B e f o r e : Dame Elizabeth Butler-Sloss, Lord Justice Brooke and Lord Justice Latham. CA : 13th November 2003.

1. **LORD JUSTICE LATHAM**: This is an appeal from Mr Recorder John Uff sitting in the Technology and Construction Court in a claim by the appellants against the respondents for work carried out by them as building contractors. The work was to the respondents' property, 22 Cornwall Gardens, in London, which is a property consisting of six flats. The essence of the dispute is that the appellants now claim that work they carried out was pursuant to a quantum meruit, whereas the respondents say that it was pursuant to a lump sum contract. The Recorder held in a preliminary ruling that, on the true construction of the document on which both appellants and respondents relied, it was a lump sum contract.

2. In his final judgment dealing with issues consequential to this ruling, which are not material to our decision, he further concluded that he would in any event have decided that the appellants were estopped by convention from asserting that it was not a lump sum contract. The appellants in their grounds of appeal say that the Recorder was wrong in both respects.

3. The relevant facts were never in dispute. The appellants were asked to carry out alterations and refurbishments to the appellants' properties. They had employed architects, Salt Evans, who had produced tender documents based on the JCT intermediate form of building contract 1984 (the IFC84), and set out the proposed amendments to that form and the manner in which the conditions were to apply. The appellants were invited to tender in relation to those works on 6th May 1998. The final documentation provided by Salt Evans was provided to them on 26th May 1998. In a series of documents in June 1998 the appellants offered to carry out the works "in accordance with the conditions of contract" by returning the form of tender, which constituted an offer to carry out the works for the lump sum of £339,895.34. The respondents informally indicated through the architects that that tender was acceptable, and the appellants commenced work on site in accordance with the tender on 6th July 1998. On 7th July 1998 the architects wrote the letter upon which both parties now rely. It reads as follows, leaving aside immaterial matters:

   *"Further to your tender dated 23 June 1998 and fax dated 24 June 1998, I write to confirm that it is the intention of our client, A.D.I Limited, to enter into a contract with you on the basis of the tender sum of £339.895.34 exclusive of VAT, for the above project.*
   *The main contract documents are currently being prepared for signature. I confirm that the conditions of contract will be those of the JCT Intermediate Form of Building Contract 1994 (sic) Edition amended as stated in the tender documents and this contract is to be executed under hand.*
   *The date for commencement is to be 06 June (sic) 1998 and the contract period is to be 12 weeks with completion on 25 September 1998.*
   *I have been instructed by our client to request that you accept this letter as authority to proceed. If, for any unforeseen reason, the contract should fail to proceed and be formalised, then any reasonable expenditure incurred by you in connection with the above will be reimbursed on a quantum meruit basis. Any such payment would strictly form the limit of our client's commitment and our client would not be subject to any further payment of compensation for damages for breach of contract.*
   *If you are agreeable to the foregoing please:*
   *(i) Sign the enclosed copy of this letter and return it to me at the above address.*
   *(ii) Provide me with a statement from your insurance broker showing the details of Employer's Liability and Public Liability Insurance along with a copy of your valid 714 Tax Certificate.*
   *(iii) Provide a programme of works for the project.*
   *I look forward to receiving this information by return."*

   The appellants were not in a position to sign a copy of that letter until the relevant director, Mr Nolan, had returned from holiday on 28th July 1998, when he duly signed the document and returned it to the architects.

4. Thereafter, work continued; but no formal IFC84 contract was prepared, although it was common ground at the trial that there was nothing left for the parties to agree. The form simply had to be prepared in accordance with the particulars of contract fully set out in the tender documents.

5. As a matter of history, thereafter the position was this. (1) From 28th July 1998 interim payments were made pursuant to certificates from the architects based on a percentage of the lump sum amount from

which a retention of five per cent was deducted in accordance with ICF84 conditions; (2) architects' instructions were issued on ICF84 forms; (3) all negotiations in relation to the applicants' final account were carried out on the basis of the tender sum, replacing provisional cost items with those required by architects' instructions, again in accordance with ICF84; (4) the final account was accordingly based on the lump sum tender figure and formed the basis of an adjudication in December 2000 which resulted in the appellants being awarded the full sum claimed in the absence of any formal objection by the respondents; (5) the original claim in the present action, which was commenced on 19th January 2001, was based on that same calculation. It might be thought therefore somewhat surprising to find that the appellants in May 2001 amended their claim to allege that they were entitled to a quantum meruit which had never been suggested at any time until then.

6. The Recorder, who is a highly experienced practitioner and arbitrator in this field, considered that it would be sensible, when the matter first came before him, to determine the contractual issue as a preliminary point. It is perhaps unfortunate that he and counsel did not formulate the issue in writing; but it is clear that both parties and the Recorder were satisfied that the critical issue to be determined was whether or not the words "the contract should fail to proceed and be formalised" applied so as to entitle the appellants to the quantum meruit they claimed.

7. The Recorder, having referred to the concessions necessarily made by the then counsel for the appellants on the basis of the evidence, that there was by 7th July 1998 nothing left to discuss or formalise, and that "the parties did not necessarily intend the letter of 7th July to be displaced at a later date by a formal contract", concluded that the parties had clearly by that letter entered into a contract to carry out the work in accordance with the ICF84 conditions. He considered that the mere fact that, as in **Stent Foundations Limited v Carillion Construction (Contracts) Ltd (formerly Tarmac Construction (Contracts) Ltd** [2000] 78 CLR 188 the parties had contemplated executing formal documents, did not detract from the clear intention of the parties to be contractually bound. He held that the words "failed to proceed and be formalised" were to be read conjunctively so that the appellants' entitlement to a quantum meruit would only arise where both conditions were fulfilled. Accordingly, he decided that the appellants' claim for a quantum meruit failed. We decided to hear the argument on this issue first because if we concluded that the Recorder was correct the second issue as to estoppel would not arise.

8. Mr Wilmot-Smith QC on behalf of the appellants has argued, with effective brevity, that the letter has to be construed on its own. He submits that the words are clear and require no elucidation from their context. The phrase "the contract should fail to proceed and be formalised" is, he agrees, to be read conjunctively, but so read, he submits, clearly indicates that the parties intended that the contract be "formalised"; that is, that a formal contractual document or documents should be signed as being a necessary part of the procedure if the work was to be carried out under the ICF84 conditions. The fact that they were not formalised triggered, he submits, the entitlement to a quantum meruit pursuant to the terms of the letter, whatever may have been the behaviour of the parties thereafter.

9. It seems to me that, whilst I entirely accept that the behaviour of the parties thereafter was not, for the purposes of this case at any rate, necessary for the purposes of identifying the true meaning of the agreement, this argument fails to recognise that the letter cannot be read in isolation. It formed the culmination of a process, which was accepted by the appellants' own witness below to have resulted in an agreement as to price and to all material terms necessary for the commercial efficacy of the contract under ICF84 conditions. The Recorder was entitled to conclude, as Dyson J had done in **Stent**, that the mere fact that the letter giving instructions to proceed envisages the execution of further documentation, does not preclude the court from concluding that a binding contract was nonetheless entered into, provided that all the necessary ingredients of a valid contract are present. In that case the relevant letter read:

*"Until formal documents are available for signature please accept this letter as our instruction to proceed.*
*In the event of the parties failing to enter into a contract, we confirm that you will be reimbursed with all reasonable costs incurred including overheads and profit thereon, but no allowance will be accepted for loss of profit."*

Dyson J held on the facts that both parties had nonetheless agreed to proceed with the works on a contractual basis. The Court of Appeal held that he was entitled to do so on the evidence. Mr Wilmot-Smith sought to argue that that was a decision on its own facts. That is so; but it demonstrates that the

judge is entitled to look behind the apparent or literal meaning of the words of a letter, such as the one in question, to determine the true intent of the parties. Having concluded that the parties had agreed to a fixed sum contract under ICF84 conditions, it is not surprising that the Recorder held that the words in question, construed conjunctively, mean what they say. In other words, the only circumstance in which the appellants were to be entitled to a quantum meruit was if the contract did not proceed and was not finalised. The contract did proceed. In my judgment, the Recorder was not only entitled to conclude as he did, that the contract was one for a lump sum under ICF84 conditions, but was also correct to reject the argument of the appellants that the proviso, if I can put it that way, as to quantum meruit applied so as to entitle them to a quantum meruit under the terms of the letter of 7th July 1998. Accordingly, I would dismiss the appeal.

10. **LORD JUSTICE BROOKE:** I agree, and wish to add a few words about certain matters of procedure. The court experienced great difficulties in the conduct of this appeal. On the one hand, we received far more documents than we needed for the disposition of the comparatively simple issues raised on the appeal. On the other hand, we did not receive most of the documents that we really needed until last night or this morning. We made clear to the parties our displeasure at what happened and I do not wish to revisit those matters now.

11. They are, however, symptomatic of a more general malaise. An increasing number of those who practise in this court appear to be unfamiliar with the requirements of the Practice Direction to CPR Part 52 and to be unaware of the reasons for those requirements. In addition, the Practice Direction sometimes imposes unreasonable requirements as to the time for lodging documents, or is silent as to time. This seems to contribute to a prevailing culture which regards certain aspects of the Practice Direction as a dead letter.

12. The Court of Appeal has often been described as the engine room of the judicial system of England and Wales. I believe that the massive volume of business which the judges of the court have to undertake against pressures of time is fairly well known. The present situation in which aspects of the Practice Direction are regarded as a dead letter is adding significantly to the burden on the members of the court.

13. It is likely in due course that the Master of the Rolls will re-state the position more formally in a Practice Direction. For the time being, there is an evident need to draw attention to four aspects of the Practice Direction where ignorance or deliberate disobedience are making things unnecessarily difficult for the court and unnecessarily expensive for the lay parties who have to pay their lawyers' bills. I have the authority of the Master of the Rolls to say what follows, and I hope that it will be given widespread publicity among practitioners, so serious is the present position.

**(i) The bundle of documents in support of the appeal (paras 5.6 - 5.8)**

14. First, the bundle that is originally lodged with an appellant's notice must comply with paragraphs 5.6, 5.7 and 5.8 of the Practice Direction. Those who are responsible in solicitors' firms for litigation in the Court of Appeal must make it their business to ensure that those members of their staff who are concerned with the preparation of papers for the Court of Appeal are familiar with the requirements of all three of these paragraphs. The Practice Direction has been drafted so as to be appropriate for appeals at all levels of the judicial system. It is designed for simple appeals from a district judge in the county court to a circuit judge in the county court, as well as heavy appeals, such as the one we are at present entertaining from a judge of the Technology and Construction Court to the Court of Appeal.

*15.* Paragraph 5.6 sets out a checklist of the documents that need to be filed with the appellant's notice which will in due course go before the judge who considers whether or not to grant permission to appeal. There is a list of the documents required for the bundle at 5.6(7), and paragraph 5.7 makes it clear that if documents are not yet ready, the court should be told why they are not ready. It is paragraph 5.8 which is so widely ignored. It reads: *"Where bundles comprise more than 150 pages excluding transcripts of judgment and other transcripts of the proceedings in the lower court only those documents which the court may reasonably be expected to pre-read should be included. A full set of documents should then be brought to the hearing for reference."*

In other words, it was quite unnecessary, and also wrong, for the appellants' then solicitors to file bundles containing 1,130 pages for the permission application. They should have had a single set of relevant papers in court when the matter came before Peter Gibson LJ on the permission application in case there

was a need to have reference to any of them, but all that those solicitors were required to lodge, and all that they were permitted to lodge, was a bundle of the documents which the court might reasonably be expected to pre-read. This will provide the judge who is hearing and considering an application the opportunity to study the most important documents before the application is heard or considered. If he needs more, he can always ask for them. I mention this because it was said that it was necessary to have the 1,130 documents copied to all three members of the Court of Appeal at the hearing of the full appeal for this hearing because there were issues at the permission stage which were not then allowed to be argued at the substantive appeal. As I have said, if those who were responsible for the preparation of documents originally had studied paragraph 5.8, they would have realised that all this copying of documents was wholly unnecessary, in addition to not being permitted by the Practice Direction.

**(ii) Core bundles (para 15.11A)**

*16.* I now move to the bundles to be prepared for the substantive appeal. In this respect paragraph 15.11A is required reading for all who practise in this court. It reads: *"Where the total number of pages to be put before the court in a full appeal exceeds 750 pages excluding transcripts and copied authorities, the parties must file and serve a full bundle of essential documents not exceeding 150 pages."*

This provision was added by amendment to the Practice Direction, but it is so critically important to the work of the court that it must be scrupulously observed. When judges are pre-reading, they do not wish or need to have 2,000 pieces of paper by their side. They need to have the central documents which they must be familiar with by the time the appeal starts. This is the purpose of the requirement for an agreed core bundle.

17. Unhappily, the Practice Direction does not specify the time by which the parties must file and serve the core bundle. In order to achieve its purpose the core bundle must at the very latest be filed seven days before the hearing starts. Ideally, it should be prepared when the bundle of authorities are prepared for the court.

18. It may be that this time limit will be reconsidered when the Practice Direction is reconsidered. For the time being, it should be regarded as an absolutely mandatory obligation that the core bundle is served, following co-operation between the parties, a week before the hearing starts. In the present case all that the members of the court received were 1,128 pages from one side and 310 from the other. When we did our pre-reading last weekend we had to delve into those pages to try and identify what was relevant to the narrow issue to be heard on this appeal. This simply will not do.

**(iii) Bundle of authorities (para 15.11)**

*19.* Thirdly, bundles of authorities. Paragraph 15.11 reads: *"Once the parties have been notified of the date fixed for hearing the appellant's advocate shall file, after consulting his opponent, for the purpose of pre-reading by the court, one bundle containing photocopies of the principal authorities upon which each side will rely at the hearing, with the relevant passages marked. There will in general be no need to include authorities for propositions not in dispute. This bundle should be made available 28 days before the hearing, unless the period of notice of the hearing is less than 28 days in which case the bundle should be filed immediately. Such bundles should not normally contain more than 10 authorities. If any party intends, during the hearing to refer to other authorities they may be included in a second agreed bundle to be filed by the parties at the hearing. Alternatively, and in place of the second bundle only, a list of authorities and text may be delivered to the office of the Head Usher of the Court of Appeal no later than 5.30 pm on the last working day before the hearing is to commence."*

20. On 7th October 2003, in **Haggis v DPP** [2003] EWHC 2481 Admin, after quoting the provisions of the Practice Direction, which apply equally to appeals to the Divisional Court, I said (in paras 32 - 33):

*"32. The judges of the Court of Appeal and the Heads of Division have recently considered the language of this practice direction. They take the view that what is really important is that this agreed bundle should be filed not less than seven days before the hearing. This appears to be a more reasonable time. If an agreed bundle with each side's authorities is not filed at least seven days before the hearing, again the judges of this court and in the Court of Appeal are likely to show very much less forbearance than they have in the past.*

*"33. I draw particular attention to the need to mark in the authorities the passages on which the advocates wish to rely. It is also very helpful if the page number can be mentioned in the skeleton argument, although that is not*

*specified in the practice direction. The reason for this is that the judges wish to be able to pre-read whenever they reasonably can. If they are simply referred to a case which may have 20 or 25 pages in it, it is unlikely that they are going to be enthusiastic about reading all 25 pages in order to run to earth, if they spot it, the principle on which the advocate seeks to rely."*

21. This judgment has received no publicity whatsoever. What has happened in connection with this appeal is exactly what I was talking about in the Divisional Court a month ago. I now have the authority of the Master of the Rolls to make it clear that this new practice will apply in the Court of Appeal as well, subject to the proviso that very strict attention need not be paid to the duty to mark the authorities in the margin provided, and provided only, that the agreed bundle of authorities is filed before the seven-day deadline and each party has by that time identified in the skeleton arguments they have filed the precise passages in the judgments the court should read.

22. We are happy to substitute seven days for the 28 days in the Practice Direction, but by seven days before the hearing we must have an agreed bundle of authorities, prepared in full compliance with the Practice Direction (Citation of Authorities) [2001] 1 WLR 1001, so that when judges of the court do their pre-reading they have the authorities to which they can refer. If the time is brought down to seven days -- in an appropriate case the upper limit of 10 authorities may be disregarded -- there should be no need for the straggling in of authorities over the course of the week before the hearing, or the night before the hearing, that is so familiar a feature of practice today.

**(iv) Skeleton Arguments (paras 5.9 and 7.6 - 7.7)**

23. Point 4 relates to skeleton arguments. The Practice Direction provides (in para 5.9) for a skeleton argument to be lodged with the appellant's notice or shortly thereafter, and (in paras 7.6 to 7.7) for the respondent's skeleton argument to be lodged at an appropriate time after the appellant's skeleton has been served. It is essential that every advocate who drafts any skeleton argument for the Court of Appeal observes the mandatory requirements of paragraphs 8.1 and 8.2 of the Practice Direction (Citation of Authorities) [2001] 1 WLR 1001, and has the provision of paragraph 8.4 of that Practice Direction well in mind. The purpose of these requirements is to focus attention on points actually in issue in the appeal at an early stage, and to facilitate the subsequent preparation of bundles of authorities.

24. Nothing is said in the Practice Direction about late skeletons. We are familiar with the need for advocates, close to the hearing, particularly if there has been a change in representation, or if there have been recent decisions in the House of Lords or the Court of Appeal that are relevant, to file a supplemental skeleton. Until now the judges of the court have been fairly relaxed about the time at which they are filed. If the seven day rule is now widely recognised as the time at which papers must be available for the judges for pre-reading in the week before the hearing, it is less likely that the judges of this court will be relaxed or even ready to read skeleton arguments which are lodged less than seven days before the hearing. In other words, if a case is listed for the Court of Appeal on a Wednesday of one week, it is on the Wednesday of the previous week (at the very latest) that the parties should file the necessary documents, and all of them, with the court. If this is done, then a great many of the present difficulties which are making the conduct of litigation in this court quite unnecessarily burdensome for the court and expensive for the litigants will be at an end.

25. So far as the substantive appeal is concerned, I agree with the judgment given by Latham LJ.

26. THE PRESIDENT: I agree with both judgments. Consequently the appeal is dismissed.

**ORDER:** Appeal dismissed with costs; payment of £10,000 to be paid on account within 14 days; costs to be subject to detailed assessment.

MR. R. WILMOT-SMITH QC (instructed by Messrs McCloy & Co., Wiltshire) appeared on behalf of the Appellant.

MR. P. COULSON QC AND MISS G. CHAMBERS (instructed by Messrs Colman Coyle, London, N1) appeared on behalf of the Respondent.