

JUDGMENT : MR JUSTICE JACKSON: TCC. 3rd July 2006.

1. This judgment is in six parts, namely Part One – Introduction; Part Two – The Facts; Part Three – The Present Proceedings; Part Four – The Contractor's preliminary objection to this action proceeding; Part Five – The question of law; Part Six – Conclusion.

Part 1 – Introduction

2. This is an application pursuant to section 45 of the Arbitration Act 1996 to determine a question of law arising in the course of arbitral proceedings. The claimants in these proceedings, who are respondents in the arbitration, are a consortium of two house-building companies. The first claimant is Taylor Woodrow Holdings Limited, formerly Taywood Homes Limited. The second claimant is George Wimpey Southern Counties Limited, formerly Alfred McAlpine Homes Southern Limited and George Wimpey Southern Limited. These companies were the employers under the building contract with which this litigation is concerned. I shall refer to them collectively as 'the Employers'.
3. The defendant in these proceedings, who is the claimant in the arbitration, is Barnes & Elliott Limited. Barnes & Elliott Limited was the contractor under the building contract with which this litigation is concerned. I shall refer to Barnes & Elliott Limited as 'the Contractor'.
4. Messrs. Lawrence Foote & Partners, a firm of chartered quantity surveyors and project managers, acted at all relevant times as agent for the Employers. I shall refer to this firm as 'LFP'.
5. Section 45 of the Arbitration Act 1996 ('the 1996 Act') provides as follows:

"(1) Unless otherwise agreed by the parties the court may on the application of a party to arbitral proceedings (upon notice to the other parties) determine any question of law arising in the course of the proceedings which the court is satisfied substantially affects the rights of one or more of the parties. An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.

(2) An application under this section shall not be considered unless:

 - (a) it is made with the agreement of all the other parties, or*
 - (b) it is made with the permission of the tribunal and the court is satisfied*
 - (i) that the determination of the question is likely to produce substantial savings in costs, and*
 - (ii) that the application was made without delay.*

(3) The application shall identify the question of law to be determined and unless made with the agreement of all the other parties to the proceedings shall state the grounds on which it is said that the question should be decided by the court".
6. The present application falls within paragraph (a) of section 45(2), since it is made with the agreement of all parties to the arbitral proceedings.
7. After these introductory remarks it is now time to turn to the facts.

Part 2 – The facts

8. Long Grove Hospital in Epsom was a psychiatric hospital constructed in or around 1900. The design and layout was typical of psychiatric hospitals built in the late Victorian and the Edwardian era. The hospital had two main blocks which were zig zag in shape. These were the North Block and the South Block. Between the two blocks stood a medical building with a clock tower on top. Other smaller buildings stood in the grounds.
9. In or about the early 1990's Long Grove Hospital was de-commissioned and the buildings fell into disrepair. Parts of the roofs failed and there was extensive water penetration into the buildings. In these favourable conditions both wet rot and dry rot developed in the timbers.
10. By 1999 the derelict buildings of Long Grove Hospital had passed into the hands of the Employers. The Employers decided to develop the North Block and the South Block into good quality residential units with one, two and three bedrooms. They commissioned a number of investigations and reports into the state of the buildings.
11. In March 1999 Gurney Consulting Engineers provided a report on the state of the buildings. I shall refer to this report as 'the Gurney Report'. The Gurney Report noted the high moisture levels inside the buildings, the high damp meter readings, and the general adverse effects of rain water penetration. The Gurney Report recorded that the ground floor and first floor of the two blocks were suspended timber floors. The Gurney Report also noted that in each block there was a one hundred millimetre thick slab beneath the roof and above the first floor.
12. In December 1999 RTT Restoration Limited provided to the Employers a report on the effects of water ingress. I will refer to this report as 'the RTT Report'. The RTT Report included the following passage:

"As discussed over the telephone on the day following our re-inspection, which was carried out on 13th December, there is still a considerable amount of water entering the structure via defects to the temporary roof coverings.

This has resulted in saturation to at least 60% of the roofing timbers with resulting wet rot and dry rot growth affecting wall plates, valley rafters, common rafters, and roof boarding. There could also be a possible problem with corrosion to reinforcement in concrete slab. Where water has penetrated through into the first floor areas pooling has occurred on floor boarded areas providing a gradual uptake of moisture in the surrounding fabric due to recycling condensation affecting joinery timbers and built in joist ends.

The rainwater penetration has percolated through to the ground floor areas resulting in excessively high moisture readings in all walls, flooring and joinery timbers. Where areas of floor boarding had been lifted to enable a sample inspection of the sub-floor timbers it was generally noted that the moisture content to the timber within the voids together with a high relative humidity are ideal conditions to culture Dry Rot. Three additional outbreaks of Dry Rot were recorded and have occurred in the time between our initial inspection and our most recent i.e. two weeks.

The problems that need to be overcome immediately are as follows:-

1. Prevent further water ingress and remove debris and insulation from roof void.
2. Remove fungal affected timbers and all superfluous timbers.
3. Lift floor board to all areas and levels particularly around the perimeter to the room to encourage ventilation.
4. Expose all built in joist ends.
5. Provide natural light and ventilation via existing window openings to reduce the incidents of trapped vapour and assist in drying out the fabric.
6. Ideally remove plaster from walls to assist drying to the main structure.
7. Monitor buildings during the moth-balling period at least monthly".

13. In early 2000 the Employers, with the assistance of LFP, drew up a set of documents comprising the Employers' Requirements, which would be sent to tenderers. The Employers' Requirements, in their current form, are divided into 53 sections labelled ER001, ER002 and so forth. The Employers' Requirements made it clear that some demolition works and the removal of some rot infected timber would be carried out by others under a preliminary contract. However, further demolition works and further removal of rotting timber would be entrusted to the contractor carrying out the main conversion works.
14. Tender Addendum No. 3 dated 20th April 2000, which was inserted into section ER002 of the Employers' Requirements, states: "Please note that not all exposed rotten timbers will be removed under the separate contract, therefore the extent of remaining rot infected timbers should be established during the recommended additional site visit".
15. Section ER001 of the Employers' Requirements includes the following provision in respect of support for existing structures:

"Provide and maintain during the execution of the works all incidental shoring, strutting, needling and other supports as may be necessary to preserve the stability of the existing structures on the site or adjoining that may be endangered or affected by the works.

Support existing structure as necessary during cutting of new openings or replacement of structural parts.

Do not remove supports until new work is strong enough to support the existing structure".
16. Section ER001 of the Employers' Requirements also includes a Design Brief. Under the heading 'External Appearance' the Design Brief includes the following passage:

"D1.1 The Employers seeks the Contractors' Proposals which achieve uniformity and consistency of final external appearance.

D1.2 Whilst the exterior of the building requires improvement in terms of cleaning and minor repair, together with the removal of redundant fixtures, fittings and services the character of the building should be retained and enhanced wherever possible.

D1.3 Whilst the Employers wishes all discolouration and staining to brick and stone surfaces to be removed back to sound original base wherever possible the building should not be "over cleaned"...

D1.7 The Contractor is to note the need for repointing and isolated brick repair. The Employer does not require each and every damaged brick to be cut out and replaced. Where very minor damage exists it is acceptable to take no action in order that the character and ageing of the building is not unnecessarily jeopardised. Where more significant localised damage exists execute a localised repair either by rubbing back the surface of the brick or carrying out a specialist epoxy material based repair.

D1.8 Where severity of damage dictates that the bricks must be replaced carry outwork using reclaim materials wherever possible ensuring that pointing type and material matches existing sound detail. Where repointing is required avoid a patchwork appearance to completed walls/elevations as far as practical".
17. The Employers' Requirements include a number of investigation and survey reports obtained by the Employers. The RTT Report is included as Appendix E in section ER001. The Gurney Report is included in section ER041.
18. The Employers' Requirements stipulate, by means of a late addition, that the whole of the existing floor construction on the ground and first floors should be removed. The Employers' Requirements also include many plans and details for the flats due to be constructed.
19. The Employers' Requirements duly went out to tender. Some of the later parts of the Employers' Requirements were submitted in the form of Tender Addendum Letters.
20. On 1st June 2000 the Contractor submitted its tender to LFP. In its covering letter the contractor stated:

"Our proposals have been fully and carefully considered, taking into account the Employers' Requirements and the footprint of the existing buildings. We believe that our solutions offer the quality of new accommodation, whilst maintaining the character of the buildings and their surroundings.

We have made numerous visits to sites, gaining advice from specialists where appropriate, and obtaining further information via independent investigation. Our belief is that we have established a competitive tender covering all aspects of work required".

21. The Contractor's Tender Submission was divided into eight sections as follows. Section 1 was an introduction. Section 2 set out the construction team. Section 3 set out the design team. Section 4 comprised a programme and method statement. Section 5 set out the design proposals. Section 6 dealt with design co-ordination. Section 7 dealt with health and safety. Section 8 dealt with quality assurance.
22. Section 5 of the Contractor's Tender Submission includes the following passage:

"Demolition and Alterations

Carefully demolish areas of the buildings not required for the development, and place all debris within the floor voids.

Infill areas of the perimeter where demolition has taken place, matching the existing as near as possible. Facing Bricks used to be Charnwood Multi imperial bricks, similar to those being used in adjacent buildings.

Remove internal walls where not required, placing all debris within the floor void.

Allow for all temporary propping required to support the roof slab prior to installation of new steel.

Remove all existing windows and doors, adapt openings as required, and make good to receive new.

Remove all existing roof coverings.

Remove existing chimney breasts where necessary, and provide permanent support to the stacks at roof level.

Remove all existing stairs.

Remove all existing ceiling finishes, wall finishes and the like.

Remove any remaining services, fittings and fixtures, both internally and externally.

Allow for the specialist removal of asbestos in accordance with the Asbestos report provided with the tender documentation...

Roof

Allow for removal of defective roof timbers and replace with new. Our assessment of the quantity that will need to be replaced, bearing in mind the limited access to the roof, is no more than 30%. (See Clarifications)

Allow for treating all roof timbers against future rot growth and damage.

Provide new felt, battens and Spanish slates, including all hips, valleys, ridges and the like, and 100mm rockwool rollbatts, or similar.

Allow for removing all existing guttering, rainwater pipes, fascias and soffits, and replace with new UPVC. Guttering to incorporate a leaf mesh. Fascias to include vents for roof space ventilation...

External Walls

Allow for cutting out severely defective bricks and replacing with new, as described above – 30% of total elevation area. (See clarifications)

Allow for raking out and repointing mortar joints, again where severely defective – 25% of total elevation area. (See clarifications)

Prepare 2nr test panels 2.00m x 2.00m including stone and brick detailing, to illustrate level of cleaning and repair that will be offered.

Allow for fine sand blasting of the elevations to remove dirt, algae and the like, as being used on the adjacent clock tower building.

Chemically inject the existing external walls with damp proof course to the perimeter of each block.

Crete the cavity to prevent future damp growth and damage".

23. It seems to me clear, and counsel on both sides agree, that the passage in section 5 of the Tender Submission headed 'External Walls' sets out how the Contractor proposes to comply with paragraphs D1.1 to D1.8 of the Design Brief.
24. At the very end of section 5 of the Tender Submission, under the heading 'Clarifications', there are two paragraphs which read as follows:

"1. We have only allowed for structural works as specifically detailed in these proposals. Whilst we have made several visits to the site, including additional investigation works to the roof slab, and carefully inspected the documentation available, we are unable to accept responsibility should the structure not be in accordance with this information once we commence on site.

2. Our detailed inspection of the elevations has been the basis of our assessment on the repairs required. However, since we have been unable to view at high level, or cannot be certain of the cleaning effect on the brickwork, any repairs, repointing and the like required over and above the % allowed may be subject to additional cost. We would be pleased to discuss this matter with you further should our offer be of interest".

25. Despite the heading 'Clarifications', these two numbered paragraphs are in the nature of qualifications of the tender. I shall refer to numbered paragraph 1 of the Clarifications as 'TC1'. I shall refer to numbered paragraph 2 of the Clarifications as 'TC2'.
26. Following delivery of the Contractor's tender there were some exchanges of correspondence between the parties, the effect of which is critical to the present litigation. In a letter dated 13th June Mr. Robert Roodhouse of LFP wrote as follows to Mrs. Angela Phillips of the Contractor:
- "Further to your tender for the above project can you please confirm the following...*
- *Remove structural and repair percentage clarifications and take risk on the percentage replacement of roof trusses and the percentage for repairs, repointing etc.*
- Can you let me have the implications of the foregoing before Friday please".*
27. On 15th June Mrs. Phillips of the Contractor responded as follows:
- "With regard to removing our percentage clarifications for the structural and repairs, and for us to take the risk, we would request further time on this matter. You will appreciate that during the limited time available during the Tender Period we have given a considered view on the extent of works required. We would be happy to re-assess our provisions with a view to taking the risk on these elements, but require the opportunity to revisit the site and our assessments before commitment".*
28. On 19th June Mrs. Phillips of the Contractor sent a further letter to LFP containing 11 bullet points. Bullet point 6 reads as follows: *"On re-evaluation of our allowance for the repairs to the roof, we confirm that we will remove our qualification regarding the percentage of repairs allowed".*
- Bullet point 8 reads as follows: *"With regard to the repairs to the external elevations, we acknowledge your request to include a Provisional Sum for this work. We confirm our allowance and subsequently our provisional sum for this work at £180,000.00. As requested a schedule of rates is attached".*
- There was attached to this letter a Schedule of Rates relating to works to the external elevations.
29. On 19th June Mr. Roodhouse of LFP responded as follows to the Contractor:
- "Further to your faxed letter of 19th June I would make the following observations and comments...*
- *With respect to the provisional sum of £180,000.00 included for external repairs it is confirmed that sufficient scaffold has been evaluated and included within the tender to carry out works to the aforementioned valley. Please provide a Schedule of Rates for additional scaffolding/hire that may arise should additional repair works in excess of the foregoing sum be instructed. Please confirm also that the rates quoted for repair works etc. are inclusive of an addition for profit and overheads".*
30. On 20th June Mrs. Phillips of the Contractor wrote as follows to LFP:
- "Further to your fax dated 19th June in response to our letter of the same date we respond as follows...*
- *We confirm that our Tender does include sufficient scaffolding to carry out the £180,000.00 of external façade repairs/cleaning. We enclose a Schedule of Rates for additional hire of scaffolding should this sum be exceeded.*
 - *We also confirm that the rates provided for the repairs/cleaning are inclusive of overheads and profit".*
31. On 22nd June LFP sent a letter of intent and requested the Contractor to commence design work up to the value of £30,000.00.
32. On 27th June Mrs. Phillips of the Contractor wrote as follows to Mr. Martin Hawkins of LFP:
- "Following our telephone conversation, we confirm that bullet point 8 in our letter dated 19th June removes our Tender Qualification regarding the existing structure as it is now covered by the Provisional Sum of £180,000.00".*
33. On 14th July Mr. Roodhouse of LFP wrote as follows to the Contractor:
- "Further to your faxed letter of 27th June 2000 and the meeting at Taywood Homes' offices earlier this week I would confirm that the Tender Qualification regarding the existing structure (which for the avoidance of doubt is deemed to be Clarification Item 1 included towards the end of section 5 – Design Proposals within your original tender submission document) is not deemed to be removed by virtue of the inclusion of the Provisional Sum which only covers external repair works.*
- Can you please confirm that Tender Clarification Item 1 regarding the existing structure is deemed to be removed".*
34. On 14th July Mrs. Phillips of the Contractor wrote as follows to Mr. Roodhouse of LFP:
- "In response to your fax dated 14th July 2000, we confirm that we have included for all structural works necessary following alterations made to the buildings by us in order to complete the development proposed.*
- We confirm that this allowance is within our tender, and will not form part of the works covered by the Provisional Sum for external façade repairs and cleaning".*
- That concluded the series of correspondence concerning TC1 and TC2.
35. On 26th July Mrs. Phillips of the Contractor wrote as follows to LFP:

"This statement is to provide clear understanding concerning the hierarchy of information that is included within the Contract Documents relating to the Employers' Requirements and Contractor's Proposals.

Any detailed information drawing or schedule and the like included within the Contract Documents that have conflicting issues/reference elsewhere within the contract documentation must be read in a chronological order with the latest date issue/reference taking precedence".

36. Thereafter, the Contract Documents were assembled ready for signature. The Contract was in the JCT Standard Form with Contractor's Design 1998 Edition. A clip of correspondence and attachments collectively comprising the Contract Sum Analysis was attached to the contract under the reference 'CSA1'. The Employers' Requirements were annexed in 53 separate sections labelled 'ER001' to 'ER053' respectively.
37. The Contractor's Proposals were also annexed to the Contract. These were in 11 separate sections labelled 'CP001' to 'CP011' respectively. Section CP001 comprises the Contractor's Tender Submission; section CP002 comprises the correspondence between 1st June and 22nd June, which I have already mentioned; section CP003 comprises the Contractor's letter of 27th June and the exchange of letters on 14th July, all of which I have read out; section CP009 comprises the Contractor's letter dated 26th July concerning the hierarchy of contractual documents.
38. The package of contract documents was duly sent out for signature on 28th July. The Contract was signed by the Contractor on or soon after that date. It was signed by the Employers on 4th August 2000.
39. Thereafter works proceeded. The Contractor duly converted the North Block and the South Block into a total of 64 dwellings. Unfortunately, the Contractor incurred unwelcome expenditure, for which it had not made adequate allowance, in dealing with certain structural matters. In particular, the Contractor found it necessary to install additional steel work and to erect structural scaffold as buttressing for the external walls. There were timber wall plates which had to be removed from the inner part of the external walls because of the presence (or at least the risk) of rot. There was dry rot in the masonry walls which had to be dealt with. The sleeper walls contained extensive dry rot and they had to be demolished and replaced. It became necessary to construct masonry party walls in place of jumbo stud walls. There were difficulties and additional costs in forming openings in the masonry walls for doors and windows. Additional demolition works were required in respect of existing structures and surfaces of which the Contractor had been unaware.
40. The Contractor requested Change Orders pursuant to Clause 12 of the Contract Conditions in respect of all those matters. The Employers maintained that all those works fell within the scope of the Contractor's obligations and declined to issue Change Orders.
41. The Contractor resorted to arbitration in respect of these and other disputes. In all, four Notices of Arbitration had been served. In respect of the matters mentioned above and related matters, the Contractor's case is set out in its Points of Claim dated 13th April 2006. In these Points of Claim the Contractor recites many of the documents and letters mentioned earlier in this judgment. The Contractor then makes the following assertions in section D of its Points of Claim:
 - "47. *It was made clear from the conclusion to this exchange and particularly by reference to the words placed in emphasis above, that the Respondents retained the risk of those unforeseen works to be existing structure of the building which might be necessary before, or as a consequence of, the specified works of design, refurbishment and conversion could proceed. This was not a transfer of all the structural risk in the Contract but it was a transfer of risk in relation to these particular structural works. The Claimant was accepting to carry out within its price all structural works which would be a necessary component of the specified works but not structural works (or demolition or other works) which were, at that point in time, undefined and unforeseen.*
 48. *All the correspondence referred to above forms part of the contract documentation.*
 49. *At that point in time no further detailed investigations into the condition of the building had been carried out by the Respondents since the submission of the tender, and no relevant adjustment to the prices or programme allowances contained within the Claimant's tender had been made, or could reasonably have been made.*
 50. *Therefore the unforeseen structural works to the underlying fabric of the Long Grove buildings carried out prior to performing the specified contract works constitute a change in the Employers' Requirements which require evaluation under Clause 12 of the Contract".*
42. The total sum which the Contractor claims in its Points of Claim dated 13th April 2006 is £4,862,073.00 plus interest. The principal sum claimed is the difference between the amount shown as due in the Contractor's revised final account (£11,889,114.00) and the amount so far paid by the Employers (£7,027,041.00).
43. The Employers took the view that a preliminary question of law arose in the arbitration which, if decided in the Employer's favour, would dispose of most of the Contractor's claim. In order to resolve that question of law, the Employers commenced the present proceedings.

Part 3 – Present Proceedings

44. By a claim form issued in the Technology and Construction Court on 2nd May 2006 the Employers applied to the court to determine two questions of law. The claim was made pursuant to section 45 of the 1996 Act. The claim form was issued under Part 8 of the Civil Procedure Rules. The Contractor is named as defendant in the claim form. The two questions of law are formulated as follows:

- "1. Did the Employers retain the risk of unforeseen works to the existing structure of the building which might be necessary (a) before the specified works of design, refurbishment and conversion could proceed, or (b) as a consequence of the said works?
2. Did the allegedly unforeseen structural works to the underlying fabric of the buildings carried out prior to, during or after performing the specified contract works constitute a change in the Employers' Requirements which require evaluation under Clause 12 of the JCT WCD?"
45. There is a cross-reference against question 1 to paragraph 47 of the Points of Claim in the arbitration. There is a cross-reference against question 2 to paragraph 50 of the Points of Claim in the arbitration. The Employers contend in the claim form that the correct answer to both questions is "No".
46. A directions hearing took place on 18th May 2006, at which the Contractor raised two objections to these proceedings. The first objection was that it was inappropriate to proceed under Part 8 of the Civil Procedure Rules. The second objection was that the court, in the exercise of its discretion under section 45 of the 1996 Act, should not allow these proceedings to go forward. It was not practicable to deal with these contested issues in the course of a short directions hearing. It was therefore decided, with the concurrence of all parties, that the Contractor's two objections should be dealt with at the start of the trial. The trial of this action was fixed for 27th and 28th June.
47. The evidence which has been filed on behalf of the Employers comprises the contract between the parties and the Contractor's Points of Claim dated 13th April 2006. The evidence which has been filed on behalf of the Contractor is a witness statement of Mr. Neil Page plus exhibits. Mr. Page is employed by Bluestone PLC (which has taken over the business of Barnes & Elliott Limited) as a senior surveyor and commercial manager. Mr. Page has been involved with the Long Grove project since 2001, and in particular has been concerned with preparing the Contractor's final account. Mr. Page gives much helpful evidence concerning the factual background.
48. It emerged shortly before the trial that none of the factual evidence is in dispute. Accordingly, and very sensibly, the Contractor abandoned its contention that the procedure under Part 8 of the Civil Procedure Rules is inappropriate.
49. The trial of this action took place on Tuesday 27th June and Wednesday 28th June. Mr. Martin Bowdery QC and Ms. Serena Cheng appeared for the Employers; Mr. Richard Fernyhough QC and Ms. Elizabeth Repper appeared for the Contractor.
50. At the start of the trial I heard argument on the question whether these proceedings under section 45 of the 1996 Act should continue. I ruled that the proceedings should continue. I gave brief reasons for this decision in my ruling and said that I would give fuller reasons in the final judgment.
51. Thereafter, argument proceeded on the two questions of law. It emerged in the course of argument that neither party wished this court to answer question 2. Therefore, only question 1 remains a live issue. In the course of argument Mr. Bowdery accepted that the simple answer "No", for which the Employers contend in their Claim Form, cannot suffice. On day two of the hearing Mr. Bowdery re-formulated his proposed answer to question 1 as follows: "No, save for those works to the external façade which are the subject of the provisional sum of £180,000.00". Mr. Fernyhough contends that the correct answer to question 1 is "Yes".
52. In the result, therefore, there are two matters to be dealt with in this judgment. First, the Contractor's preliminary objection to this action proceeding and, secondly, the one surviving question of law. I shall deal with matters in that order.

Part 4 – The Contractor's preliminary objection to this action proceeding

53. Article 6(A) of the contract between the parties provides that any dispute shall be referred to arbitration in accordance with Clause 39B of the Contract Conditions. Clause 39B.4 of the Contract Conditions provides:
- "The Parties hereby agree pursuant to S.45(2)(a) and S.69(2)(a) of the Arbitration Act 1996 that either party may (upon notice to the other party and to the arbitrator):*
- 39B.4.1. apply to the court to determine any question of law arising in the course of this reference, and*
- 39B.4.2 appeal to the courts on any question arising out of an award made in an arbitration under this arbitration agreement".*
54. Let me now consider whether the various threshold conditions set out in section 45 of the 1996 Act are satisfied. First of all, the surviving question of law, as formulated in the Claim Form, undoubtedly arises out of the arbitral proceedings between the Contractor and the Employers. Secondly, that question of law substantially affects the rights of the parties. During the course of the trial there was some debate between counsel as to how much money turned upon the answer to this question. For present purposes it is not necessary to embark upon any detailed quantification exercise. Suffice it to say that more than half of the Contractor's pleaded claim turns upon the answer to this question of law. Thirdly, the agreement of all parties to the proceedings, as required by section 45(2)(a) of the 1996 Act, has been duly recorded in Clause 39B.4 of the Contract Conditions. It therefore follows that the threshold conditions set out in section 45 of the 1996 Act are satisfied.
55. The next question to consider is whether the court has a discretion in the matter, or whether it is bound to determine any question of law posed once the threshold conditions have been satisfied. Mr. Fernyhough submits that the court does have a discretion in this regard. Mr. Bowdery submits that there is no discretion in this regard.

Mr. Bowdery submits that in view of the parties' agreement, recorded in clause 39B.4 of the Contract Conditions, this court is bound to determine the question of law which has been posed.

56. On this issue I prefer and accept the submissions of Mr. Fernyhough. The use of the word 'may' in the first line of section 45 is a clear indication that the court has a discretion. Further guidance is to be obtained from the Court of Appeal's decision in *Babanaft International Co. SA v Avant Petroleum Inc.* [1982] 1 WLR 871. *Babanaft* concerned an application to the High Court to determine a question of law arising in the course of a reference pursuant to section 2 of the Arbitration Act 1979. At page 882 Donaldson LJ said this:

"The judge has to consider the application on its inherent merits. If he is not satisfied that the question of law proposed for determination ought to be determined at that stage he should refuse the application..."

Section 2 is the successor in title to the old consultative case which more aptly describes its nature. Put colloquially the arbitrator or the parties nip down the road to pick the brains of one of Her Majesty's judges and, thus enlightened, resume the arbitration. It is essentially a speedy procedure designed to interrupt the arbitration to the minimum possible extent and it is an exception to the general rule that the courts do not intervene in the course of an arbitration".

Although much has changed in the law of arbitration since *Babanaft* was decided, in my view the passage just quoted from the judgment of Donaldson LJ is apposite to section 45 of the Arbitration Act 1996.

57. The next question to consider, therefore, is how I should exercise my discretion in this case. Mr. Fernyhough urges me not to entertain the present claim essentially on three grounds. First, the determination of this question is more appropriate for the arbitrator. He is a very experienced construction law arbitrator, well versed in these proceedings, and he is also the parties' chosen tribunal. Secondly, the proposed question of law is entangled with the facts, which are somewhat complicated. It is better decided by the arbitrator who will hear all the evidence. Thirdly, these proceedings will not achieve any saving in costs. The main arbitration hearing will still have to go ahead in November and December 2006 in any event.
58. Although these arguments were forcefully developed, I am not persuaded by them. So far as the first ground is concerned, I readily accept that the arbitrator in this case, Mr. E. J. Mouzer, is an experienced construction arbitrator. He is indeed the parties' chosen tribunal. Nevertheless, the parties have also agreed that any question of law arising may, at the option of either party, be referred to this court. In other words, this court is the parties' chosen tribunal for such questions of law. Party autonomy is one of the founding principles of modern arbitration law. See the DAC Report and see also section 1(b) of the 1996 Act. Accordingly, in the present case I should give great weight to the parties' agreement that either may refer a question of law arising to this court, even though that agreement is not binding upon me.
59. It is quite true, as Mr. Fernyhough observes, that the proposed question of law is based upon a series of letters, which the arbitrator is well able to interpret. No question of general importance or general principle is involved. Nevertheless, the parties have agreed that any question of law, whether wide ranging or one off, may be referred to this court. I am pre-disposed to respect the parties' agreement, unless the circumstances of this case make it inappropriate to do so.
60. Let me now turn to Mr. Fernyhough's second ground. I quite accept that in order to interpret the contractual provisions and the contractual correspondence, the court needs to understand the relevant factual background. On the other hand, both parties have put before the court all of the factual evidence which they regard as relevant and none of that factual evidence is disputed. The evidence before the court, in particular the witness statement of Mr. Page and its exhibits, is particularly helpful in explaining the factual background. In my view, this court, with the benefit of that evidence, and with the assistance of counsel, is in just as good a position as the arbitrator to interpret the contractual provisions and the contractual correspondence. Whereas the arbitrator is the parties' chosen tribunal for all questions of fact, this court is the parties' chosen tribunal for any question of law arising.
61. Let me now turn to Mr. Fernyhough's third ground. The question of law which has been identified goes to the heart of the dispute between the parties. If the Employers are correct in their interpretation of the Contract, this will mean that the majority of the Contractor's claim (as presently pleaded) cannot succeed. It seems to me highly desirable to establish what is the legal basis of the Contractor's claim, before the parties spend substantial sums of money on marshalling and presenting both factual and expert evidence on the individual heads of claim. In my view, it is cost-effective from the point of view of both parties to resolve the question of law now, and this course is likely to lead to a saving of costs. It should also be noted that the 'cost saving' test only applies to cases which fall under paragraph (b) of section 45(2) of the 1996 Act. This case falls under paragraph (a) and not paragraph (b).
62. Let me now draw the threads together. For the reasons set out above, I am quite satisfied that this is a proper case for the court to exercise its discretion in favour of determining a question of law arising in the course of arbitral proceedings. The Contractor's preliminary objection to these proceedings is dismissed.

Part 5 - The Question of Law

63. The starting point for any consideration of this question must be the provisions of the JCT Standard Form Building Contract, with Contractor's Design, 1998 Edition. Article 1 of the Contract provides: "Upon and subject to the Conditions, and where so stated in Appendix 1, upon and subject to the Supplementary Provisions issued

February 1998 which modify the aforesaid conditions, the Contractor will, for the consideration mentioned in article 2, both complete the design for the Works and carry out and complete the construction of the Works".

64. Clause 2 of the Contract Conditions is headed "Contractor's Obligations" and includes the following provisions:
- "2.1 The Contractor shall upon and subject to the Conditions carry out and complete the Works referred to in the Employer's Requirements, the Contractor's Proposals (to which the Contract Sum Analysis is annexed), the Articles of Agreement, these Conditions and the Appendices in accordance with the aforementioned documents, and for that purpose shall complete the design of the Works including the selection of any specifications for any kinds and standards of the materials and goods and workmanship to be used in the construction of the Works so far as not described or stated in the Employer's Requirements or the Contractor's Proposals...
- 2.5.1 Insofar as the design of the Works is comprised in the Contractor's Proposals and in what the Contractor is to complete under clause 2 and in accordance with the Employer's Requirements and the Conditions (including any further design which the Contractor is required to carry out as a result of a change in the Employer's Requirements), the Contractor shall have in respect of any defect or insufficiency in such design the like liability to the Employer, whether under the statute or otherwise, as would an architect or, as the case may be, other appropriate professional designer holding himself out as competent to take on work for such design who, acting independently under a separate contract with the Employer, had supplied such design for or in connection with works to be carried out and completed by a building contractor not being the supplier of the design.
- 2.5.2 Where and to the extent that this Contract involves the Contractor in taking on work for or in connection with the provisions of a dwelling or dwellings the reference in clause 2.5.1 to the Contractor's liability includes liability under the Defective Premises Act 1972..."
65. The works which are referred to in Article 1 and Clause 2.1 are defined as follows in clause 1.3 of the Contract Conditions: "The works briefly described in the First Recital and referred to in the Employer's Requirements and the Contractor's Proposals and including any changes made to those works in accordance with this Contract".
66. The First Recital, which is referred to in clause 1.3, provides the following brief description of the works: "The design, refurbishment, conversion and hand over to Toywood Sales Department of Long Grove North and South Buildings to achieve 64 dwellings together with associated site works and services at Long Grove, Horton Lane, Epsom".
67. It can be seen from the above provisions that the Contractor was under an obligation to complete the design and then to build in accordance with that completed design, so that at the end of the day the Contractor handed over 64 dwellings which accorded with the Employers' Requirements and the Contractor's Proposals. Let me disregard for one moment TC1, TC2, and any correspondence which may have cut down the Contractor's Obligations. Under the primary contractual provisions the Contractor was obliged to do all necessary works to the structure of the building (whether foreseen or unforeseen) in order to carry out and complete the works as defined in clause 1.3. Thus, by reference to the primary contractual provisions the answer to the question of law posed must be "No". Indeed, Mr. Fernyhough accepts that this is the case. (See paragraph 23 (b) of his skeleton argument).
68. It therefore becomes necessary to examine TC1, TC2 and the correspondence between the parties, in order to see whether and to what extent the Contractor's obligations were modified. That correspondence has been identified in Part 2 above, and I have read out the relevant extracts. That correspondence became incorporated into the Contract as sections CP002, CP003 and CP009 of the Contractor's Proposals. I shall now examine that correspondence in chronological order.
69. The effect of TC1 and TC2 (submitted with the Contractor's tender letter dated 1st June 2000) would have been to cut down the Contractor's primary obligations and to entitle the Contractor to be paid for unforeseen works to the structure and the external elevations.
70. In their letter to the Contractor dated 13th June 2000, LFP raised a number of points concerning the tender. In the final bullet point LFP requested the Contractor to remove both TC1 and TC2. The Contractor replied to this letter on 15th June stating that it needed more time to consider the request and also an opportunity to revisit the site.
71. On 19th June the Contractor wrote again to LFP. In bullet point 6 the Contractor agreed to remove TC1 in relation to the roof. In bullet point 8 the Contractor stated that there would be a provisional sum of £180,000.00 in relation to works to the external elevations. This device of the provisional sum was clearly intended to be in substitution for TC2.
72. In their letter dated 19th June LFP raised certain queries concerning the provisional sum of £180,000.00. The Contractor answered these queries to LFP's satisfaction by its letter dated 20th June. There then followed LFP's Letter of Intent dated 22nd June.
73. On 27th June the contractor sent a letter which is not easy to understand. Mr. Bowdery submits that the phrase "our tender qualification" in line two of the letter is a reference to both TC1 and TC2. Mr. Fernyhough submits that the phrase refers only to TC2. In my view, Mr. Fernyhough's interpretation is correct. When this letter is read in the context of the earlier letters, it is clear that the reference to "the existing structure" is a slip. The writer must have been intending to refer only to the external elevations and not to the existing structure as a whole. By this date both parties knew that the provisional sum of £180,000.00 related only to the external elevations.

74. Then one comes to the crucial exchange of letters on 14th July 2000. LFP in their letter of that date specifically ask the Contractor to confirm that TC1 was removed. The Contractor's reply was sent later on the same day. The correct interpretation of the Contractor's letter of 14th July has been the subject of extensive argument. Mr. Bowdery submits that the Contractor's letter constitutes confirmation that TC1 has been removed. Mr. Fernyhough urges the opposite interpretation. Mr. Fernyhough submits that the Contractor was only accepting responsibility for those structural works which were required as part of the alterations made to the buildings (as shown in the contract documents) or which were necessary in order to allow those alterations to be carried out. (See Paragraph 33 of Mr. Fernyhough's skeleton argument).
75. In relation to this crucial issue I have read and re-read the correspondence between the parties. I have also read and re-read counsel's skeleton arguments and my notes of counsel's oral submissions. Having done this exercise, I am quite satisfied that Mr. Bowdery's interpretation is correct. The Contractor's letter dated 14th July 2000 constitutes confirmation that TC1 has been removed. I reach this conclusion for four reasons.
- (1) This seems to me to be the natural and obvious interpretation of the letter in the context of the surrounding correspondence.
 - (2) The phrase "all structural works necessary following alterations made to the buildings by us in order to complete the development proposed" must embrace all structural works necessary in order to achieve a completed development. It cannot be limited to some only of the structural works which were necessary, as suggested by Mr. Fernyhough.
 - (3) The whole tenor of the Contractor's letter suggests that the Contractor is agreeing with LFP's letter dated 14th July. There is no suggestion that the Contractor is putting forward a new and restrictive counter-proposal.
 - (4) The second sentence of the Contractor's letter reinforces the first sentence. The second sentence makes it clear that the provisional sum of £180,000.00 relates only to works to the external façade (i.e. what was formerly the subject matter of TC2).
76. The final letter which I should refer to is the Contractor's letter dated 26th July. This confirms that in the event of conflict amongst the contractual documents, those which are later in time prevail. Thus, it can be seen that in the series of letters running from 1st June to 14th July (all of which are bound into the Contract) the Contractor's letter dated 14th July, being last in the series, prevails over the earlier letters.
77. Let me now draw the threads together. For the reasons set out above, I am quite satisfied that the effect of the contractual correspondence was twofold. First, TC1 was removed altogether. Secondly, there was substituted for TC2 a provisional sum of £180,000.00 in respect of works to the external façade of the building. Accordingly, the correct answer to the question of law is that proposed by Mr. Bowdery on Day 2 of the trial. That answer is as follows: "No, save for those works to the external façade which are the subject of the provisional sum of £180,000.00".

Part 6 – Conclusion

78. For the reasons set out in Part 4 above, this court, pursuant to section 45 of the 1996 Act, will determine the answer to the following question of law arising in the course of arbitral proceedings: "Did the Employers retain the risk of unforeseen works to the existing structure of the building which might be necessary (a) before the specified works of design, refurbishment, and conversion could proceed or (b) as a consequence of the said works?"
79. I note that the Arbitrator has set a timetable for the arbitration which dovetails in nicely with the proceedings before this court. I thank the Arbitrator for so doing.
80. For the reasons set out in Part 5 above, this court determines that the answer to the question of law identified is as follows: "No, save for those works to the external façade which are the subject of the provisional sum of £180,000.00".
81. Finally, I express my thanks to the solicitors and counsel on both sides for the efficient conduct of this litigation and the clear presentation of the evidence and arguments. As a result of the endeavours of the lawyers on both sides, this action has progressed from commencement to a two day trial and then to judgment, all within the space of two months.

MR MARTIN BOWDERY QC and MISS SERENA MISS CHENG (instructed by Eversheds LLP) appeared for the Claimants
MR RICHARD FERNYHOUGH QC and MISS ELIZABETH REPPER (instructed by Fenwick Elliott LLP) appeared for the Defendant