CA on appeal from QBD (HHJ Gilliland QC) before Mummery LJ; Arden LJ; Dyson LJ. 21st June 2007

JUDGMENT : Lord Justice Dyson:

1. This appeal raises a point of construction on a standard JCT Form of Contract on which it appears there is no previous authority. The point turns on the relationship between clauses 24 (damages for non-completion), 25 (extension of time), 28 (determination by the Contractor) and 30 (certificates and payment).

2. Following the giving of a notice of specified default dated 26 January 2006, the respondent ("the Contractor") gave notice on 4 July 2006 purporting to determine its employment under the contract with the appellant ("the Employer") on the grounds that the Employer had continued to fail to pay the amount properly due under an interim certificate by the final date for payment. His Honour Judge Gilliland QC held that this was a valid determination. The Employer appeals (with the permission of Waller LJ) on the ground that the notice dated 26 January was wrongly given. Its case is that there had been no default on its part in relation to the interim certificate because it had been entitled to deduct liquidated and ascertained damages ("LADs") from the sum certified as payable.

The relevant contract conditions

3. So far as material, the contract conditions provide as follows:

"24. Damages for non-completion

24.1 *If the Contractor fails to complete the Works by the Completion Date then the Architect shall issue a certificate to that effect. Such certificate shall (unless cancelled as hereinafter provided or revised in proceedings pursuant to Article 7B and clause 41C) be conclusive and binding on the Contractor until final ascertainment or agreement between the parties as to the matters to which it relates. In the event of a new Completion Date being fixed after the issue of such a certificate such fixing shall cancel that certificate and the Architect shall issue such further certificate under clause 24.1 as may be necessary.*

24.2.1 Provided:

- the Architect has issued a certificate under clause 24.1; and

- the Employer has informed the Contractor in writing before the date of the Final Certificate that he may require payment of, or may withhold or deduct, liquidated and ascertained damages,

then the Employer may, not later than 5 days before the final date for payment of the debt due under the Final Certificate:

either:

.1.1 require in writing the Contractor to pay to the Employer liquidated and ascertained damages at the rate stated in the Appendix… for the period between the Completion Date and the date of Practical Completion and the Employer may recover the same as a debt; or

.1.2 give a notice pursuant to clause 30.1.1.4 or clause 30.8.3 to the Contractor that he will deduct from monies due to the Contractor liquidated and ascertained damages at the rate stated in the Appendix (or at such lesser rate as may be specified in the notice) for the period between the Completion Date and the date of Practical Completion.

24.2 *. 1 If, under clause 25.3.3, the Architect fixes a later Completion Date or a later Completion Date is stated in a confirmed acceptance of a 13A Quotation, the Employer shall pay or repay to the Contractor any amounts recovered, allowed or paid under clause 24.2.1 for the period up to such later Completion Date.*

24.2 *3 Notwithstanding the issue of any further certificate of the Architect under clause 24.1 any requirement of the Employer which has been previously stated in writing in accordance with clause 24.2 shall remain effective unless withdrawn by the Employer.*

25 Extension of time

25.3 *. 1 If, in the opinion of the Architect…..*

The Architect shall in writing to the Contractor give an extension of time by fixing such later date as the Completion Date as he then estimates to be fair and reasonable…

….

25.3 . 3 After the Completion Date, if this occurs before the date of Practical Completion, the Architect may, and not later than the expiry of 12 weeks after the date of Practical Completion shall, in writing to the Contractor either

.3.1 fix a Completion Date later than that previously fixed if in his opinion the fixing of such later Completion Date is fair and reasonable…..

28 Determination by Contractor

…..

28.2 . 1 If the Employer shall make default in any one or more of the following respects:

.1.1 he does not pay by the final date for payment the amount properly due to the Contractor in respect of any certificate and/or any VAT on that amount pursuant to the VAT agreement; …

the Contractor may give to the Employer a notice specifying the default or defaults (the "specified default or defaults").

…

28.2 .4 If

…

- the Employer repeats (whether previously repeated or not) a specified default…

…

then, upon or within a reasonable time after such repetition, the Contractor may by notice to the Employer determine the employment of the Contractor under this Contract. Such determination shall take effect on the date of receipt of such notice.

30 Certificates and payments

30.1 1.1 The architect shall from time to time as provided in clause 30 issue interim certificates stating the amount due to the Contractor from the Employer, specifying to what the amount relates and the basis on which that amount was calculated; and the final date for payment pursuant to an Interim Certificate shall be 14 days from the date of issue of each Interim Certificate.

If the Employer fails properly to pay the amount, or any part thereof, due to the Contractor under the Conditions by the final date for its payment, the Employer shall pay to the Contractor in addition to the amount not properly paid simple interest thereon until such payment is made….

***30.1** .1.4 Not later than 5 days before the final date for payment of the amount due pursuant to clause 30.1.1.1 the Employer may give a written notice to the Contractor which shall specify any amount proposed to be withheld and/or deducted from that due amount, the ground or grounds for such withholding and/or deduction and the amount of withholding and/or deduction attributable to each ground.*

***30.1** .1.5 Where the Employer does not give any written notice pursuant to clause 30.1.1.3 and/or to clause 30.1.1.4 the Employer shall pay the Contractor the amount due pursuant to clause 30.1.1.1.*

…..

***30.1** .4 Without prejudice to any other rights and remedies which the Contractor may possess, if the Employer shall, subject to any notice issued pursuant to clause 30.1.1.4, fail to pay the Contractor in full…by the final date for payment as required by the Conditions and such failure shall continue for 7 days after the Contractor has given….written notice of his intention to suspend the performance of his obligations….then the Contractor may suspend such performance …until payment in full occurs."*

The facts

4. The material facts can be stated shortly. The contract was for the construction of 59 apartments at Duke Street, Castlefield, Manchester. It is dated 16 January 2003 and is in the form of a JCT Standard Form of Contract, 1998 Edition, With Quantities incorporating Amendments 1 of 1999, 2 of 2000 and 3 of 2001.

5. The Date for Possession of the site stated in the contract was 14 July 2003 with a deferment period of 3 weeks. The agreed Completion Date was 18 October 2004 *"or any date fixed under either clause 25 or in a confirmed acceptance of a 13A quotation"*: see clause 1.3 of the conditions of contract. LADs were agreed at the rate of £13,000 per week or part thereof.

6. There were considerable delays on the project. On 7 December 2005, the Contractor made an application for an extension of time. On 14 December 2005, the contract architect, OMI Architects ("the Architect") issued a certificate of non-completion under clause 24.1. On 11 January 2006, the Architect issued interim certificate no 29 showing the net amount for payment as £187,988. The final date for payment was 25 January: see clause 30.1.1.1.

7. On 17 January, the Employer issued two notices. One was a notice under clause 24.2 of "*intention to deduct from monies due to you under Interim Certificates issued after 14 December 2005 liquidated and ascertained damages…for the period from 14 December 2005 up to the date of Practical Completion of the Works"*. The second notice confirmed the Employer's intention to withhold £61,629 LADs from monies due under interim certificate no 29 and stated in accordance with clause 30.1.1.3 that the Employer proposed to pay £126,359. That sum was arrived at by deducting £61,629 from £187,988.

8. On 20 January, the Employer paid £126,359. On 23 January, the Architect granted an extension of time until 10 January 2006. On 24 January, the Contractor wrote to the Employer stating that the effect of the extension of time and revision of the Completion Date was that the Employer was now entitled to withhold no more than £12,326 in respect of LADs. The amount due under interim certificate no 29 was, therefore, £175,662.

9. The Employer did not make any further payment before 26 January when the Contractor purported to serve notice of default purportedly under clause 28.2.1.1. On the following day, the Employer replied to the letter of 24 January saying that payment of the further sum of £49,303 would be made by 2 February. In fact that sum was paid on 1 February.

10. On 28 June, the Employer should have paid £39,981 pursuant to certificate no 34. That sum was not paid. On 4 July, the Contractor served notice of determination relying inter alia on the notice of 26 January as the notice specifying the previous default. It ceased work and left the site. On 6 July 2006, the Employer wrote to the Contractor purporting to accept its repudiatory breach of contract in leaving the site and refusing to return.

11. The Employer issued these proceedings on 11 July 2006. It claims declarations that the Contractor unlawfully terminated the contract and was in repudiatory breach. By its defence and counterclaim, the Contractor seeks declarations that it lawfully determined its employment under the contract.

The judgment

12. I shall only refer to those parts of the judgment which deal with the issue that arises on this appeal. At para 28, the judge said that it was clear from clause 24.1 that the fixing of a new completion date under clause 25.3.3 operated to cancel the previous certificate of failure to complete the Works by the Completion Date. Thus the fixing by the letter dated 20 January 2006 of 10 January 2006 as the new Completion Date cancelled the certificate dated 14 December 2005. Accordingly, as at 25 January 2006, the Employer could no longer rely on the earlier certificate as its justification for deducting LADs in respect of the period between 14 December 2005 and 10 January 2006 and any such deduction would be wrongful and not authorised by the contract.

13. At para 29, the judge rejected the submission made on behalf of the Employer that, where the Employer complies with the obligation in clause 24.2.2 to pay or repay any LADs recovered, allowed or paid under clause 24.2.1, the Employer cannot be said to be in breach of contract in having deducted an amount in respect of LADs which turns out to be too much as a result of the fixing of a later completion date. He accepted that there was an implied term of the contract that any repayment under clause 24.2.2 must be made within a reasonable time. But clause 24.2.2 did not "*have the effect of converting the clear obligation under clause 30.1 to pay the full amount properly payable as at the final date for payment into an obligation, where an excessive amount of LADs has been retained, merely to repay any wrongly deducted LADs within a reasonable time.*" The question whether there has been a breach of contract in failing to pay an amount due is to be determined as at the date when the sum falls due and not at some other date. Clause 24.2.2 does not apply to the situation where at the date of payment the Employer makes a deduction which it is not entitled to make. In principle, with the cancellation of the certificate of non-completion, any right to deduct LADs based on that certificate is also terminated.

14. The judge said further that clause 24.2.3 saves any requirement which the Employer may have previously given under clause 24.2.1 in reliance on a certificate of non-completion which is cancelled if a further certificate of non-completion is given. He said: "*It would thus not be necessary for the employer to make a further requirement in writing under clause 24.2.1 but any existing requirement could only take effect in relation to those LADs which were properly recoverable based upon the new completion date.*"

15. It followed that, on the facts of this case, the Contractor was not entitled to give a notice of default on 26 January 2006.

Submissions on behalf of the Contractor

16. I start with the submissions of Mr Sears QC because he seeks to support and amplify the judge's reasoning. He accepts that as at 17 January 2006 the Employer would have been entitled to deduct from the sum otherwise payable pursuant to interim certificate no 29 LADs calculated on the basis of the certificate of non-completion that had been issued on 14 December 2005. That is because as at that date all three conditions for the deduction of LADs from the interim certificate had been satisfied viz: (i) the architect had issued a certificate of non-completion under clause 24.1; (ii) the Employer had informed the Contractor in writing that it might deduct LADs (second bullet point in clause 24.2.1); and (iii) no later than 5 days before the final date for payment of the interim certificate the Employer had given notice pursuant to 30.1.1.4 so as to satisfy the requirement of clause 24.2.1.2.

17. But once the architect granted an extension of time on 23 January 2006, and thereby fixed a new Completion Date, the earlier certificate of non-completion was cancelled by reason of clause 24.1. Once the certificate had been cancelled, it could not be relied on by the Employer and the notice pursuant to clause 30.1.1.4 could not be relied on either. As I understand it, Mr Sears accepts that the written information given pursuant to the second bullet point in clause 24.2.1 remained effective (unless withdrawn): see clause 24.2.3. But he submits that, once the Architect granted an extension of time, the Employer no longer had any right to deduct or claim LADs in reliance on the certificate of non-completion or the clause 30.1.1.4 notice. The certificate and notice stand together. Once the certificate is cancelled, the notice ceases to have any effect and cannot be relied on.

18. He derives support for his argument from the decision of His Honour Judge Newey QC in ***A Bell & Son (Paddington) Ltd v CBF Residential Care and Housing Association*** 46 BLR 102. That case was concerned with an earlier version of the standard form of contract, the JCT Standard Form 1980 Private Edition with Quantities. Clause 24.1 provided for the issue by the architect of certificates of non-completion. Clause 24.2 provided that "*subject to the issue of a certificate under clause 24.1, the Contractor shall, as the Employer may require…pay or allow to the Employer the whole or such part as may be specified in writing by the Employer of a sum calculated at the rate stated…as liquidated and ascertained damages for the period between…*". The judge said: "*when a new completion date is fixed, if the contractor has not completed by it, a certificate to that effect must be issued and it is irrelevant whether a certificate had been issued in relation to an earlier, now superseded, completion date.*" The earlier certificate ceased to be of effect. If the certificate of non-completion on which the notice was based ceased to be of effect, the Employer would cease to be entitled to LADs. At p 108, he said: "*since the giving of notice is made subject to the issue of a certificate of non-completion, if the certificate is superseded, then logically the notice should fall with it*".

19. Mr Sears submits that the Employer's contention that the clause 30.1.1.4 notice can be relied on despite the cancellation of the certificate of non-completion confuses the procedural requirement to give notices with the

underlying entitlements of the parties. The notices given on 17 January did not of themselves give rise to a substantive right to deduct LADs. They were merely procedural machinery which allowed the Employer to exercise such entitlements as the contract gave it. Without the substantive rights, the notices were of no significance. Nor does clause 24.2.2 assist the Employer's argument. The purpose of that clause is to ensure that, if having made payment of the sum due on an earlier certificate, it later transpires that the Contractor was entitled to an extension of time and that LADs previously deducted fall to be repaid, they will be repaid within a reasonable time. It does not avoid the need for the Employer to pay the amount due to the Contractor under the relevant interim certificate by the final date for payment and cannot be used to circumvent that payment regime.

20. In short, Mr Sears submits that the notice given under clause 30.1.1.4 did not have the effect of reducing or altering the amount which was *"due"* to the Contractor in respect of interim certificate no 29. The amount that is due to the Contractor under an interim certificate is the amount stated as due less any legitimate deductions. If LADs are not due to the Employer (because the certificate of non-completion on which they are based has been cancelled) a clause 30.1.1.4 notice which was effective before the cancellation of the certificate of non-completion cease to be effective and cannot be relied on.

Discussion

21. I would reject these submissions and the judge's reasoning largely for the reasons given by Mr Furst QC. The judge was plainly right to say that clause 24.2.2 did not have the effect of converting the obligation in clause 30.1 to pay the amount properly due on the final date for payment into an obligation to repay any wrongly deducted LADs within a reasonable time. But the critical question is what sum was properly due on the final date for payment.

22. It is (rightly) common ground that as at 17 January, the 3 conditions for deduction from interim certificate no 29 of the LADs specified in the notice of that date (£61,629) were satisfied. The sole question that arises on this appeal is whether the cancellation of the certificate of non-completion under clause 24.1 by the grant of an extension of time had the effect held by the judge and for which Mr Sears contends. In my view, where the 3 conditions are satisfied, the right to deduct the amount of LADs specified in a notice given pursuant to clause 30.1.1.4 crystallises on the giving of the notice. If it had been intended that the subsequent grant of an extension of time should defeat the right to deduct the amount of LADs specified in a valid notice, it is likely that this would have been expressly provided by the contract. The contract makes express provision for a certificate of non-completion to be cancelled upon the fixing of a later date for completion. In my view, it is significant that there is no similar provision for the cancellation of a notice under clause 30.1.1.4 where a certificate of non-completion has been cancelled.

23. Judge Newey said in ***Bell*** that, if the certificate of non-completion was superseded, the notice should fall with it. In my judgment, the conclusion does not follow from the premise. It is not necessary to give efficacy to the contract that the notice should fall with the certificate. In any event, the form of contract that was being considered in ***Bell*** did not include a provision such as that contained in the second sentence of clause 24.1 of the contract in the present case. The standard form of contract was amended some time after the decision in ***Bell*** to introduce that sentence so as to reflect the reasoning of Judge Newey that if a new completion date is fixed after the issue of a certificate of non-completion, the certificate is superseded and ceases to have effect. But the draftsman did not amend the contract to reflect the other part of Judge Newey's reasoning, namely that the notice fell with the certificate.

24. The contract contains no provision to the effect that the Employer's entitlement to deduct LADs at the final date for payment depends on, or must be calculated by reference to, the completion date fixed at any time other than that fixed at the date of the notice. It does not follow that, because a change of circumstances defeats one pre-condition for the giving of a notice (a valid certificate of non-completion), the entitlement to do what the notice provided is also defeated.

25. I do not accept Mr Sears' submission that the giving of a notice of intention to deduct is *"merely procedural machinery"*. It is a condition precedent to the right of deduction. Although a notice cannot be given unless a certificate of non-completion has been issued by the Architect, its continuing efficacy does not depend on the continuing existence of the certificate. Provided that the notice has been validly given, there is no additional requirement that the underlying condition for issuing a notice should continue to subsist at the final date for payment. Notices serve an important purpose in this contract. They reduce uncertainty. Thus, for example, if a notice is not given under clause 30.1.1.4 and the Employer does not pay the net amount shown as due on an interim certificate in full, the parties know that the Contractor can suspend performance under clause 30.1.4 and give a notice of determination under clause 28.2.1. I do not consider that a clause 30.1.1.4 notice should be characterised as "*mere procedural machinery"*. It is an important part of the contractual machinery. Its effect when a certificate of non-completion is cancelled turns on the meaning of the language used in the contract. For the reasons I have given, a valid clause 30.1.1.4 notice does not cease to be effective when a certificate of non-completion is cancelled.

26. In my view, the machinery provided by the contract is clear and straightforward and produces a workable and commercial scheme. The interpretation for which Mr Furst contends requires no words to be added to the contract. In my view, no additional words are required either by necessary implication or as a matter of construction. If the conditions for the deduction of LADs from a payment certificate are satisfied at the time when the Employer gives notice of intention to deduct, then the Employer is entitled to deduct the amount of LADs specified in the notice,

even if the certificate of non-completion is cancelled by the subsequent grant of an extension of time. There is no additional requirement that the underlying condition for giving a notice (the issue of a certificate of non-completion) must continue to subsist at the final date for payment. But any LADs so deducted must be repaid by the Employer pursuant to clause 24.2.2. It is common ground that, as the judge said, this must be done within a reasonable time. In many cases, knowing that he will have to repay within a short time, the Employer may decide not to exercise his right to deduct the amount of LADs specified in the notice.

27. The judge's interpretation leads to surprising consequences. If (as occurred in the present case) the certificate of non-completion is cancelled less than 5 days before the final date for payment, the Employer can continue to rely on his requirement in writing in accordance with clause 24.2.1 that he may deduct LADs: see clause 24.2.3. But it is too late for him to give a fresh notice pursuant to clause 30.1.1.4. It follows that in such a case, the Employer cannot deduct any LADs from the payment certificate at all. This is illustrated by the facts of the present case. The effect of the grant of an extension of time was to reduce the Contractor's liability for LADs from £61,629 to £12,326. But on the judge's interpretation, the Employer was not entitled to deduct even the lesser amount from interim certificate no 29. If the judge was right, the Employer had the choice of either issuing proceedings to recover the LADs or deducting them from the next certificate of payment. However, the next certificate of payment might not have been issued for some time.

28. To take another example, let us suppose that less than 5 days before the final date for payment, the architect fixes a Completion Date *earlier* than that previously fixed under clause 25 as he has power to do under clause 25.3.2. Suppose further that (i) the Employer has already given a notice under clause 30.1.1.4 specifying a proposed deduction of £50,000 LADs on the basis of a certificate of non-completion; (ii) the certificate is then cancelled by the architect fixing an earlier Completion Date under clause 25.3.2; and (iii) that the fixing of the earlier date increases the Contractor's liability for LADs to £60,000. On the judge's interpretation, the consequence of the architect's assessment that the Contractor is liable for more delay than was reflected in the previous certificate of non-completion is that the Employer is unable to deduct any LADs at all.

29. These consequences do not show that the judge's interpretation is absurd or unworkable. But they are commercially surprising. It seems to me that a more sensible scheme (and one which is, therefore, more likely to have been intended) is that the Employer may deduct the LADs specified in a valid clause 30.1.1.4 notice but is obliged to repay any LADs that are repayable by clause 24.2.2 within a reasonable time. A reasonable time will often be a matter of a very few days.

30. Mr Furst suggested that the judge's interpretation could give rise to draconian consequences. He gave an example of the architect granting an extension of time late on the final date for payment of the amount due on a certificate. I did not find such an extreme example helpful in resolving the question of construction that is before us

Conclusion

31. For the reasons that I have attempted to give, I consider that the judge was wrong to hold that the Employer could not rely on the notices given on 17 January 2006. It follows that the Employer paid the amount properly payable in respect of interim certificate no 29 and that the Contractor was not entitled to give notice under clause 28.2.1 on 26 January 2006. I would, therefore, allow this appeal.

Lady Justice Arden:

32. I agree.

Lord Justice Mummery:

33. I also agree.

Stephen Furst QC & Mr A Singer (instructed by Dandara Group Legal Department) for the Appellant/Claimant
David Sears QC & Mr A Hickey (instructed by Messrs Hammonds) for the Respondent/Defendant