. Thirdly, that a draft for certificate 35 (page 279) which when it came was dated 25th June 2004 included "Gross Valuation" (with initial upper case capitals) "to 15th February 2004 at £32.6 million." And that the certificate itself, although it did not contain that expression or that amount, can be shown to have been calculated with reference to the amounts which made up the £32.66 million.

33. The draft dated 3rd June 2004 and handed over, so we are told, by Multiplex to Cleveland Bridge on that or the following day had a draft prospective reference to the then unagreed Supplemental Agreement which was in part at least removed when the certificate was issued.

34. Mr Stewart for his part produced material before us this morning designed to indicate that Cleveland Bridge had before 15th February 2004 claims for matters other than variations which only amounted to about £3.1 million, that is less than the two sums in the Heads of Agreement and subsequently the Supplemental Agreement amounting to £5.25 million; and to show that by virtue of his concession before the judge Cleveland Bridge would be paid not only the £5.25 million but also the £2.37 million of his concession or possibly, if he has to go that far, the £2.88 million to which I have referred; and that the sum of these, £7.62 million, was a superficially sensible commercial compromise of claims which he said then had amounted to something over £13 million.

35. The material parts of the Supplemental Agreement were as follows: recital (B) which refers to the original subcontract sum of £60 million; recital (C) which recited that the subcontractor had made certain claims under the subcontract and certain disputes had arisen between the contractor and the subcontractor under and in connection with the subcontract; recital (D) which said that it had been agreed to resolve and settle all claims and disputes between the contractor and the subcontractor existing on or before 15th February 2004 and to make consequential amendments to the subcontract.

36. Clause 1 provided as follows: *"Unless the context otherwise requires, or this Agreement specifically otherwise provides, words and phrases used in this Agreement shall have the meanings (if any) given or ascribed to them by the Subcontract."*

37. Clause 2.1: *"Subject to Clause 2.2, the provisions of this Agreement are in full and final settlement of all disputes between the Contractor and the Subcontractor and all and any claims by the Subcontractor to the Contractor and by the Contractor to the Subcontractor existing on or before 15 February 2004 under or in connection with the Subcontract whether for extension of time, direct loss and/or expense, Variations, other adjustments to the Subcontract Sum, damages for breach of contract or otherwise or howsoever arising. Neither the Contractor nor the Subcontractor shall be entitled or permitted to make or pursue any claims against the other for any matter arising from any event or circumstance occurring up to and including 15 February 2004 (whether or not known to the Subcontractor)."*

38. Clause 2.2: *"Clause 2.1 shall not apply to any claim that the Contractor might have for design, workmanship or materials not being in accordance with the Subcontract."*

39. Clause 3.1 provides: *"The Subcontract works shall be varied post 15 February 2004 only by the omission of the fabrication and supply to the Site of the items specified in Schedule 3, Part A."*

40. This refers to payment for fabrication and supply of steel which was to have been done in China but which was returned unmade to Cleveland Bridge to do the work. The effect of clause 3.1 is that Cleveland Bridge were to be paid for this in addition to the other amounts for which the Supplemental Agreement provides.

41. By clause 3.2, Cleveland Bridge were to retain responsibility for all design and fabrication of drawings, for brought-out materials and subcontracts within its remaining scope.

42. By clause 3.3, the subcontract works were to be completed in accordance with a revised programme in schedule 4.

43. Clause 4 provided: *"Save as may be subsequently adjusted in accordance with the terms of the Subcontract (any such adjustment being subject to Clause 2.1 above), it is agreed that (taking account of all the matters referred to in Clauses 2.1, 3.1 and 3.2) the adjusted subcontract sum (exclusive of Value Added Tax) shall be as specified in Schedule 1."*

44. By clause 5, Cleveland Bridge warranted that it had or would discharge all payment obligations to its subcontractors and suppliers in respect of work performed and material supplied up to and including 15th February 2004.

45. Clause 6.1 provided that: *"In consideration of the above, the Contractor has paid to the Subcontractor prior to the date of this Agreement the sum of £4 million (exclusive of Value Added Tax)."*

46. Clause 6.2 provided that: *"In addition, the Contractor shall pay to the Subcontractor the sum of £1.25 million (exclusive of Value Added Tax) within 14 days following completion of the lifting of the steel arch (forming part of the Subcontract works) to the position referred to in Schedule 1, paragraph (e)."*

47. By clause 7, the parties were to use reasonable endeavours to agree to reprogramme the completion of the subcontract works and to agree a fixed lump sum and/or reimbursable subcontract sum for their completion with other payment and to enter into a further Supplemental Agreement.

48. By clause 8, if the parties failed to reach this agreement on or before 29th June 2004 or by an agreed extended date, Multiplex would be entitled to remove from the subcontract the unperformed reimbursable cost items referred to in schedule 1, paragraph (c).

49. Clause 9 provided what was to happen in that event. There is reference to an orderly handover of the works.

50. Clause 10 provided that the subcontract should be amended in accordance with the provisions of schedule 2 and that, except as amended by the Supplemental Agreement, the subcontract should continue in full force and effect.

51. There was some suggestion that Mr Stewart QC on behalf of Multiplex had a submission intended to deal with Mr Bompas' submission relating to clause 1.8.1 to the effect that the Supplemental Agreement rescinded the subcontract and replaced it with a new contract. Insofar as that matters, I would summarily reject it. Plainly the Supplemental Agreement varied the subcontract which otherwise remained intact.

52. Schedule 1, which is the critical part for the purposes of this appeal, of the Supplemental Agreement provided under the heading "Subcontract Sum":

"The adjusted subcontract sum shall comprise:-

(a) the gross valuation as at 15 February 2004 of work properly completed on Site and goods and materials brought onto the Site by the Subcontractor and Offsite Materials in accordance with the provisions of the Subcontract, subject to the deduction of Retention and other deductions permitted under the Subcontract; and

(b) a fixed, lump sum of £12 million for the completion of all remaining works, services and other obligations under the Subcontract (save for those reimbursable cost items referred to in paragraphs (c) and (f) below and those lump sum items referred to in paragraphs (d) and (e) below subject to the deduction of Retention and other deductions permitted under the Subcontract; and

(c) all costs reasonably and properly incurred by the Subcontractor from 15 February 2004, in connection with the erection and site works (being site staff, direct labour, cranes and other site related costs), plus a fixed amount for off-site administration and overheads at a rate of £80,000 per month from 15 February 2004, subject to the deduction of Retention and other deductions permitted under the Subcontract; and

(d) a fixed, lump sum of £4 million previously paid as consideration for this Agreement (as referred to in Clause 6.1 above) not subject to the deduction of Retention;

(e) a fixed, lump sum of £1.25 million following completion of the rotation of the steel arch to its parked, temporarily restrained position prior to load transfer (as referred to in Clause 6.2 above) not subject to the deduction of Retention; and

(f) the costs reasonably incurred by the Subcontractor in purchasing steel (as directed by the Contractor) that are not included in the gross valuation as at 15 February 2004, subject to the deduction of Retention and other deductions permitted under the Subcontract. The Contractor has, prior to the execution of this Agreement, directed that all steel required for these Works is purchased by the Subcontractor, but the Contractor reserves the right to alter this direction for subsequent purchases.

53. Payment of the adjusted Subcontract Sum shall be made, monthly, in accordance with the payment provisions of the Subcontract save as to the items referred to at paragraph (c) above which shall be paid by the Contractor to

the Subcontractor at two week intervals. An application for Payment in respect of the items referred to in paragraph (c) above may be made in accordance with clause 21.3 of the Subcontract at two week intervals and clause 21 of the Subcontract shall be construed accordingly with the necessary changes made."

54. Then there is a reference to the possibility of discussion between Mr Stagg and Mr Grant or other people on their behalf.

55. As has been repeatedly said, the dispute of construction centres on the meaning of paragraph (a) of schedule 1. The first main question, as it has now become, is whether "the gross valuation as at 15 February 2004" is to be construed as a direct reference to the £32.66 million which Cleveland Bridge said, and wished to continue to be able to say, was agreed as such for the purpose of the Heads of Agreement on 14th May 2004.

56. It will be recalled that the agreement for which Cleveland Bridge contended was not established before the judge or as a direct reference to £32.66 million as being the amount included by reference to the terms of the draft certificate in certificate 35 as the gross valuation to 15th February 2004.

57. I say parenthetically in this context that, in my judgment, the indiscriminate or quixotic use in clause 21 of the subcontract as amended, in the draft certificate and in the Supplemental Agreement of lower or upper case initial letters for the expression "gross valuation" is on consideration no aid to the construction of paragraph (a) of schedule 1.

58. The second main question, if Cleveland Bridge's main case fails, is how to apply the Supplemental Agreement so as to deal with disputed variations as at 15th February 2004.

59. There were, it seems to me, in principle two possible kinds of disputed variations; firstly, if Cleveland Bridge claimed that work was varied work entitling them to additional payment but Multiplex said that it was not varied work but work comprised within the original subcontract; secondly, work which was agreed to be varied work but where the amount of additional payment was in dispute.

60. There is also a suggestion of a problem where a variation instruction was given before 15th February 2004 but the work was carried out after 15th February 2004.

61. For my part, I do not see this as a problem in principle. Work unperformed on 15th February 2004 was not then "work properly completed" within the terms of paragraph (a) of schedule 1. It was not therefore to be valued under that subparagraph. It would fall within either the lump sum in subparagraph (b) or the reimbursable costs in subparagraph (c), depending on the nature of the work.

62. This matter was, as I read it, the subject of issue 4(b)(2) and (3) as originally drawn in the proceedings before the judge. The judge's judgment did not answer these sub-issues in terms, but I would have answered each of those sub-issues yes, if it had remained necessary to do so.

63. The judge recorded in paragraph 557 of his judgment that Mr Stewart eventually conceded this point, and Mr Stewart has confirmed that he has conceded this point before us this morning.

64. The remaining important parts of issue 4 as originally drawn were in these terms: was the effect of the Supplemental Agreement in relation to pre 15th February variations (a) that insofar as such variations were disputed, the costs of carrying out the varied elements of the works after 15th February 2004, whether offsite or onsite, were compromised by the terms of the Supplemental Agreement, or (b)(1), the costs of the varied elements of such works on and offsite before 15th February were compromised by inclusion within the agreed sum of £32.66 million.

65. The form of the judge's order as drawn was, in relation to that: insofar as such variations were disputed, the cost of designing and fabricating the varied elements of the work after 15th February 2004, whether offsite or onsite, was compromised by the terms of the Supplemental Agreement. As regards undisputed variations, the position is as reflected in concessions made by Multiplex recorded in the transcript of Day 17 at pages 196, line 5 to 197, line 10. That is to say, paragraph 553 of the judge's judgment which I have already referred to.

66. Issue 7, insofar as it is the subject of the present appeal, was in these terms: (a) was the effect of clause 4 and schedule 1(a) of the Supplemental Agreement and of the valuation agreement that the valuation to 15th February 2004 of £32.66 million became part of the adjusted sum payable under the amended subcontract; (b) is the effect of clause 1.8.1 of the amended subcontract that the amended subcontract sets out the entire agreement between the parties so that Cleveland Bridge is not entitled to rely on the valuation agreement?

67. The terms of the issue reflect my understanding that Cleveland Bridge's case at trial was that the gross valuation in paragraph (a) of schedule 1 of the Supplemental Agreement was that which they said had been finally agreed on 14th May 2004. Their reliance on the terms of certificate 35 was evidence of that agreement rather than as the fact and event which crystallised and contained the gross valuation to which paragraph (a) of schedule 1 referred.

68. The judge's answer to issue 7 also reflects this. His answer was that the issue did not arise because he had decided issue 6 against Cleveland Bridge. His contingent answer to the issue 7 questions was no in each instance.

69. The judge recorded Multiplex's contentions on the variations part of issue 4 in paragraph 556 of his judgment as follows. He said this:

"Mr Stewart contends that the effect of clause 2.1 is that CB compromised its claim in respect of disputed pre-15th February variations. Accordingly, sums attributable to those variations should be left out of account in determining the gross valuation of the steelwork as at 15th February (as required by schedule 1, paragraph (a)). Also, sums attributable to those variations should be left out of account in determining what reimbursement is due to CB under schedule 1, paragraph (c), for fabrication and retrofit work done onsite after 15th February."

70. Cleveland Bridge's contention was recorded by the judge at paragraph 558 of his judgment as follows:

"Mr Tomlinson, on the other hand, accepts only that CB's loss and expense claims attributable to pre-15th February variations were compromised by the Supplemental Agreement. Mr Tomlinson submits that the measured value of the varied work was not so compromised. Accordingly, the measured value of the pre-15th February variations fell to be included in the valuation of the steelwork as at 15th February (required by schedule 1, paragraph (a) of the Supplemental Agreement)."

71. The judge recorded that both parties contended that their interpretations were in line with the earlier Heads of Agreement. The judge thought that clause 3 of the Heads of Agreement in particular was equivocal on this question and in the result shed no light on the meaning of clause 2.1 of the Supplemental Agreement. He also declined to look at the parties' conduct in the period between 15th February and 16th June 2004.

72. In paragraph 561 the judge concluded that Multiplex's interpretation was correct. He gave six reasons as follows:

"(i) Clause 2.1 states that the provisions of the Supplemental Agreement are in full and final settlement of all disputes and claims existing on or before 15th February 'whether for extension of time, direct loss and/or expense, variations, other adjustments to the subcontract sum, damages for breach of contract or otherwise'. This is an all-encompassing list of the financial disputes between the parties. I find it impossible to read into this list some such phrase as 'except the measured value of variations'.

(ii) The sums totalling £5.25 million payable by Multiplex to CB under section 6 of the Supplemental Agreement are 'in consideration of the above'. That must be a reference to the preceding provisions, in particular clause 2.1.

(iii) Clause 4 of the Supplemental Agreement says that the adjusted contract sum shall be as specified in schedule 1. Clause 4 also includes the phrase 'taking account of all the matters referred to in clauses 2.1, 3.1 and 3.2'. In my view, this indicates that the computation exercises required by schedule 1 shall be performed without including those matters which have been settled by clause 2.1 or omitted from CB's scope of work by clause 3.1. Any alternative reading of clause 4 would lead to an absurd result.

(iv) CB's interpretation leads to the anomaly that the measured value of pre-15th February variations is included in paragraph (a) of schedule 1, excluded from paragraph (b) and included in paragraph (c). Such a reading of schedule 1 is bizarre. Furthermore, it would mean that CB could at whim increase its remuneration by shifting work from paragraph (b) to paragraph (c). This could be achieved by transferring fabrication work from Darlington to Wembley.

(v) Multiplex's interpretation of schedule 1, paragraph (c) fits with the language of that provision, once one takes into account the concession made by Mr Stewart in his closing speech at Day 16, page 141. On this interpretation, CB will recover all costs reasonably and properly incurred in connection with erection after 15th February. It can be seen from the structure of the Supplemental Agreement as a whole that onsite erection is the principal focus of schedule 1, paragraph (c).

(vi) On this interpretation of the Supplemental Agreement, CB recovers some £2.37 million in respect of variations which were not disputed as at 15th February, plus £5.25 million in respect of loss and expense, acceleration matters and disputed variations. These two figures total approximately £7.62 million. Having regard to the claims and issues which were being debated during the interregnum, I see nothing surprising or untoward in this figure. Neither party can say that those figures are so high or so low that this outcome cannot possibly have been intended.

73. Let me now draw the threads together. Despite the industry of leading and junior counsel, issue 4 still does not quite encapsulate the real dispute between the parties. Subparagraph (a), which is meant to represent Multiplex's case, does not include Mr Stewart's concession in respect of erection costs. Subparagraph (b) which is meant to represent CB's case presupposes that CB will win issue 6. I believe that subparagraph (b) should really be focussed upon the 15th February valuation, whatever that may turn out to be after the court has decided issue 6.

74. I therefore propose to respond to issue 4 not with 'yes' or 'no' answers, but with the following formulation which I hope will be of greater assistance to the parties.

75. Insofar as such variations were disputed, the costs of designing and fabricating the varied elements of the work after 15th February 2004, whether off site or on site, were compromised by the terms of the Supplemental Agreement.'"

76. With the exceptions of the latter part and possibly all of reason 4 and also possibly with the eventual formulation of the judge's result I find this persuasive. As to the latter part of the fourth reason the terms of paragraphs (b) and (c) of schedule 1 of the Supplemental Agreement do not seem to me to admit of Cleveland Bridge shifting work from one to the other. In essence paragraph (b) was for fabrication work and paragraph (c) was for erection and site works. Fabrication work would not cease to be fabrication work only because fabrication work was transferred to and done onsite.

77. As to the judge's eventual formulation of his answer in paragraph 564, it seems to me that that blurs the question which Mr Stewart had conceded and which he agrees he had conceded in paragraph 557.

78. In my judgment the terms of paragraph (a) of schedule 1 of the Supplemental Agreement make it clear that what that valuation is concerned with is work which was properly completed on site and goods and materials brought on to the site in accordance with the subcontract as at 15th February 2004.

79. Mr Stewart has conceded, and it seems to me correctly conceded, that insofar as variations may have been ordered before 15th February but were carried out after 15th February they fall for consideration and if appropriate for payment under either (b) or (c) of schedule 1 of the Supplemental Agreement.

80. By contrast, in my judgment it is quite clear from the terms of the Supplemental Agreement that what was compromised included disputed variations or, as clause 2.1 puts it, all disputes and any claims in relation to, among other things, variations as at 15th February. If therefore there was, as a matter of fact, a dispute as to variations relating to work which had already been performed as at 15th February, then in principle it seems to me that was compromised.

81. Before going to issue 7 I pause to say and to confirm that in my judgment the terms of paragraph (a) of schedule 1 are clear to the extent that what has to be valued is work "properly completed on Site and goods and materials brought onto the Site by the Subcontractor and Offsite Materials in accordance with the provisions of the Subcontract."

82. The essential question therefore was: what was the physical state of completion on site on 15th February 2004? If work had been properly completed then, it was to be included in the valuation. If it was not, it was to be paid for as appropriate under paragraphs (b) and (c).

83. I further think that the judge's construction of clause 2.1 of the Supplemental Agreement was in substance correct so that all disputes and claims existing on 15th February 2004 in that respect were compromised. Such disputes expressly included disputed variations of each of the two kinds that I have identified insofar as those variations related to works which had been properly completed on 15th February 2004.

84. Mr Stewart's concession remains that a definition of what were disputed variations may be found in the letter of 4th February 2004 and its schedule.

85. Issue 7 was, as I have said, and as I understand it, argued before the judge on the premise that Cleveland Bridge contended under issue 6 that a final valuation of work done and so forth before 15th February had been agreed on 14th May 2004. The judge found against Cleveland Bridge on issue 6, so in his view issue 7 did not arise.

86. He decided contingently that even if it had been so agreed Cleveland Bridge could not rely on it because of the combined effect of clause 1 of the subcontract articles of agreement and clauses 1.2, 2.2, 1.8.1 and of the subcontract conditions and clause 1 of the Supplemental Agreement.

87. It will be recalled that clause 1 of the Supplemental Agreement provided: *"Unless the context otherwise requires, or this Agreement specifically otherwise provides, words and phrases used in this Agreement shall have the meanings (if any) given or ascribed to them by the Subcontract."*

88. Clause 1.2 of the subcontract conditions provided: *"The Subcontract is to be read as a whole and the effect or operation of any recital, article or clause in the Subcontract must therefore unless otherwise specifically stated be read subject to any relevant qualification or modification in any other recital, article or clause in the Subcontract."*

89. The judge said at paragraph 593: *"In my view, the combined effect of these provisions in conjunction with those mentioned above is to preclude reliance upon negotiations or statements made before 16th June 2004 for the purpose of displacing or qualifying any written provisions of the Supplemental Agreement."*

90. In my judgment in any event, but certainly as the case for Cleveland Bridge is now put in this appeal, formalistic questions of this kind are not the first consideration. The first task is to construe paragraph (a) of schedule 1 of the Supplemental Agreement. It is, in my view, formally and in law open to Cleveland Bridge to submit, as Mr Bompas does, that *"the gross valuation as at 15th February 2004 of work properly completed on site..."* is an incorporation by reference of an antecedently determined gross valuation. It is I think also alternatively open to Cleveland Bridge to say that, even if as a matter of construction these words are not a reference back to a gross valuation which had already been determined, so that paragraph (a) of schedule 1 envisages a valuation that is just to be determined, nevertheless, £32.66 million or some other greater sum is nevertheless the amount properly to be determined as the gross valuation as at 15th February 2004. Mr Stewart, as I understand him, agrees that this is indeed open to Cleveland Bridge.

91. Mr Bompas's essential submission in support of the proposition that the words *"the gross valuation as at 15th February 2004..."* incorporate by reference the antecedently determined £32.66 million are in summary as follows:

    1. The use of the introductory definite article in paragraph (a) of schedule 1. I find this of itself unpersuasive.

    2. The use in paragraph (f) of schedule 1 of the expression "costs ... that are not included in the gross valuation as at 15th February 2004."

92. He says that the use of the present tense in this provision predicates an existing gross valuation. I think this is at best a straw in the wind. The expression can readily be seen as prospective.

93. Of greater force are these submissions:

> *3. As a matter of fact there was a gross valuation to 15th February 2004: see the draft for certificate 35, the certificate itself being issued after the date of the Supplemental Agreement in a form which had the same headings as the draft, those headings themselves corresponding with some of the paragraphs of schedule 1 of the Supplemental Agreement. The certificate itself was stated to be on account so cannot, it seems to me, in itself be binding.*

94. Mr Bompas's fourth submission is in summary as follows:

> *4. That the Supplemental Agreement was intended to compromise all disputes up to 15th February 2004. It would neatly do so if it picked up the £32.66 million, but fail comprehensively if it did not. This because:*
>
> *5. The terms of the subcontract conditions were not designed to produce a final valuation of partly completed work. Problems of detailed application arose and continue to arise as, for instance, with what to do about preliminaries.*
>
> *6. The historical dispute before 15th February 2004 had comprised numerous valuation issues under the terms of the subcontract so that agreeing to have those issues determined in the future under the very same mechanism that had failed to have them determined in the past was not a compromise of all disputes, such as the Supplemental Agreement stated was its effect.*

95. In my judgment paragraph (a) of schedule 1 of the Supplemental Agreement on its true construction does not incorporate by reference the £32.66 million. It provides in essence that one element of the subcontract sum shall comprise "the gross valuation as at 15th February 2004 of work properly completed on site ... in accordance with the provisions of the subcontract subject to the deduction of retention and other deductions permitted under the subcontract".

96. These words, in my view, mean in short that the valuation has to be a valuation in accordance with the subcontract. They do not incorporate by reference £32.66 million as an antecedently determined such amount because they simply do not say so in a context where other determined amounts are stated as such.

97. I would accept the submission that it is impossible to read the words as Mr Bompas contends, and I would further accept that a necessarily one-sided account of what as a matter of background or matrix the parties were aiming to achieve by the Supplemental Agreement is not an aid to the construction of this clause.

98. No doubt Cleveland Bridge would have liked to hold on £32.66 million as a firmly determined amount, but no doubt also Multiplex wanted to be able to continue to argue for a substantially lesser valuation of the pre-15th February 2004 completed works.

99. I do not consider that there emerges from any background to which we have been directed an obvious commercial aim of this part of the Supplemental Agreement, nor is the construction contended for, as Mr Bompas submitted yesterday, obvious.

100. It is true that valuation in accordance with the provisions of the subcontract for the purpose of paragraph (a) of schedule 1 is not entirely straightforward conceptually. But reference to clause 21, and where necessary, clauses 4.6 and 4.7 for variations provides in my view a conceptually workable result. There is no problem in principle for variations because the fall back provision in clause 4.7 is for valuation on a fair and reasonable basis. As for unvaried work, the core provision in clause 21 of the subcontract conditions is clause 24.4.1. This provides for a valuation of the lesser of the gross value of the works claimed in accordance with the clause 21.3.2 and the cashflow cap.

101. For the purposes of paragraph (a) of schedule 1 the cashflow cap has obviously to be discarded. The core provision of clause 21.3.2 is 21.3.2.1 where we find "the value of works properly completed". This is essentially the same expression as is used in paragraph (a) of schedule 1 of the Supplemental Agreement. Clause 24.4.2 provides how the value of the works properly completed is to be ascertained. It will be recalled that this clause provides:

> *"For the purpose of paragraph 21.3.2.1 the value of the works properly completed shall be ascertained by allocating to each activity bar in the Payment Programme a monetary value equal to the same percentage of the total amount attributed to the whole of that activity bar in the Payment Programme as the percentage of the total work represented by the said bar as has been properly completed on Site in accordance with the Subcontract prior to the end of the Relevant Month, and aggregating the said monetary values for all activity bars."*

102. That is, in my view, understandable and must have been and have been regarded as reasonably workable when the unamended subcontract was entered into and indeed when it was in operation. There is no reason in principle why it should not continue to be so for the purposes of the Supplemental Agreement. If it gives rise to problems in detail, the parties, an adjudicator or the court will have to resolve them.

103. The one point which has caused me some concern in reaching this conclusion is that there is some force in the argument that this construction might be seen as leaving in place a potentially fairly wide margin of dispute when the Supplemental Agreement itself proclaimed that the parties were settling all their disputes.

104. I consider however that Mr Stewart is correct to point out that clause 2.1 of the Supplemental Agreement is comprehensive as to the disputes which the agreement does settle, that these include claims for extension of time, loss and expense, damages and, as I think, disputed variations and that what that leaves for the gross valuation

under paragraph (a) of schedule 1 is what should be a comparatively uncontroversial valuation of the work in accordance with the subcontract which has been physically completed on 15th February 2004.

105. What is more, the inclusion in paragraph 2.1 of "disputes ... and claims for ... other adjustments to the contract sum" shows that what is not compromised is the valuation unadjusted of the work actually completed.

106. Another, to my mind, very important point is that what the agreement did do was to provide a clear reference point for payment for work after 15th February 2004.

107. I would also say that even if the construction of paragraph (a) of schedule 1 which I favoured did result in significant areas of remaining dispute, that is not a reason or not a significant reason for construing the paragraph to mean what in my judgment it does not and cannot mean.

108. In my judgment the entire contract debate with reference to clause 1.8.1, as Mr Bompas now puts Cleveland Bridge's case on this appeal, is to a great extent a sideshow of little or no consequence, since in my view, as a matter of construction, paragraph (a) does not refer to and is not to be construed by reference to any antecedently determined valuation. I have already indicated that this does not in my view preclude Cleveland Bridge from contending that the gross valuation as at 15th February 2004 in accordance with the provisions of the subcontract should be £32.66 million or some greater sum.

109. If, however, it was subsequently held that the judge's decision on issue 6 was wrong so that the parties on 14th May 2004 did orally agree £32.66 million as a final valuation of the subcontract works to 15th February 2004, I would uphold the judge's decision on issue 7 for the reasons he gave as to the effect of clause 1.8.1 to preclude reliance on that collateral agreement on the subsequently entered into Supplemental Agreement. It appears to me in truth to be an academic question in the light of my construction of the subsequent Supplemental Agreement with which it is inconsistent.

110. Mr Bompas says that clause 1.8.1 has to operate on one date only and that has to be the date of the original subcontract. But Mr Stewart's answer to that is in my view convincing. The Supplemental Agreement varies the original subcontract and in particular, makes the Supplemental Agreement itself part of the subcontract and the document first in precedence. In these circumstances and to put it shortly clause 1.8.1 has to operate, if it needs to, by reference to the varied subcontract from the date on which it was varied.

111. For these reasons I would dismiss this appeal.

112. **LORD JUSTICE DYSON:** I agree.

113. **LADY JUSTICE SMITH**: I also agree.

Roger Stewart QC and Paul Buckingham (instructed by Clifford Chance LLP) for the claimant.
George Bompass QC and Simon Hargreaves (instructed by Reid Minty LLP) for the defendant.