

**JUDGMENT : HIS HONOUR JUDGE DAVID WILCOX : TCC. 24<sup>th</sup> August 2000**

1. The Claimants seek a declaration that the provisions of the Housing Grants Construction and Regeneration Act 1996 Part II does not apply to the dispute between the Claimant and the First Defendant concerning building works carried out at 136/144 New Kings Road, London, because there was no construction contract whether in writing or at all between the Claimant and the First Defendant for those works. The original area of dispute has widened. The First Defendants have joined Sulzer Infra CBX Limited (Sulzer) as Part 20 Defendants seeking declarations that they acted in breach of warranty of authority, that there is no contract between Sulzer as Principal and Flairnote, and that Flairnote are entitled to payment on the basis of quantum meruit.
2. The Claimant, Universal Music Operations Limited are a large United Kingdom company with a turnover in the United Kingdom of half a billion pounds per year. They are part of a larger international group based in the United States of America. The company secretary in the United Kingdom is Mr Michael Howle. Universal own a number of properties in London and wish to refurbish and adapt a property at 136/144 New Kings Road, Chelsea, London.
3. They had undertaken similar work in relation to a site at Chancellor's House.
4. On that occasion they used the services of the Part 20 Defendants Sulzers who principally operate as project managers. On that occasion they used a form of contract described as an Agreement for Project Management and Management Contracting Services.
5. That agreement has many of the attributes of the classic project management agreement.
6. In Part H at paragraphs 5/7/9/10 it provides:
  - (5) *Obtain Poly Gram's approval to appoint selected contractor and to proceed to the construction phase of the Project. Acting as Poly Gram's agent, place all orders for specific supplies. (Note, SI-CBX places the orders on behalf of Universal and manages the account in full - the liability for the value of that account and the warranties associated are purchased on behalf of Poly Gram and remain with Poly Gram throughout).*
  - (9) *Arrange for execution of the contract by the contractor.*
  - (10) *Advise Poly Gram generally on the appointment of the Contractor and on the responsibilities of Poly Gram and the Contractor under the terms of the Contract.*  
*"Contractor" is defined as:*  
*"Any contractor contracted to CBX to execute any part of the works".*  
*"Contract" is defined as:*  
*"The contract under which the contractor is appointed by CBX to carry out the works under a purchase order".*
7. The purchase order used by CBX (Sulzer) then and in relation to the commission of the works now the subject of dispute, and performed by the first defendant contractors has the following relevant provisions.
  - 1.1 *Goods and all services means the articles and services which may be described in the purchase order.*
  - 1.2 *Purchaser means CBX Limited acting for itself and/or its client.*The purchase order system clearly applies to situations where Sulzer acts as a principal or as agent as was confirmed in the oral evidence of Mr Jon Evans.
8. Mr Michael Howle said that the Chancellor's House agreement provided for a contractual system whereby Sulzer provided a comprehensive service both as project managers of the scheme and by being responsible for the provision of the executed works. He described it as "a one stop shop". This was an expression not used until May 2000 in correspondence. To this end he contended that payment provisions were agreed whereby Sulzer entered into a "pay when paid" arrangement with contractors and consultants and Poly Gram, as Universal was then known, funded the payments Sulzer had to make in advance of the liability arising.
9. In relation to the King's Road project Mr Howle wanted to put in place a similar scheme. At a meeting of 2 February 1999 the procurement strategy was considered by Universal and Sulzer. Mr Howle confirmed that at that stage a construction management route would be followed, namely that there would be no main contractor but a number of contractors responsible to Sulzer. He envisaged that this would result in some saving to Universal. The form of contract was also discussed at that meeting. Paragraph 4.06 of the

minute records: *"The form of contract used previously between Poly Gram and CBX for the Chancellor's House Project was agreed as the basis for the current appointment"*.

10. Mr Jon Evans of Sulzer recollected the agreement as one that would be used as a starting point.
11. The process of planning and preparation of tenders occupied the months that followed and the next material event was the sending of a draft contract for King's Road and other projects to Mr Michael Howle on 16 March 1999. That draft agreement was based upon a draft of the Chancellor's House agreement but without a similar deletion which appeared in the original signed copy of that agreement at Section H paragraph 9, so that it read:  
(9) *"Arrange for the execution of the contract by the contractor and Universal"*.
12. The draft contract was painstakingly checked by Mr Howle, and Universal's lawyers. The draft has minor amendments and markings which bear out Mr Howle's oral evidence that he carefully checked the draft. He says that he missed the provision at paragraph 9 providing that the contract be executed by Universal. It bears the tick of approbation in all probability made by him.
13. The Chancellor House Project was not as large or complex as that at King's Road. It was accomplished smoothly without the disputes that bedevil many other projects which test the operation and effect of the contractual mechanism put in place to apportion risk and govern the obligations of the parties to each other.
14. Mr Acton Davis QC on behalf of the claimants submitted that the Chancellor's House Agreement was the basis of the agreement between Universal and Sulzer, that it was a "one stop agreement" and conferred no authority on Sulzer to enter into a JCT IFC 1998 contract on behalf of Universal as an employer under such a contract.
15. Mr Colin Reese QC on behalf of the Third Defendant contended that the agreement and the purchase order scheme has all the attributes of a project management agreement and that it was as project managers that his clients Sulzer were engaged.
16. The purchase order scheme as operated by Sulzer covers the purchase of goods and services for Sulzer both as principal and as agent. The expression "services" does not include workmanship.
17. Both Mr Reese QC and Mr Akenhead QC on behalf of the first defendant point to what they contend are clear provisions in the draft of the agreement between Universal and Sulzer pointing to Sulzer's employment as project managers and not as employers.
18. These include by way of example and not exhaustively the following provisions:
  - 1.1. **Purchase Order**  
*Any purchase order by SICBX on the terms set out in Annex 2.*
  - The Services.**  
*The obligations of SICBX set out in this Deed and the schedule of duties at Schedule 2.*
  - 2.1 **Appointment**  
*Universal appoints SICBX and SICBX agrees to perform the Services with all the reasonable skill, care and diligence to be expected of a competent person carrying out services similar to the services in relation to a project of similar size, scope and complexity to the Project in accordance with the Instructions of Universal or Universal's Representative and upon terms and conditions set out in this Deed.*
  - 3 **Obligations of SICBX**
    - (a) *In carrying out the Services use best endeavours in relation to the construction and design of the works.*
19. The obligations that are then described relate to the direction of the execution of the project to ensuring completion in accordance with the project programme, to ensure the project is executed in accordance with the cost plan, to ensure that project is executed in accordance with drawings and specification and to administer the terms of each contract.
20. The obligations of Universal provided at paragraph 4 for the provision of information and data to enable SICBX to carry out its services and timeously so as not to disrupt the performance of their services at 4.3:

*"Universal shall pay to SI-CBX the Fixed Fee and any other payments due in accordance with the terms of this Deed. At paragraph 9.1 remuneration is provided for; it is a fixed fee arrangement with no provision for profit. Paragraph 9.2.b it is provided that:*

*On the first day of the operating month SI-CBX shall make application for payment from Universal for the projected cost of services provided by the contractors for the operating month. The Contracts are to be procured and managed in accordance with an agreed budget and any variance to the budget will be mutually agreed in advance.*

## **Schedule 2**

### **21. (Schedule of duties of SI-CBX)**

Section E Costs planning and control, sub-clause (9).

*"Check invoices from the Contractor in connection with the presentation of documentation in respect of Universal's liability for VAT.*

### **22. Paragraph F project administration direction.**

(7) *Manage and liaise with the Building Contractor to procure that all public utility supplies are available for the Project and advise Universal on any restrictions or delays.*

(9) *Manage and liaise with the contractor to procure that the Contractor prepares and maintains a schedule of long lead items....*

(15) *Liaise with the Contractor to ensure that all necessary consents are obtained in connection with traffic road closures, traffic restrictions... statutory undertakers..."*

### **23. Section H contractual arrangements**

(1) *Having considered the types of contractual arrangement available for execution of the Project appropriate to Universal's brief having regard to the time, quality and cost, advise Universal of the most appropriate form of contractual arrangement and form of contract.*

### **24. At sub-paragraph (4) the duties of Sulzer are set out in relation to arranging for tenders and giving advice in relation to selection of tenders for final tender lists.**

(5) *Obtain Universal's approval to appoint the selected contractor and to proceed to the construction phase of the Project.*

(6) *Negotiate and prepare contract documentation for execution in accordance with the Tender.*

*Acting as Universal's agent place all orders for specific supplies. (Note, SICBX places the orders on behalf of Universal and manages the account in full - the liability for the value of that account and the warranties associated are purchased on behalf of Universal and remain with Universal throughout).*

(9) *Arrange for execution of the Contract by the Contractor and Universal.*

(10) *Advise Universal generally on the appointment of the Contractor and the responsibilities of Universal and the Contractor under the terms of the Contract.*

### **25. At section I of Schedule 2 which relates to contract administration the obligation in sub-paragraph 1 epitomises the terms of the engagement of Sulzer.**

(1) *Administer the terms of the contract on behalf of Universal during operations on the Site and as relating to the completion of the Works in accordance with Universal's Brief.*

### **26. I accept the submissions of Mr Reese and Mr Akenhead as to the effects of this agreement it provides for and governs the appointment of a project manager. It presupposes that the execution of the building and ancillary works would be governed by an agreement between the contractor and the employer Universal. It strains language to say that the contract to be administered was the contract between Sulzer and Universal.**

### **27. I accept that as to the operation of the Chancellor's House Agreement with its careful budgeting and provision for one monthly invoice to be pre-paid by Poly Gram (as they then were) to Sulzer was administratively convenient. I reject Mr Acton Davis' submission that it insulated Poly Gram from any liability in relation to the contracts placed by Sulzer, and that the sole contractual link was between Universal and Sulzer.**

### **28. The description "one stop" in terms of the payment provisions and the project management obligations undertaken by Sulzer may be apt but only from an administrative point of view.**

29. On 22 July 1999 Sulzer acknowledged the news that Universal's parent company in the United States had given their approval for the expenditures of money to cover the project at King's Road. They reported on the main fit out tenders. They reported their conclusion that instead of 4 separate packages for demolition, warehouse roof replacement, mechanical and electrical, and fit out all should be given to one contractor namely the fit out contractor Flairnote Limited.

30. At the meeting held on 23 July 1999 with Mr Howle of Universal, Jon Evans and Roger Smith of Sulzer, the changed position was discussed.

Paragraph 3 of the minute records that:

*"Sulzer propose that the contractor be engaged to complete the project under a standard form JCT type of contract".*

Sulzer also recommended that Flairnote should be awarded the fit out project to include building and mechanical and electrical work subject to final negotiations to include liquidated and ascertained damages and other contract terms.

31. On 23 July 1999 Universal through Mr Howle gave written authority to Sulzer in relation to an authorised budget of £1.151m in these terms:

*"The Project Manager shall be given authority to raise purchases, vary contracts etc. in furtherance of achieving the intended project delivery without further recourse to the Client to a value of ...£1,151,000". It was signed by Mr Michael Howle.*

SIGNED FOR THE EMPLOYER

(My emphasis)

32. I am in no doubt that Mr Howle appreciated the significance of acknowledging that he was signing as employer and that the role of Sulzer was described of that as project manager.

33. On 26 July 1999 Sulzer informed Flairnote that it was their intention to place a contract with them subject to agreeing final terms and conditions.

They placed a purchase order FOC 21872 on that basis for works in the sum not exceeding £1,078,768 with the delivery address underneath:

*Universal Music UK Ltd Universal Island 136-140 King's Road*

34. On 29 July 1999 at a meeting attended by Mr Smith of Sulzer and Mr Simms of Flairnote it was agreed that the form of contract would be the JCT (IFC 98). At that meeting the amount of the LADs was queried. It was left to be determined later. The defects liability was agreed at 12 months from the date of practical completion. A copy of those minutes were sent to Universal and a request for Universal to check the insurance cover for the building ensuring that it was in joint names.

35. On 11 August 1999 Mr Howle e-mailed at 5.20pm to Mr Jon Evans of Sulzer:

*We need to put in place your Project Manager's Agreement relating to the above refurbishment. I believe the wording has now been agreed between us but the fees will need to be reviewed bearing in mind we are no longer going down the construction management route.*

*"Could you please call me on this with a view to our arranging a meeting" (My emphasis).*

36. On 6 September 1999 Mr Howle wrote to Sulzer confirming that he was happy with the project management agreement subject to minor immaterial amendments.

His considered view of it was doubtless coloured by the changed circumstances, namely 1 principal contractor instead of 4, an argument for trimming Sulzer's fees, and the contractual proposals put forward namely JCT IFC 98 contract.

37. I am satisfied that he knew that Universal was the intended employer and that Section H.9 as it appeared in the approved draft was not an oversight by him. I am satisfied that he had expressly given Sulzer full authority to contract as agent for Universal.

Mr Howle was less than candid when he sought to represent that his omission to delete the words from Section H paragraph 9 was a mere oversight. He is meticulous in his approach to documentation and details.

38. During the Autumn of 1999 there were many delays in the projects and complaints as to the workmanship and performance of the first defendant Flairnote.
39. On 22 November 1999 Sulzer prepared an executive summary entitled A Review of Construction Works. It included the following paragraph:
- (7) Legal Position
- A formal contract has yet to be enacted with the Contractor, however, an intent has been put in place to use the JCT Intermediate Form of Contract 1998 Edition IFC 98.*
40. The rights of the employer under the contract were referred to. The analysis in the executive summary makes it clear that there are 3 roles, that of the employer, the main contractor and the project manager. That summary was laid before the meeting attended by Mr Howle on 22 November 1999. The meeting was noted by him:
- (5) JCT Contract
- The JCT contract between SI-CBX and Flairnote has not yet been executed. MH would obtain advice from the Wheeler Group (quantity surveyors) and, if necessary, from Clintons (Solicitors) whether it was in our interest to execute this document.*
- (My emphasis)
41. On 22 November 1999 there was a further file note made by Mr Howle following a meeting with Mr Jon Evans and Mr Young of Sulzer where they reported upon their meeting with Mr Knight of Flairnote. The service of Notices of Intention to Determine and of a 14 day Notice of Variation under the JCT contract was noted as having been discussed. On 22 November 1999 a notice of intention to determine was drafted for issue to Flairnote in accordance with Condition 7.3.1 of the JCT IFC 1998 contract with the knowledge and it appears authority of Mr Howle.
42. The advice of Mr Warner of Wheelers the quantity surveyors advising Mr Howle was sought as to whether these notices should be served. They advised against service of the draft notice. But Mr Warner reported fully upon the contract as he saw it. It was in part on the basis of Mr Howie's verbal instructions and information on 24 November 1999. Wheelers clearly concluded that the role of Universal was that of employer, that of Sulzer project manager and that of Flairnote main contractor.
43. Mr Howle appreciated this, he did not disabuse them as to their misapprehension, or remind Mr Jon Evans of Sulzer of the true contractual relationship between Universal Sulzer and Flairnote as he saw it. In the former case, he said because Wheelers were only temporarily involved. I reject his explanation.
44. On 26 November 1999 Mr Howle e-mailed Mr Jon Evans of Sulzer. He referred to Mr Warner's belief that whilst the JCT contract was unsigned the parties nonetheless had acted as if the contract was in existence and that the intention of the parties was to act in accordance with the provisions of the JCT IFC 1998 contract conditions.
- He then went on to ask Mr Evans to prepare "*our position regarding the circumstances relating to the contract being in delay on 17 December so that we are in a ready position to refute any unreasonable applications by the contract or for an extension of time*".
45. On 7 January 2000 copies of the JCT IFC 1998 contract was sent to Flairnote for signature.
46. They were not signed but Mr Knight confirmed in evidence and I accept that the relevant terms including LADs had all been agreed and it was for tactical reasons only that his signature was not appended to the document. The amount of the LADS had been agreed. These had been calculated on the basis of Universal's anticipated losses and are wholly referable to those criteria. Not unsurprisingly they did not reflect Sulzer's loss of profit, overhead and expenses, as clearly would have been the position had Sulzers been contracting as principal, as the Employer.
47. It is not without significance that there was never any suggestion that Universal was not a contracting party in relation to the construction contract - which all parties accept was concluded with Flairnote - until May 2000 when adjudication was mooted.

**Conclusions**

48. **Agency**

1. Sulzer were agents of Universal under the expressed written authority given by Michael Howle, its company secretary on 23 July 1999 on behalf of Universal as employer.
2. This express agency was modified and confirmed in the project management agreement the terms of which were finally agreed at the end of August 1999.

49. **The Contract**

1. There was an agreement between Sulzer acting on behalf of Universal and Flairnote, evidenced by the purchase order POL121872 and the undisputed minutes of 30 July 1999. The terms of the construction contract incorporated the provisions of the JCT 1FC 1998 edition of contract. The essential terms including those as to price, defects liability were concluded by 30 July 1999 and it was agreed that the other terms including the LADs would be the subject of future agreement.

By January 2000 I am satisfied that all such terms had been agreed between Flairnote and Sulzer, with the knowledge and authority of Universal.

That contract is a construction contract within the Housing Grants Construction and Regeneration Act 1996.

50. The claimants are not entitled to the declarations sought.
51. The First Defendants are entitled to a declaration that there was no contract between Sulzer as principal and Flairnote.