Carillion Construction Ltd v Felix (UK) Ltd [2000] ADR.L.R. 11/06

JUDGMENT : The Honourable Mr Justice Dyson : TCC. 6th November, 2000

Overview

1. Carillion Construction Ltd ("Carillion") was the main contractor employed by Hammerson UK Properties Ltd ("Hammerson") to carry out the construction of an office building at 16-17 Old Bailey, London EC4. Carillion subcontracted the design, manufacture and supply of the cladding to Felix UK Ltd ("Felix"). Although Felix started work on the design in about September 1998, negotiations for the terms of the subcontract were not concluded until about December 1999. In November 1999, and notwithstanding that the subcontract works were several months away from completion, Felix suggested that an attempt should be made to agree a draft final account for Felix' works. Negotiations ensued, and culminated in an agreement reached at a meeting on 13 March 2000 that the final account sum should be £3.2M plus VAT. This agreement was then embodied in a formal Settlement Agreement dated 17 March. Carillion contends that it was compelled to enter into the agreement by a threat made on behalf of Felix that it would not continue to supply cladding units in accordance with the subcontract unless a final account sum of £3.2M. was agreed. In these proceedings, Carillion seeks to set the agreement aside for duress.

The history in more detail

2. By the 14'h December 1999, all contractual matters had been agreed between Carillion and Felix except the wording of the performance bond and the warranty. By 14th January 2000 (at the latest), the wording of these two documents had been agreed, and the subcontract had become binding on the parties. Felix had started work on about 26 July 1999. It was a term of the subcontract that the work should be, completed in 22 weeks (ie by 17 January 2000). By the end of 1999, Carillion was complaining of delays by Felix in the delivery of the cladding units.

3. On 14 January, a meeting was held between the parties to discuss Felix's continuing inability to complete its works, and its refusal to exchange the subcontract documents. At this meeting, Felix stated that it wanted to know the projected final account figure before it was prepared to release the subcontract documentation. This position as confirmed in a letter dated 17 January from M Joffre (Operations Director of Felix) to Mr Godfrey (Regional Director of Carillion).

4. On 8 February 2000, Felix provided Carillion a list of expected delivery dates for the outstanding units: the last date was 14 April.

5. There had been disputes from time to time as to whether instructions for the carrying out of items of work were variation instructions which would attract additional payment, or whether they were part of the original subcontract works for which there was no right to further money. One of these disputes concerned work in connection with the low level panels. Felix contended that this was a variation for which it was entitled to an extra £ 14,160. Carillion was of the view that this was part of the original subcontract works. The parties exchanged correspondence on the subject. On 18 February, Felix wrote saying that it would not carry out this work until Carillion agreed in writing to pay the extra sum of £14,160. Mr Craig (one of Carillion's Commercial Managers) says that he felt that he had no alternative but to accede to this demand. No ground floor cladding had yet been delivered, and the project was at a crucial stage. He said that he was not prepared to put the project at risk for the sake of £14,000.

6. Mr Webb, Project Director of Carillion, says that on various occasions during February, Mr Spencer (a Felix quantity surveyor) made statements to the effect that the delivery of further cladding materials by Felix would be dependent on agreement of the final account. Mr Webb recalls specifically that at a meeting on 23 February, Mr Spencer threatened him *"face to face*" that future deliveries would be dependent on agreement of the final account. Mr Spencer denies having made the threat. There is no written record of this conversation. Mr Webb reported the threat to Mr Craig. Mr Craig regarded it as a very serious threat, since it was critical from Carillion's point of view that the project be completed by 5 June 2000, the overall completion date. If Carillion failed to meet that date, it would be liable to Hammerson for liquidated and ascertained damages at the rate of £75K per week. The ability to progress and complete the main contract works at this stage was dependent on Felix continuing with the subcontract works, especially the ground floor cladding.

7. A delivery of cladding was made to the site on 25 February.

8. On 28 February, M Joffre wrote a letter to Mr Godfrey saying that the companies' respective surveyors did not appear to be making any headway in agreeing the final account. He went on: *"Without this figure being agreed, I cannot predict when the project will be complete"*. He added that he had reviewed the account, and felt that the final account should be £3.3M "*including all claims from all parties*". He also said that once the figure had been agreed, he wanted to agree a payment plan, and written agreement by Carillion that it. would abide by the amounts and the dates. In other words, Felix was proposing to substitute a different payment regime for that contained in the subcontract.

9. Mr Godfrey replied on 29 February: *"I fail to understand how non-agreement of the Final Account prior to completion of your works prevents you from predicting when the project will be complete. Your comments could be interpreted as a veiled threat but I feel sure that your personal integrity would prevent this; I would therefore request confirmation of when you intend to fulfil your obligations or a detailed explanation of why you cannot do so in order that we can work with you to overcome your problems.*

I, like you, am keen to resolve your Final Account. Our calculations fall short of your stated figure. Could you please submit a detailed build-up and justification to this figure as a matter of urgency, on receipt of which I will arrange a meeting to discuss and agree the way forward."

10. Another letter was sent by Felix to Carillion on 29 February, this time to Mr Webb. It confirmed the existence of various problems on site which, it was said, would prevent Felix from proceeding with its work, and concluded with these words: *"We note that Carillion will finalise the financial agreement before our next delivery, schedules for 10 March"*. In fact, as we shall see, the next delivery was not made until 17th March.

11. The precise figure put forward by Felix at the end of February was £ 3.314M. Mr Bird of Carillion checked Felix's calculations, and thought that it contained arithmetical mistakes. He considered that the Felix figure, when corrected, was £3.119M. His own figure at that time was £2.756M.

12. The position at the end of February was a matter of great concern from Carillion's point of view. There were four outstanding deliveries of cladding materials. Large areas of the building were still open to the elements, and following trades would be held up until Felix progressed its work. As I have said, Felix should have completed its work by about 17 January. Carillion explored with two other curtain walling manufacturers the possibility of having the balance of the Felix work supplied and installed by them, but that solution was impracticable. The Felix cladding system was a *"bespoke*" system tailor made for this project, and one of those approached declined on that account. The other said that it was too busy to take on the work in the immediate future.

13. On 7 March, Mr Craig telephoned Mr Foster, Carillion's in house lawyer, and explained the position. He wanted to be advised as to Carillion's legal options. He sent Mr Foster some of the documents to which I have already referred. On 9 March, Mr Craig had a meeting with Mr Foster and Mr Campbell, the commercial director of Carillion Building Ltd. Mr Craig explained the programme position, and said that he was desperate to get Felix to complete its work as soon as possible. He also explained that he was of the view that Felix was attempting to force Carillion to agree a final account figure that was considerably in excess of its true entitlement, and was threatening not to make any further deliveries until the account was agreed to its satisfaction.

14. Mr Craig told Mr Foster and Mr Campbell that if Felix continued with its threat not to complete its work, there would be no commercial option open to Carillion but to agree the final account. The possibilities of injunction proceedings were considered by Mr Foster, but they were rejected. He thought that it would probably not be possible to obtain an injunction, and, even if adjudication proceedings were a possibility, they would take several weeks to complete: that was too long. They decided that there was no way of ensuring that the outstanding deliveries would be made, and concluded that there was no alternative but to agree the final account on the best terms that they could get. Mr Foster advised Mr Craig that if Carillion was compelled to agree the final account, the company would be able to set it aside subsequently for duress.

15. Meanwhile, on 8 March, a Carillion representative notified those who attended the Site Meeting on that date that, although the ground floor panels were ready for delivery to the site, "Felix are withholding

until final account has been agreed Carillion senior management at present discussing with their legal advisers". On the following day, Mr Wright of Hammerson wrote to Mr Godfrey at Carillion expressing his concern that Felix was refusing to deliver the ground floor units until their final account was settled. He stated that this was "*quite unacceptable*", and asked Carillion what they were proposing to do to resolve the problem. Mr Wright expressed the opinion that the matter could not be resolved by meeting M Joffre, but said that he thought that a meeting with Mr Felix Senior and a non-executive director was appropriate. Mr Wright offered to accompany Carillion to a meeting in Geneva. Carillion did not take up Mr Wright's suggestion. Mr Felix Senior was no longer with Felix, and they did not want to involve Mr Wright in any negotiations. Mr Godfrey replied to Mr Wright on the same day. He wrote: *"At present, Felix are linking the delivery of remaining materials to agreement of their subcontract account and have advised us as to their expectation. They have not, however, given any detail as to the reasoning behind their expectation, which is excessive in our opinion. We have, therefore, arranged to meet Edgar Joffre at our offices on Monday 13th March following his confirmation that he will be able to bring the necessary level of detail required to reach a resolution.*

I am determined to reach a solution on Monday that will result in the completion of the Felix works. This may have to involve our agreement to paying a substantial premium under duress but with a view to pursuing our legal right at the appropriate time."

16. The meeting was held on 13 March. Mr Craig and Mr Godfrey attended on behalf of Carillion, and M Joffre and Mr Spencer on behalf of Felix. The delivery that had been scheduled for 10 March had not been made. M Joffre informed the meeting that 50 of the outstanding units had been completed and were ready for delivery. He said that the next delivery was now scheduled for 17 March. The parties then started to discuss the final account. Carillion assumed that Felix was still contending for a figure of about £3.3M. This was the figure that had been stated in M Joffre's letter of 28 February, and was in line with the figure of £3.314M to which I have referred. Carillion was expecting an explanation as to why the Felix figure was not £3.119M as had been pointed out earlier. Carillion noted that the Felix figure gave no credit for the £150,000 which Carillion believed was due on account of the glass that had been supplied by Felix and which did not conform to the specification. Carillion's own figure was £2.756M. There were many differences between the rival figures, but the most important were (a) the £150,000 credit in respect of the non-conforming glass, and (b) the sum of almost £100,000 estimated by Mr Bird of Carillion of potential contra-charges resulting from the delays of Felix. In preparing for the meeting, the Carillion representatives had considered whether they could reasonably concede more than £2.756M. They looked at the various figures, and decided that they might be able to justify going up to £2.845.65 on the material that they presently had. Felix admits that it supplied some units that contained glass which did not comply with the contract specification. It is accepted by Felix that Carillion agreed to give Hammerson a credit of £150K in return for Hammerson's acceptance of the non-conforming glass. Felix claims that it agreed to give Carillion a credit of £80K in respect of this. There clearly was a dispute between Felix and Carillion about the amount of credit due from Felix to Carillion in respect of this glass.

17. At the meeting, Felix explained the difference between its figure of £ 3.314M and the version of the Felix figure that had been "*corrected*" by Carillion down to £3.119M. They then produced a new calculation in the sum of £ 3.488M. This document included many new items. Four of these (totalling £205K) were for extra costs under the heading "*due missing/lack of information/extra work*". Mr Godfrey and Mr Craig were annoyed at this unexpected turn of events, especially since no information was put forward to substantiate these new claims. Moreover, Felix denied that it was liable to give credit for the £150K in respect of the non-conforming glass, or that it was liable to Carillion for any contra-charges.

18. The first part of the meeting ended at about 4pm. During the recess, Mr Craig decided to tape-record the second part of the meeting in view of the nature of the threat that had been made to Carillion. The recording is apparently of poor quality, and no transcript of it has been placed before me. The meeting was resumed at about 6pm, and continued until 9.30pm. During the interval, Mr Craig had produced a schedule of the items in dispute. The parties went through each item, but no progress was made in agreeing any of them. What occurred then is recorded in a note that Mr Craig made a few days after the meeting. Felix does not dispute that this note accurately records the substance of what was said. The

material part reads as follows*: " Having explained the above, CB again re-iterated that allowing for the usual process of account valuation to occur (where further and better substantiation would be provided for various items), it was thought that the maximum value that the Felix account was ever likely to reach was £2,900,000 but at present, it was still being valued in accordance with the subcontract at £2,748,219.*

CB stated that it was clear that CB/Felix could not agree the projected value of the account since the difference was so large. However it was critical to CB that the works could progress and therefore a way forward had to be found. Felix made it clear that the only way to progress the works was for CB/Felix to agree the final account to Felix' satisfaction.

At this stage of the meeting, CB made it quite clear that they were only progressing with the meeting in order to ensure that the works progressed. CB asked Felix what sum of money they would have to pay in order to get Felix to complete the works. Felix stated that they would be prepared to settle their account for £3.3m. CB stated that this was not possible since it was approx £0.5Million over what Felix were entitled to be paid. General debate over the amount ensued resulting in CB stating that they would be prepared to pay £3.1m to secure the completion of the project. This was not acceptable to Felix so CB suggested that since an agreement had to be reached, it was worth considering how the final account agreement would be dealt with.

Discussion re the mechanism of paying the outstanding monies into a solicitor's account ensued resulting in the principles of a payment/ performance mechanism being agreed. Also agreed that the agreement had to include the handing over of the subcontract documents, the Employer/subcontractor warranty and the performance bond. Felix not happy at having to provide a bond but CB stated that it was imperative.

Returned to the subject of the amount of the money and eventually agreed to the sum of £3.2m."

19. I should also record that the note states at the outset that the reason for the meeting was *"to reach a position whereby Felix would comply with their subcontract by completing their works and would hand over the outstanding documentation required by Carillion".*

20. On 14 March, solicitors were instructed by both parties to settle the terms of a formal settlement agreement. Mr Craig says that during the next few days he had many conversations with Mr Spencer about the wording of the agreement. He says that Mr Spencer told him that, if the materials were to be delivered on 17 March, an order would have to be given for them to leave Switzerland by 15 March, and that he (Mr Spencer) was unwilling to give such an order until he saw the wording of the settlement agreement. Mr Spencer denies any such conversation.

21. The next delivery was loaded in Switzerland on 15 March, and arrived at site in the early hours of 17 March. The lorry had been ordered on 9 March. Thereafter, Felix made deliveries more or less in accordance with delivery schedule incorporated in the Settlement Agreement. The Settlement Agreement provided that the final account was £3.2M in respect of "any actual or potential claims of either party arising from the Subcontract and was in full and final settlement of those claims". It provided for payment of stage payments by Carillion to Felix by certain specified dates in respect of work already done, and it also provided a schedule of dates for the delivery of the remaining units, and payment by reference to those dates.

22. On 17 March, Mr Craig wrote to Felix recording Carillion's *"extreme displeasure at being required to enter into such an agreement".* He said: *"Prior to the completion of your subcontract works, you have demanded from us additional sums to which you clearly have no contractual entitlement. Failing our agreement to pay these sums, you refused to continue with the subcontract works."* Having complained that Felix had committed a breach of contract, and had left Carillion with no practical choice but to consent to its terms under considerable duress. Felix did not reply. Mr Spencer explained that he did not consider that a reply was necessary, since this letter was evidence of what he called *"commercial sour grapes*". By this he meant that he thought that Carillion realised that they had not done well in the negotiations, but that this was all part of the normal rough and tumble of commercial life.

23. Thereafter, the parties operated the Settlement Agreement until Felix had made its I last delivery. Once that had happened, Carillion reverted to he original subcontract. On 12 June, Carillion started the present proceedings seeking an order rescinding the Settlement Agreement for duress.

The Law

24. This is not in dispute. It is common ground that the following summary of the relevant principles that I set out in **DSND Subsea Ltd v Petroleum Geo-services ASA** [unreported, 28 July 2000] is an accurate statement of the law: *"The ingredients of actionable duress are that there must be pressure, (a) whose practical effect is that there is compulsion on, or a lack of practical choice for, the victim, (b) which is illegitimate, and (c) which is a significant cause inducing the claimant to enter into the contract: see* ***Universal Tankships of Monrovia v ITWF*** *[1983] AC 336****, 400B-E,*** *and* ***The Evia Luck*** *[1992] 2 AC 152****, 165G.*** *In determining whether there has been illegitimate pressure, the court takes into account a range of factors. These include whether there has been an actual or threatened breach of contract; whether the person allegedly exerting the pressure has acted in good or bad faith; whether the victim had any realistic practical alternative but to submit to the pressure; whether the victim protested at the time; and whether he affirmed and sought to rely on the contract. These are all relevant factors. Illegitimate pressure must be distinguished from the rough and tumble of the pressures of normal commercial bargaining."*

25. Accordingly, Carillion must show that there was (a) pressure or a threat, (b) which was illegitimate, (c) the practical effect of which was that it had no practical choice but to enter into the agreement, and (d) which was a significant cause inducing it to enter into the contract.

Did Felix threaten to withhold deliveries until the final account was agreed'

26. There were irreconcilable conflicts between the evidence of (a) Mr Webb and Mr Spencer as to whether Mr Spencer had said in late February that Felix would not deliver the outstanding units until the final account was agreed, and (b) Mr Craig and Mr Spencer as to whether Mr Spencer made a similar remark on about 15 March. Despite Mr Spencer's adamant denials, I am satisfied that he did make the statements attributed to him by Mr Webb and Mr Craig. Mr Spencer was insistent that he had nothing to do with the placing of orders, but paragraph 10 of his witness statement (which he confirmed as being accurate) shows that this was not the case. It is clear that he was very annoyed by what he considered to be Carillion's unreasonable refusal to enter into meaningful negotiations over the final account. He was also annoyed by the introduction by Carillion of a scaffolding contra-charge. I believe that during February and March, he was somewhat antagonistic towards Carillion. I found the evidence of Mr Craig and Mr Webb convincing. Moreover, and crucially, it is consistent with, and supported by a number of documentary strands of evidence, some of which I have mentioned in my review of the history.

27. Even if I had accepted the evidence of Mr Spencer, I would have found that Felix made other threats to withhold deliveries until the final account was agreed. First, there is M Joffre's letter of 28 February. By saying that unless the final account was agreed, he could not predict when the project would be completed, M Joffre was making a clear threat not to deliver before the final account was agreed. In his evidence, M Joffre attempted to explain his thinking. He said that he wanted to ensure that Felix's suppliers gave priority to making supplies to Felix. He thought that if the Felix final account was agreed by Carillion, it would be easier for him to deal with his suppliers. I confess that I cannot accept this explanation. I should say M Joffre has no difficulty in expressing himself in English, although I believe that English is his third language. He is an articulate and obviously intelligent person, and his English is almost perfect. Whatever M Joffre's thinking may have been, the meaning and effect of his letter is plain: it was a threat not to deliver unless the final account was agreed. Moreover, that is how it was understood. As we have seen, Mr Godfrey replied saying that it could be interpreted as a *"**veiled threat***". In his evidence, he said that he saw it as a threat. Consistent with that was Felix's letter of 29 February saying that it was noted that Carillion would finalise the final account before the next delivery, which was scheduled for 10 March. This was another indication that Felix was making a clear link between the timing of the next delivery and the agreement of the final account.

28. Next, there is the report by Carillion to the meeting of 8 March that Felix was withholding delivery until the final account had been agreed. In my view, this would not have been said to the meeting unless it was true. Not surprisingly, it generated concern in Hammerson, and I have already referred to the letter written by Mr Wright to Carillion on 9 March.

29. The decision by Mr Craig to consult Mr Foster on 7 March was made only because a threat had been made by Felix not to deliver until the final account had been agreed. The decision by Mr Godfrey to

request a meeting with Felix on 13 March to discuss the final account was a strong indicator that Carillion felt under pressure from the threat. Until then, Carillion had been stalling over agreeing the final account. That was one of Mr Spencer's complaints. And yet, suddenly upon receipt of Mr Wright's letter of 9 March, Mr Godfrey demanded an urgent meeting with Felix. According to the note of the meeting made by Mr Craig, the reason for the meeting was *"to reach a position whereby Felix would comply with their subcontract by completing their works"*. The parties to the meeting then launched into negotiations over the final account. The link between the delivery of the units and the agreement of the final account could hardly have been clearer.

30. I am satisfied that, on several occasions during the period up to the meeting of 13 March, Felix did threaten to withhold deliveries until the final account was agreed. That threat was not removed until the parties agreed the figure of £3.2M at that meeting. I have already referred to the note prepared by Mr Craig of what was said after the parties had been through each disputed item. M Joffre made an aide-memoire for himself in preparation for the meeting. It is revealing. Under the heading *"Carillion weaknesses"* there is a list which *included "They need to finish the work". Lower down the page appear the words: "No deliveries until we get agreement"*. I am quite satisfied that the threat not to make deliveries was not lifted until the parties agreed the figure of £ 3.2M.

31. It is said by Felix that a true arm's length commercial bargain was struck at that meeting. It is pointed out that the figure of £3.2M was a compromise between the sum of £3.488M that was being claimed by Felix and the sum of £2.756M for which Carillion was contending. But the claim of £3.488M was an afterthought. The extra over the sum of £3.314M that had previously been claimed was wholly unsubstantiated. M Joffre had always maintained that he was looking for £3.3M. More importantly, it must have been obvious to Felix that Carillion did not willingly agree to pay £3.2M. Carillion told the meeting of 13 March that the maximum value that the account was ever likely to reach was £ 2.9M, but that at present it was still being valued at £2.748M. There was no negotiation in the sense of give and take on individual items. The contentious items were discussed in turn, and no agreement was made in relation to any of them. Carillion did not consider that £3.2M represented a reasonable compromise of the positions of the two parties. But for the threat, it would not have agreed the final account on 13 March at all. It felt compelled to agree the account only because it was determined to secure the delivery of the cladding units. The figure of £3.2M was the best Carillion could achieve in the circumstances.

32. There was every advantage to Felix in securing early agreement of the final account in the circumstances of this case. It was in delay, and there was no certainty as to when it would complete its work. Its potential liability to Carillion for damages for delay was, therefore, uncertain. The damages potentially included the cost of indemnifying Carillion against delay claims by other subcontractors and against Carillion's liability to Hammerson for liquidated and ascertained damages at the rate of £75K per week. There was also an obvious cash flow advantage to Felix in securing agreement of the final account at an early stage. It is unusual, to say the least, to agree a final account well before completion of the work.

33. Conversely, there was no good reason why Carillion should have wanted to agree Felix's final account before completion. Many of the claims by Felix were disputed by Carillion. Moreover, it was too early to quantify the contra-charges that it might wish to make against Felix. These factors support my finding that the threat was made, and that Carillion was induced by the threat to enter into the Settlement Agreement. Mr Burr submits that there was a benefit to Carillion in having the certainty of a deal, and in avoiding the trouble and expense of adjudication, arbitration or litigation. I can see that in some circumstances this would be so. But in the particular circumstances of this case, Carillion considered that, if these were benefits at all, they were too modest to justify paying the price that Felix was demanding. The reality is that Felix knew that Carillion was distinctly unenthusiastic about agreeing the final account at all, and would not have agreed a figure in excess of about £ 2.9M but for the threat.

34. I ought at this point to deal with a point made by Mr Burr that, whatever the position might have been at the conclusion of the meeting of 13 March, the negotiations over the drafting of the formal agreement led to the execution of a document on 17 March which did give real benefit to Carillion. Clause 7 of the Settlement Agreement provided that payments were to be made to Felix in accordance with the Schedule of Payments appended to the agreement. The Schedule gave dates for the outstanding

deliveries and matching payments, culminating in Practical Completion of the Sub-Contract Works not being later than 5th June. Mr Burr submits that, upon the true construction of the agreement, completion of a section of the Works by the specified date was a condition precedent to Felix's right to be paid the stated amount for that section. He points out (correctly) that the right to be paid under the original subcontract depended solely on the work being carried out, and not on its being carried out by a certain date. Mr Burr submits, therefore, that this change conferred a real benefit on Carillion which it did not previously enjoy. This argument fails because it is based on a false premise. There is no warrant for saying that the Settlement Agreement made the right to be paid for a section of the work dependent on that work being completed by the due date. On the face of it, a contractor's obligation to do work within a certain time (as opposed to its obligation to do the work simpliciter), and an employer's obligation to pay for that work are independent obligations. If the parties intend that the obligations should be interdependent, then that should be made clear, either by express words or by words from which such an intention may necessarily be inferred. Mr Burr has not pointed to any such words in this case. But even if the Settlement Agreement had made these two obligations interdependent, I would not have accepted Mr Burr's argument. Even on that footing, it seems to me that the benefit accruing to Carillion from the amendment would have been one arising from the detailed working out of a bargain which Carillion did not want to make, and which it would not have made but for the threat made by Felix.

35. Finally, I should say that the making of the threat was consistent with the stance adopted by Felix earlier on in relation to the subcontract documentation. As we have seen, at a meeting on 14 January, Felix said that it wanted to know what its projected final account figure would be before it was prepared to release the subcontract documentation. This was another example of the unjustified use of threats to achieve a commercial advantage. Yet another example of such behaviour occurred in relation to the dispute over the question whether the instruction in relation to the low level panels was a variation: in breach of contract, Felix refused to carry out the work until Carillion conceded the point.

Illegitimate pressure

36. The threat to withhold deliveries was a threat to commit a clear breach of contract. Felix was already in breach of its obligation to complete by 17 January 2000. There was also an express term of the subcontract (clause 11.8) that it would *"... use constantly its best endeavours to prevent delay in the progress of the Sub-Contract Works ... and to prevent any such delay, resulting in the completion of the Sub-Contract Works being delayed or further delayed ..."*

37. Nor has it been suggested that Felix genuinely (but mistakenly) believed that it was contractually entitled to withhold deliveries lending agreement of the final account. There was no contractual entitlement to insist on agreement of the final account before completion of the Subcontract Works; still less was there any contractual right to suspend deliveries until the account was agreed.

38. In any event, as Mr Sears points out, even if Felix was entitled to have its final account agreed at this stage, then it could and should have referred the matter to arbitration under the subcontract.

39. The threat was made at a time when Felix knew that there was a number of trades which were dependent on Felix completing its work, or at least completing the outstanding work at ground floor level in order to make the building watertight. Felix knew that Carillion was becoming increasingly concerned about progress. It knew that Carillion had to complete the main contract works by 5th June, and that this would not be possible unless Felix completed the cladding works. Felix must also have known that it would be impossible for Carillion to find an alternative supplier in time to meet the main contract completion date.

40. For all these reasons, in my judgment, the pressure that Felix applied to Carillion by its threat to withhold deliveries until the final account was agreed was illegitimate. There was no justification for it. Mr Burr submits that (a) there were no threats, (b) this was a normal commercial bargain in which there was benefit to both sides, and (c) if there were any threats and this was not a normal commercial bargain, Carillion nevertheless had realistic practical alternatives to entering into the agreement. I did not understand him to submit that if he is wrong as to (a) and (b), the pressure brought to bear by Felix was legitimate. I turn, therefore, to consider the final point: did Carillion have a practical alternative?

Practical choice?

41. Carillion did consider alternatives. As we have seen, it approached two other contractors to see whether they would supply the remaining units, but one was not interested and the other would not have been able to deliver for several months. The difficulty was that these units were not standard items that could be bought off the shelf. I do not understand Mr Burr to contend that Carillion failed to use reasonable diligence in exploring the possibility of alternative supplies. But he does submit that there were other avenues that ought to have been explored. In particular, he says that Carillion should have started or at least threatened to start an adjudication or proceedings for a mandatory injunction. But as I have already said, both of these were considered by Mr Craig with Mr Foster when they met on 9 March. Mr Foster thought that there would be real difficulties in obtaining a mandatory injunction for the carrying out of construction work. In my opinion, this was a reasonable view to take. There are circumstances in which a court will grant a mandatory injunction for the carrying out of construction work, but there are many cases in which the court will refuse to do so. Unless Carillion could be certain that an injunction would be granted, and granted within a few days, it was entirely reasonable to reject that option. Time was running out. It was impossible to say with any confidence that a court would have granted an injunction in a case such as this, and any proceedings, even if expedited, would have taken weeks if not months to come to court. To start such proceedings without the intention, if necessary, of seeing them through, would have been a hazardous step to take. In my view, it was not unreasonable not to take that course.

42. Adjudication was rejected on the grounds that it would take at least 6 weeks to obtain a decision. In my view, Carillion was acting reasonably in deciding that it could not afford to wait 6 weeks. Mr Burr suggests that Carillion should have given a notice of adjudication to see whether that would have brought Felix to heel. I doubt whether a mere notice, not followed up by the appointment of an adjudicator would have had any effect on Felix. But I cannot accept that Carillion acted unreasonably in failing to take that course.

43. Finally, Mr Burr suggests that Carillion ought to have followed the advice contained in the letter of Mr Wright dated 9 March. It will be recalled that he suggested that a meeting be held with Mr Felix Senior and their non-executive director. Carillion preferred to meet M Joffre, who was clearly the man with the greatest authority in Felix who was involved in the project. I regard as fanciful the suggestion that Carillion acted unreasonably in failing to meet Mr Felix Senior (who had moved on) or a non-executive director. There is not a shred of evidence that, if such a meeting had taken place, events would have taken a different turn. In short, I consider that in making these suggestions, Mr Burr is clutching at straws.

Conclusion

44. For the reasons that I have attempted to give, I am satisfied that Carillion has made out its case on economic duress, and that the Settlement Agreement of 17th March 2000 should be set aside. I should add that in its Defence, Felix alleges that Carillion lost its right to set aside the agreement on the grounds that it had affirmed it. But in his submissions before me, Mr Burr abandoned the affirmation argument. In my view, he was right to do so. It is clear that Carillion stopped performing the Settlement Agreement as soon as it ceased to be subject to the effect of the threat: ie as soon as Felix had made its final delivery.

David Sears of Counsel (instructed by Messrs Barlow Lyde and Gilbert for the Claimant).
Anthony Burr of Counsel (instructed by Messrs Landau and Landau for the Defendant).