Hurst Stores and Interiors Ltd v ML Europe Property Ltd. [2004] EWCA Civ 490 1st April 2004

JUDGMENT : LORD JUSTICE BUXTON: CA : 1st April 2004

1. This appeal concerns the fitting out of the toilet blocks at the London headquarters of Messrs Merrill Lynch. The building is large and extensive and is well-known to lawyers, at least from the outside, because it stands on the immediately opposite side of Newgate Street from the Central Criminal Court. In order to administer this contract, Merrill Lynch created a company registered in the Cayman Islands ("MLEP") to supervise the development. A further corporate entity, Mace Ltd *("Mace"),* was created, and described as the *"construction manager"*, in order to coordinate the work of trade contractors. The leading individual in Mace for the purposes of the present appeals is a Mr David Rumsey.

2. On 18 October 2000 MLEP entered into a detailed trade contract (as it was so described) with Hurst Stores & Interiors Ltd *("Hurst")* the respondent to this appeal, claimant in the court below. In fact that contract was signed many months after the works had begun and dated back to their commencement. The individuals principally concerned on behalf of Hurst were a Mr Michael Grant, who was a director of the company, and a Mr James Mell, who was described as the project manager, a description again to which I shall have to return.

3. The contract envisaged that there should be a fixed *"Trade Contract Price"*, adjustable only by measured variations or by extensions of time granted under the provisions of clause 17 of the contract in respect of delays that properly affected the progress of the works. In respect of variations, Mace issued formal contract instructions, described as CMIs, under terms of the contract. Some of these were fairly routine. Others, however, provided for significant additional works over and above those contemplated in the original trade contract. It also will be convenient, so far as mechanics are concerned, to say at this stage that there was a system or practice of issuing interim statements of account (*"ISAs"),* valuing or claiming to value the works so far performed. That again I shall have to return to.

4. The Trade Contract envisaged that the works - that is to say the completion of the fitting out of the toilet blocks - would be commissioned on 5 February 2001. In fact the works were not completed until the end of October 2001. On 26 November 2001 Hurst submitted to MLEP what was described as a "Final Account". I need only describe the sums involved in very round figures. According to that account the valuation of the trade contract price together with additions came to about £3.3 million. The final claim, however, as set out in that account, was for a sum as large as £6.5 million, which included some £2.5 million in respect of what was broadly described as disruption. That claim was said to be available to Hurst because it was the fault of Mace that the works had been delayed and that Hurst had been put to extra expense. It was thus contended by Hurst:

   "The delayed releases and failure of Mace to manage other Trade Contractors involved frustrated all attempts made by Hurst to implement the Works in an efficient, economic, sequential and continuous manner, the result was enforced fragmentary implementation of the Works. The same factors also compelled the deployment of substantial additional and extended resources, including labour, site supervision, plant and equipment."

5. It is important at this stage to note that a significant part of that claim was in respect of contractual damages caused by the alleged breach by MLEP of its express and implied obligations under the contract to give proper and timely access to the site. Mr Taverner QC on behalf of Hurst submitted, and I accept, that the claim was not, or at least was not merely, a claim for extension under clause 17 of the contract, because the latter provision gave no right to a direct claim for monetary compensation, as opposed to seeking extensions of time: including extensions in circumstances in which (unlike in relation to the allegations of Hurst in this instance) MLEP was not at fault.

6. Mace refused to accept the Hurst final account. The judge spared Merrill Lynch the embarrassment of quoting the terms in which its representatives saw fit to express themselves on that occasion, and I will exercise the same restraint. Suffice it to say that Mace asserted that by a document signed by Mr Mell on 27 April 2001, Hurst had agreed to a final settlement of all claims up to that date, and could therefore now only assert additional costs arising since 27 April 2001. Since its terms affect a significant number of further aspects of this judgment, it will be convenient now to set out the document upon which MLEP relies.

7. The document, the form of which I shall have to return to later, set out valuation of a large series of CMIs, then on its last page said this:

"Total of Final Account 3,445,815.06 Less total of sums previously Paid to the Trade Contractor 2,839,960.90
THE FINAL PAYMENT payable to the Trade Contractor 605,854.16."

The letter then went on:

"In consideration of the agreement that final payment is to be made by the Client, we hereby agree that payment to us of THE FINAL PAYMENT will be accepted by us in full and final settlement of all our claims (other than claims in respect of Value Added Tax) arising out of or in connection with the Trade Contract works which have accrued up to and including the date of this statement. We agree that nothing contained in this statement shall relieve us of any of our obligations pursuant to the Trade Contract including, but not limited to, our obligations set out under clause 8 ('Practical Completion and Defects Liability') of the Trade Contract."

That document was drawn (in circumstances again to which I shall come) by MLEP, but it was signed on behalf of Hurst by Mr Mell and it is expressed, as will be seen, as a statement formulated as if were made by Mr Mell itself.

8. MLEP continues in these proceedings in the contention that those words were binding and are binding on Hurst, and exclude any claim of any sort, including those already described, accruing in respect of events before the date of this document, 27 April 2001. It is clear that if that contention is valid it impacts very severely on any claim Hurst may wish to make in these proceedings.

9. In order to avoid that conclusion Hurst seeks various declarations in relation to the 27 April 2001 document. Those which were granted by the judge below, Mr Recorder Reese QC, and with which we are concerned in this appeal, claimed (i) rectification to remove from the agreement said to be constituted by 27 April 2001 document the words on which MLEP rely, that is to say, broadly speaking, the words that I have already set out; and (ii) a declaration that in any event Mr Mell did not have authority to enter into that agreement. Either declaration, if granted, will achieve Hurst's purpose of freeing itself from obligation under the 27 April 2001 document.

10. It is necessary to say something as a preliminary matter about the origins of that 27 April 2001 document. That is to be seen against the background of the machinery that is provided in the Trade Contract. Clause 20.3 provides for the variation of the works under instructions from Mace:

"Unless otherwise instructed by the Construction Manager pursuant to Clause 20.6, the Trade Contractor shall not execute any variation required by the Construction Manager nor comply with any Instruction issued by [him]... unless the Trade Contractor shall have first submitted to the Construction Manager in writing within 5 working days of the Construction Manager's Instruction ..."

- and a number of requirements are set out of which the most significant for our purpose is clause 20.3.4*:*
"an assessment of the amount of any direct disruption costs to which the Trade Contractor might be entitled;"

I should say that although that clause is drawn in terms of a precondition to the operation of the works we were told that it was accepted that such assessment of the works could properly or acceptably under the arrangements between the parties be made ex post facto.

11. Clause 23 of the contract deals with payment and certification in respect of the works or their extensions. The clauses that have played an important part in this case are 23.6.4 and 23.6.5:

"23.6.4 The Construction Manager will issue to the Trade Contractor interim statements of account which will detail all instructions issued to the Trade Contractor which will entitle the Trade Contractor to an adjustment to the Trade Contract Sum under the terms of this trade contract. The Trade Contractor will value the interim statements of account and shall return the interim statements of account within seven days of receipt to the Construction Manager accompanied by all necessary information, measurements and calculations in substantiation thereof. Following agreement by the Construction Manager, the Trade Contractor will be required to signify his agreement and acceptance of the valuation of the instructions detailed in the interim statements of account.

23.6.5 Either before or within 28 Working Days after completion of the Trade Contract Works, the Trade Contractor shall send to the Construction Manager all further documents necessary for the purposes of the final measurement and valuation of the Trade Contract Works which will be completed within the period stated in item 14 of Appendix 1. A final statement of account for the Trade Contract Works shall be provided to the Trade Contractor by the Construction Manager and the Trade Contractor shall signify his agreement by signing and returning such statement within seven days of receipt thereof and such signature shall be conclusive evidence that the amounts shown therein are accepted by him in full and final settlement of the amount of the Trade Contract Sum."

It is important to understand that the document with which we are concerned, the 27 April 2001 document, was drawn not only against the background of those contractual terms, but also against the background of constant contacts (a perhaps more appropriate word than negotiations) between Mr Mell, the project manager for Hurst, and Mr Rumsey on behalf of Mace.

12. The judge heard evidence from Mr Mell and said this of him:

"In my judgment, he was an honest witness, entirely lacking in guile who did his best to recollect what had happened in the early months of 2001. Without the aid of contemporary documents he was unable to recollect the sequence of events and, even with the assistance which they gave, he did not pretend to have a detailed recollection of the discussions which he had had with Mace's Mr Rumsey. He could, however, be sure that certain things were not raised by Mr Rumsey at any time during the discussions which took place between January and April 2001 and, as to that, I believe his memory is reliable - had these matters been raised not only would they have stuck in his memory but, more importantly he would have acted differently at the time; most significantly, I think he would have informed Mr Grant and involved him in the ongoing process."

There was no evidence given by Mr Rumsey or by anyone else from MLEP. It is therefore hardly surprising that in tracing the events the judge largely relied on the account of Mr Mell, as illuminated by the contemporary documents, and he was plainly entitled to take that course.

13. A considerable number of CMIs had been issued before 27 April 2001. Many of these did not affect, or did not appear to affect, the contract price, but some involved additional works, in particular CMI 288, which related to toilet facilities in parts of the building not covered by the original Trade Contract, and which were priced at something not much short of £1 million.

14. On 12 January 2001, Mr Mell produced a document entitled *"Final Account"*, which effectively detailed the CMIs that were said to add to the contract price. The judge set that out verbatim at paragraph 31 of his judgment. He specifically held that, comparing this list with previous interim statements of account *("ISAs")* that had been exchanged, it added little to matters that had already been discussed between Mr Mell and Mr Rumsey. The judge described the rationale of this 12 January document in paragraph 32 of his judgment:

"When this 'Final Account' is compared with the December 2000 and January 2001 ISA Forms, it is apparent that Mr Mell had done nothing more than list, in numerical order, the CMIs which had had values attributed to them (either agreed values or a Hurst value), the CMIs where the words 'to follow' had been included and, in the case of CMI 274, where it had been indicated that its value was included in CMI 288. The only additional and possibly new information shown was that given below the list, where Mr Mell noted four further items which were said to require CMIs.

32. The explanation for the production of these documents given by Mr Mell in his witness statement was, that he had been approached by Mr Rumsey: '... who asked whether it would be possible to agree a cost for a number of the CMIs. Whilst there was no particular need for me to do this whilst they were being dealt within the interim applications, I did appreciate that Mace were faced with the task of doing this with numerous other trade contractors and therefore it would be of assistance to them if we could tie up these items. It was certainly of no disadvantage to [Hurst] and it was my understanding that David Rumsey was to leave the Project at some stage and certainly it was to Mace's advantage that someone with first-hand knowledge was able to deal with this... At Mr Rumsey's request, I submitted a document to Mace headed 'draft Final Account' on 12 January 2001. It was clear that the document could not be a 'final' account given that we were still on site and so intervening events could effect our actual carrying out of the works. Further, there were further CMIs to price which would be included in the final account. However, the document was what could be described as the first element of the final account as it finalised the cost to carry out CMI's 1 to 399 in terms of labour, plant and material together with the additional preliminary costs agreed within CMI's 51 and 288. (para 3.1 and 3.5 of Mr Mell's witness statement - my emphasis)

Apart from the erroneous reference to CMI 399 rather than CMI 333 in paragraph 3.5 of the witness statement, the last sentence of this paragraph conveniently encapsulates one of the essential submissions which Hursts makes. The description given by Mr Mell to the sum of £3,442,831.87 at which he had arrived as 'total to Final Account' is consistent with his believing that the exercise being undertaken was that described in this final sentence."

It is to be noted from those passages that Mr Mell said, and the judge plainly accepted, that the CMIs in his list were costed in terms of labour, plant and material, and nothing more. If that was indeed the limit of Mr Mell's figures they could not include the cost of delay of the type claimed in the contested account submitted on 26 November 2001. Quite apart from his having emphasised that passage in Mr Mell's evidence, the judge specifically found that that was indeed what Mr Mell understood. He made that finding in paragraph 41 of his judgment, to which I shall have to return. Further, the judge found that Mr Rumsey, on behalf of Mace, did not seek any valuation on a different basis. He plainly accepted evidence from Mr Mell to that effect in these terms:

"Mr Mell said that at no stage in their discussions had Mr Rumsey stated that he was looking for CMIs 1-399 to be priced to include all disruption/loss and expense claims. He said that he had regarded the discussions as routine/day to day events at which values of some only of the CMIs which, in the overall context, involved only comparatively minor sums had been raised. What Mr Mell said appears to me to be consistent with what MLEP stated at paragraphs 19 and 20 of the Defence."

15. After further discussions, which could not be shown to have altered the basis upon which the parties had previously proceeded, there was provided to Mr Mell on 26 April 2001 a document drawn by Mace that was described as "*Final Statement of Account*". This set out the CMIs priced as in the earlier exchanges, and then set out on its last page, as a new addition to previous statements in similar form, the passage in issue in this appeal. As we have seen, Mr Mell signed that on 27 April 2001, and this became the *"27 April 2001 document"*.

16. The judge accepted that Mr Mell did not understood, and Mr Rumsey did not say, that this document was intended to be (as MLEP now argue it to be) something very different from the earlier exchanges that had included the same figures. It is now said, not to be an interim and provisional valuation, as had been the ISAs exchanged earlier between the parties, and addressing as had the earlier CMI figures only labour plant and material costs and agreed preliminary items; but rather, in respect of works up to 27 April 2001, a final statement of account in respect of all claimed costs and that, in respect of that limited period, was, or was to be seen as taking the place of, the final settlement envisaged by clause 23.6.5 of the contract.

17. The judge found that Mr Mell did not read the document and did not direct his mind to the implications of its last page. He said this in paragraph 41 of his judgment: *"In my judgment, when Mr Mell prepared his 'Final Account' of 12th January 2001, when he met with Mr Rumsey in February and April 2001, and when he signed the 27th April 2001 Document, he did not understand that he was being requested to deal generally with the issue of contractual claims and to allow for them, and there was no reason why he should have thought that he was. Mr Mell can be criticised for not reading the 27th April 2001 Document with some care before he signed it, copied it (or arranged for someone else to copy it) and placed the copy in the site files. However, in my judgment the fact is that he did nothing more than glance at it before he signed it. He did not appreciate at the time that he was being invited to do more than 'firm up' valuation figures which would continue to be included on the ISA forms for the remainder of the project and then be taken into the FSA in due course. He did not appreciate that, by the terms included on the last page, Mace was inviting Hurst to forego any and all as yet unrecognised contractual claims for additional costs that it might have. These terms had been included, without any prior hint that they were to be there and they were, unfortunately, overlooked by Mr Mell."*

When he was asked why his own document of January had been headed "Final Account", and whether he agreed with the normal understanding of that expression, as stated in the evidence of Mr Grant (that is to say, an account that covered all financial obligations to the parties of whatever sort), Mr Mell explained that it was not usually his responsibility to prepare the final account under a contract, so he was not in a position to agree or disagree with Mr Grant's understanding of that expression, but he had used the words *"final account"* because he was asked to do so by Mr Rumsey. He further said in reply to Mr Darling in cross-examination: *"I generally don't do final accounts, and I - when I produced this document. I know it says 'final account'. I can't deny what it says, but the value of all those is purely labour, plant, material. Nothing else. Nothing more, nothing less. It's been a mathematical exercise. I didn't put any grades or emphasis on to it. I actually thought I was doing Mace a favour. I was just doing what they asked me to do."*

As we have seen, the judge accepted that evidence. Mr Darling sought to persuade us that Mr Mell had said something different from what the judge understood, and had committed himself to having sought to draw up a final account that would be final in all respects, as clause 23.6.5 of the contract envisaged. The judge who heard Mr Mell's evidence did not take that view of it. I do not take that view either.

18. Further, so far as Mr Grant was concerned, it is, in my view, quite plain from his evidence, and from his criticism of Mr Mell for calling his document final account, that he, Mr Grant, did not accept that either the January or the April document was a final account properly so called. It had therefore been a misnomer to call either of them a final account. Far from involving any admission that the 27 April document must cover all issues between the parties just because it was called a final account, Mr Grant's evidence supported Hurst's case by saying that the document, because of its nature, should not have been called a final account at all.

19. Against that background I turn to the two issues in the appeal and to the two declarations sought. First, rectification on grounds of unilateral mistake. It was agreed below and before us that the judge and ourselves should follow the admittedly obiter guidance given in this court in **Commission for New Towns v Cooper** [1995] Ch 259. First, what was said by Stuart-Smith LJ at page 280B of the report, where the Lord Justice said this: *"...were it necessary to do so in this case, I would hold that where A intends B to be mistaken as to the construction of the agreement, so conducts himself that he diverts B's attention from discovering the mistake by making*

false and misleading statements, and B in fact makes the very mistake that A intends, then notwithstanding that A does not actually know, but merely suspects, that B is mistaken, and it cannot be shown that the mistake was induced by any misrepresentation, rectification may be granted. A's conduct is unconscionable and he cannot insist on performance in accordance to the strict letter of the contract; that is sufficient for rescission."

Lord Justice Evans said at page 292E: *"...there is nothing unfair in holding them to the agreement which, to its knowledge, was the only one which MK's representatives intended to make. I would have no hesitation, if necessary, in holding that 'knowledge' in this context includes 'shut-eye' knowledge."*

The Lord Justice then went on to refer to the analysis of types of knowledge adopted by Peter Gibson J (as he then was) in the well-known of case **Baden v Société Génerale** [1993] 1 WLR 509. In my judgement, it is not necessary to pursue the details of that analysis because it was sufficiently expressed as relevant to this chapter of the law in the terms adopted by Evans LJ, already set out, with whose judgment Farquharson LJ agreed.

20. What it therefore comes to is that there had to be established (i) Mr Mell mistaken as to the content of the document; (ii) Mace, through Mr Rumsey, had actual, or what Evans LJ called "shut-eye", knowledge of that mistake; and (iii) overall, the conduct of Mace was unconscionable.

21. The judge held, for reasons that he had already set out, that it was plain that Mr Mell was relevantly mistaken. He enunciated that conclusion in paragraph 47 of his judgment. I have already set out the findings that the judge made on the basis of which he reached that conclusion as to Mr Mell's mistake.

22. In this appeal, MLEP seek to contest that finding. Their grounds for so doing, although they were expanded upon by Mr Darling QC in argument, are conveniently set out in paragraph 39 of a detailed skeleton argument, which reads as follows:

"It is respectfully submitted that there are the following flaws in the Judge's approach:

(i) He failed to give any or any appropriate weight to the use by Mr Mell of the words 'Draft Final Account' in the letter of 12 January and 'Final Account' on the accompanying document. The evidence of Mr Grant was to the effect that a Final Account would include loss and expense. Accordingly, the Judge ought to have given weight to the fact that the description that Mr Mell himself gave of the document was that it was a "Draft Final Account", which would be expected to include all financial entitlements.

(ii) The Judge failed to deal at all with the fact that under the Trade Contract the valuation of an instruction was required to include 'direct disruption costs'. Accordingly, a contractual valuation of an instruction would have included direct disruption".

23. I would venture to comment as follows. So far as subparagraph (i) of that contention is concerned, it simply repeats the argument that I have already addressed about the significance of Mr Mell's use of the term "final account". I respectfully agree with the judge's view that that was not dispositive of anything. As to subparagraph (ii), that reverts to clause 20.3.4 on the valuation of variations to the contract, a clause that I have already set out. The difficulty about deploying it in the present context are as follows. First, Mr Mell's evidence, accepted by the judge, was that his CMI figures only included the matters that he set out in his evidence; second, the claims made by Hurst which MLEP seeks to exclude are not just, or mainly, for disruption caused by CMI variations (that being what is referred to by the phrase *"direct disruption costs"* in clause 20.3.4) but for extra costs incurred in the works as a whole, whether varied or not, by the incompetent release of the works and overall management of Mace: a claim for damages, and not just for certification or for a variation under clause 23. So it cannot be assumed that the Hurst claim is in any event included in the CMI figures: indeed all the evidence, plus I would say common sense, points in a different direction. Third, if the Hurst claim was valued as part of the CMI figures, MLEP do not need the exclusion clause that they included in the 27 April document and now seek to support. It adds nothing, because the costs that it seeks to exclude have already been valued. Mr Darling said that even if that were the case, the last page of the April 27 document was understandable, as an insurance on MLEP's part against Hurst trying later to reopen the claim that had reached finality. But there was no explanation of that in evidence by MLEP, and the course of negotiations, already set out, does not suggest that such an explanation would have been plausible, even if it had been given. Finally, these arguments are at best reasons why Mr Mell could, or even perhaps should, have taken a different attitude to the content and valuation of the CMIs, and to the nature of the exercise into which Mr

Rumsey was inviting him. But as the judge found, that is what he did not do. Nothing has been said to demonstrate that that finding was not open to the judge.

24. Second, Mr Rumsey's knowledge. The relevant question in that regard is agreed in the following terms and set out in paragraph 47 of the judgment:

"...had it been proved that Mr Rumsey had actual knowledge that Mr Mell was mistaken as to the contents of the 27th April 2001 Document or that, in this regard, Mr Rumsey wilfully shut his eyes to the obvious or that he wilfully and recklessly failed to make such enquiries as an honest and reasonable man would make?"

There was no evidence from Mr Rumsey. There was no clear evidence as to how the document reached Mr Mell from Mr Rumsey. The judge assumed that either it was handed to Mr Mell, or was passed to him through the normal documentary channels, in either case without any indication that it represented a departure from previous formulations. The judge set out those findings in paragraph 49 of his judgment: *"49. The possible factual situations which might have happened are these -*

(1) Mr Rumsey, as he had said in the witness statement upon which Mr Mell commented in his evidence, personally handed the 27th April 2001 Document to Mr Mell and invited him to sign it (without explaining to him that Mace had included in the document a previously unheralded invitation to Hurst to forego all as yet unrecognised contractual claims up to the date of signature). If he did so and saw that Mr Mell signed it without first taking time to read carefully through it, the probability is that he had actual knowledge of Mr Mell's mistake as to the effects of the document; alternatively,

(2) Mr Rumsey, as he had said, personally handed the 27th April 2001 Document to Mr Mell (without explaining to him that Mace had included in the document a previously unheralded invitation to Hurst to forego all as yet unrecognised contractual claims up to the date of signature) but Mr Rumsey did not invite Mr Mell to sign it then and there. In the alternative, in line with the established site practice, Mr Rumsey forwarded the document to Mr Mell for him to collect from the Hurst site correspondence tray, (without including a covering note or in any other way drawing Mr Mell's attention to the fact that Mace had included in the document a previously unheralded invitation to Hurst to forego all as yet unrecognised contractual claims up to the date of signature). On either of these possible bases, the probability is that Mr Rumsey was wilfully shutting his eyes to the risk that Mr Mell would not notice the newly introduced, potentially prejudicial, words which he had no reason to suspect might be there. Alternatively, at the very least, on either of these possible bases, Mr Rumsey would have been a person wilfully and/or recklessly failing to take such steps as an honest and reasonable man would take if he knew (as on my findings Mr Rumsey did know) that the document he had prepared did not simply reflect the agreement(s) on CMI values which had been reached earlier that month after protracted negotiations."

The judge was dealing, as he had to, with the evidence available to him. He concluded that it did not matter which of the two explanations as to how the document had been transferred was correct. He still found, on the hypothesis that Mr Rumsey had not been present when Mr Mell signed the document (which was the hypothesis favourable to MLEP), that Mr Rumsey had had at least "shut-eye" knowledge of the mistake. There is no way in which it can be said that that conclusion was not open to him.

25. MLEP sought to contest that conclusion on the grounds again conveniently set out in paragraph 41 of their skeleton. *"MLEP did not call Mr Rumsey. Accordingly, the learned Judge erred in paragraph 49(i) of his Judgment in referring to Mr Rumsey's witness statement. That is sufficient to impugn the Judgment. In any event, it was a pre-condition to the Judge answering the second question in a way that was adverse to MLEP that the tests set out in question 2 had been met on the balance of probabilities. He had to make that finding in the absence of any positive evidence that Mr Rumsey had the necessary knowledge or, to put the test colloquially, suspicion. No-one gave evidence that Mr Rumsey actually had that knowledge. There was no document emanating either from MLEP or Mace to suggest that Mr Rumsey had that knowledge. There was no direct or other documentary evidence from Hurst that Mr Rumsey had the necessary knowledge or suspicion. There was simply no case made out for Mr Rumsey to rebut."*

The first part of that paragraph, referring to the reference to Mr Rumsey's witness statement, was very properly said by Mr Darling not to be something that he wished to press. It is right to say that the reference was only brought in inferentially or by a side wind by reason of the witness statement having been referred to by Mr Mell. As to the substance of the matter, there was no direct evidence that Mr Rumsey had knowledge or suspicion. But the circumstances, already set out, were very striking. They plainly called for an explanation. Amongst the factors that were relevant were first, the words relied on had been added apparently after substantial amount of agreement on a different basis on the CMIs; second, the wording was never discussed with, nor even notified to Mr Mell; and third, the document differed from previous documents apparently serving the same purpose as passed between the parties. The judge drew attention to that in paragraph 18 of his judgment:

"The 27th April 2001 Document differed from the monthly ISA statements in two significant respects. First, the bold headings at the top of each page were changed; the word 'final' was substituted for 'interim' in the typescript; the word 'draft' was added to the typescript but it was crossed through in manuscript and the words 'Stage 1' were added in manuscript. Secondly, in place of the standard wording which was included as the last page of each of the monthly ISAs [the judge refers back for the text of those] there was a very obviously different last page for this document."

If MLEP chose not to take what would have been the elementary and simple step of calling Mr Rumsey then one has to say that they did so at their peril. This latter observation is not a point of law or something near to being a point of law, as in the speech referred to by the judge of Lord Lowry in **Inland Revenue Commissioners v Coombs** [1991] 2 AC 300, but is just a point of common sense arising out of the judge's original findings of fact. The judge was not speculating in this part of his judgment, but reaching conclusions on the whole of the evidence, including evidence that might have been expected but was not given, that were well open to him.

26. The judge did not separately address the issue of unconscionability, but he plainly had that in mind, and was well within his proper area of judgement in finding that MLEP's conduct fell within the description set out in this court in **Commission for New Towns.**

27. I would therefore uphold the judge on rectification. That suffices to dismiss this appeal, but in case I am wrong so far I go on to the question of Mr Mell's authority.

28. The judge made a specific finding in paragraph 51 of his judgment that Mr Mell's authority did not extend beyond dealing with matters pursuant to and in accordance with the Trade Contract. MLEP relied on the description of the relative roles of Mr Grant and Mr Mell given to them as part of Hurst's account of how the contract would be managed. Those descriptions said this, in the course of referring to a number of other persons in the Hurst set up:

"Mike Grant, Director Mike Grant will be the Account Director and will have overall responsibility for the project. He will visit site on a regular basis.

Jim Mell, Project Manager Jim will be based on site and will be responsible for the successful delivery of the project to the specified quality, in accordance with the programme and within budget constraints and for producing method statements in accordance with Health and Safety requirements. He will be the team leader and chief point of contact with Mace."

MLEP called no evidence to explain how their own senior executives, including Mr Rumsey, had understood those statements; nor any evidence that Mr Mell, contrary to his evidence already quoted, did or could deal with the final account as understood under the contract.

29. The judge (who, it will be remembered, brought to the case an unrivalled experience of building contracts and their management) said this about the organisation structure in paragraph 22 of his judgment:

*"Mr Mell was not engaged by Hurst to act generally on the company's behalf in the management of its business nor did anyone with actual authority to manage Hurst's business (eg Mr Grant) hold him out as having that authority. Mr Mell was engaged by Hurst to act on the company's behalf in the management of a particular project undertaken on contractual terms agreed between MLEP and Hurst. It is well established that, persons engaged by a contracting party to act on its behalf in the fulfilment of a contract, are not to be taken to have power to vary the terms of the contract - see **Sharpe v Paulo Railway Company** (1873) LR 8 Ch App 597 where the extent of the authority of the Railway Company's engineer-in-chief in relation to the construction of a railway in Brazil was considered. The point was succinctly dealt with by Lord Romilly MR at page 605, where he contrasted the engineer's power to give directions 'within the limits of the contract' with his inability to vary the contract itself. Of course, a power to agree to vary some or all of the contract terms might be expressly given to a particular Project Manager in a particular case but, in this case, when Mr Mell's job description is examined no such power was expressly given to him and I cannot see any possible basis for its implication. Cause 32.2 of the Trade Contract provided for variations to the terms of the Trade Contract to be written and signed by the contracting parties; a director of the company, Mr Grant, was actively involved with the project and he was notified to Mace/MLEP as the person with overall responsibility for it; it was Mr Grant, not Mr Mell, who had a general authority to act for the company in the management of its business."*

30. I would agree that the situation in **Sharpe v San Paulo Railway Company** was somewhat different from this present case, since that case concerned the vires of the engineer as a certifying officer. Concern on that point appears to have been a significant reason why this court gave permission to appeal in the present case. However, the passage just read shows that the judge did not in any sense regard himself as bound by **Sharpe**, but simply quoted the antithesis formulated by Lord Romilly as a convenient

illustration of what is a matter of fact and judgment: what actual authority has been conferred on a particular employee?

31. MLEP argued that the judge simply misunderstood the organisation chart and the role it had allocated to Mr Mell. The quantity surveyor, described in the chart as assisting Mr Mell, was in fact there, he said, to prepare the loss and expense claim. So, MLEP says rhetorically, Mr Mell must have had authority to agree such a claim that his assistant had prepared. This question was explored with Mr Grant in the passage in cross-examination read to us, and he was not prepared to accept that Mr Mell had that authority, or that the work of the quantity surveyor with regard to loss and expense claims would have been work to Mr Mell. Whether or not that was the case, however, the essential point is that the 27 April document, at least in relation to the part of it that is in dispute, was plainly not a loss and expenses claim: rather, it was an undertaking, said by MLEP to be binding, that Hurst would make no loss and expenses claim, of the kind that they now seek to assert, in respect of the period up to 27 April 2001. The judge was fully entitled to find that no one contemplated Mr Mell as having authority to agree to so radical a departure from the process of valuation contemplated by the contract.

32. Although argued separately, this point is closely linked to MLEP's other position, that if it be accepted that Mr Mell only had authority to agree matters falling within the Trade Contract, then the 27 April document was indeed such a contractual document, falling within the procedure that the contract envisaged.

33. MLEP so argued in paragraph 20 of their skeleton, having set out various terms of the contract which I have already quoted. They then say this:
"In those circumstances, it is submitted that it is not correct to characterise the 27th April document as being outside the trade contract. Hurst's primary position is that that document fell fair and square within the terms of the Trade Contract."

I think in that paragraph "Hurst" should be "MLEP". What was involved was part of the process of (i) advance agreement envisaged by clause 23, and (ii) final effect being given to agreements at interim payment stage (Clause 23.6.4).

34. It is necessary, however, to remember the terms of the 27 April document that are objected to. They provide for "full and final settlement of all claims arising out of or in connection with the trade contract works." That is not advance agreement under clause 20.3, because that involves a valuation, not an agreement not to value nor to claim for disruption. Similarly, it is not something that emerges under clause 23.6.4, because that also envisages agreement on the value of a variation, not an agreement on a claim or non-claim in respect of general disruption. The 27 April document cannot be an acceleration, as it was described, of clause 23.6.5 and its accounting, because that clause quite plainly envisages an agreement relating to the complete contract and the complete contract term, and not, as contended for here, an agreement for one period only, interposed during the continuing currency of the contract: which, as we have seen, continued after 27 April and which was envisaged in that document as continuing after 27 April.

35. In truth, the simple point is that the 27 April document, by addition of its last page, became something quite different from its predecessors, which were, as the completed April 27 document in the terms relied on by MLEP was not, the working out of the valuation of instructions and variations under the contract. The judge was entitled to find that Mr Mell did not have authority to agree with or authorise a change in the contractual machinery of that fundamental nature.

36. I would therefore also dismiss the appeal on the authority point and would dismiss this appeal.

37. LAY JUSTICE ARDEN: I agree.

38. MR JUSTICE PUMFREY: I also agree.

(Appeal dismissed; Appellant do pay the respondent's costs of the appeal).

MR PAUL DARLING QC and MISS FRANCES PIGOTT (instructed by Wragge & Co LLP, Birmingham B3 2AS) appeared on behalf of the Appellant

MR MARCUS TAVERNER QC (instructed by Walker Morris, Leeds LS1 2HL) appeared on behalf of the Respondent