JUDGMENT : MR. RECORDER COLIN REESE Q.C. (Sitting as a Deputy Judge, TCC) 17th August 2000

Introduction

1. The issue before the court is, as Lloyd LJ said at the outset of his judgment in ***Pagnan SpA v Feed Products Ltd*** [1987] 2 Lloyd's Rep 601, 615, "*the perennial question whether the parties reached a concluded contract*".

2. The claimant, Birse Construction Limited ("Birse"). carried out certain work required by the defendant, St David Limited ("St David"), for the construction of luxury apartments at Adventurers' Quay, Cardiff Bay. By a Writ issued on 8 September 1998 and a Statement of Claim served on 12 October 1998 Birse seeks to recover payment for the work upon a Quantum Meruit. Birse contends that by 11 August 1998 – the date upon which it left site – it had executed works to the value of and/or for which a fair commercial price was £6,759,608.21. St David had paid £5,745,518.65 in respect of the works, leaving an outstanding balance of £1,014,089.56 which is the sum claimed in these proceedings. Birse accepts that there were extensive negotiations with St David with a view to making a contract, but it contends that no contract was made prior to its leaving site in August 1998.

3. St David takes a different view. It contends that a contract, incorporating JCT Conditions (*Private Without Quantities*, 1980 Edition) and containing an arbitration clause, was made. On 21 October 1998 St David issued an Arbitration Application seeking a stay of these proceedings pursuant to s 9 of the Arbitration Act 1996 (*"the 1996 Act*").

4. In the arbitration application St David stated that the arbitration agreement was: ". . . *made and/or confirmed*
(a) on 2 July 1997; alternatively
(b) by the conduct of [Birse] after 2 July 1997; alternatively
(c) on 18 July 1997
but in any event thereby having agreed to refer to arbitration any dispute or difference as to the construction of the Contract or any matter or thing of whatsoever nature arising thereunder or in connection therewith."

5. The arbitration application came before His Honour Judge Humphrey Lloyd QC in February 1999. He considered/accepted the affidavit evidence which had been filed and the contemporary documents which various of the deponents had exhibited. In particular, he accepted all the evidence given by Mr R Brennan, one of the Special Project Managers of the group of companies which includes St David. Judge Lloyd concluded that St David was right in its contention that a contract which incorporated standard JCT Forms and Conditions (including art 5 and Clause 41 which contained an arbitration agreement) had been concluded.

6. Birse applied to the Court of Appeal for permission to appeal. This was given by Clarke LJ. The matter came before the Court of Appeal, Pill, Aldous and Ward LJJ in November 1999. The majority (Pill and Aldous LJJ) were persuaded that the affidavit evidence disclosed a triable issue which could not be resolved without a trial at which the deponents could be cross-examined. The order made by Judge Lloyd was set aside and the matter was: "*remitted generally to the Technology and Construction Court without any directions of [the Court of Appeal] as to who would hear the case, the manner in which the case should be conducted or which issues should be dealt with.*"

7. The Court of Appeal ordered that all costs up to that date should be costs in the application.

8. On 4 February 2000 his Honour Judge Hicks QC ordered the trial of the following issue: ". . . *whether the parties had by 31st August 1997 entered into a contract for building work as alleged by [St David], it being accepted by [Birse] that if there was such a contract it included an agreement to refer disputes to arbitration.*"

9. He fixed the trial for the week beginning 22 May 2000. He gave directions to the parties to serve "*statements*" or "*summaries*" of their cases, for disclosure of documents and for the service of further witness statements.

10. It is convenient at this point to mention three things. First it is common ground that if a contract was made between the parties in 1997 these proceedings must be stayed pursuant s 9 of the 1996 Act. Secondly, during the course of the trial I queried the relevance or appropriateness of the date 31 August 1997 as the cut-off date by which the contract had to have been made. In my view, the issue was better framed without any particular date being stated and the trial proceeded with the words "by 31 August 1997" deleted. Thirdly, it was apparent at the trial that more extensive witness evidence and considerably more contemporaneous materials were before me than had been before Judge Lloyd.

The legal principles

11. There was little if any difference between Mr Howard Palmer QC (counsel for St David) and Mr Paul Darling QC (counsel for Birse) as to the legal principles which fall to be considered and applied in cases where this "*perennial question*" arises for decision. The real differences between them concerned the proper application of the well established principles to the facts.

12. Mr Palmer referred to a number of authorities including ***Pagnan*** (supra) for the principles set out by Lloyd LJ at p 619 of the report, ***Smith v Hughes*** (1871) LR 6 QB 597 and ***G Percy Trentham Ltd v Archital Luxfer Ltd & others*** [1993] 1 Lloyd's Rep 25, 63 Build LR 44, in support of his argument that it was permissible to conclude that the terms of the contract were agreed between the parties either expressly or by the conduct of Birse in carrying out the work and that there were no essential terms which had been left unagreed. He also relied on dicta of Lord Denning MR in ***F & G Sykes (Wessex) Ltd v Fine Fare Ltd*** [1967] 1 Lloyd's Rep 53 at page 57: "*In a commercial agreement the further the parties have gone on with their contract, the more ready are the Courts to imply any reasonable terms so as to give effect to their intentions. When much has been done, the Courts will do their best not to destroy the bargain . . .*"

13. Mr Darling generally accepted those principles but he also relied on the statement of the distinguished editor of *Keating on Building Contracts* (6th Edition) p 20 where, under the heading "*Lengthy negotiations for a contract*" the following appears:

> *"It is sometimes difficulty to determine whether a concluded contract has come into existence when there have been lengthy negotiations between the parties but no formal contract has ever been signed. It is suggested that the useful approach is to ask whether the following can be answered in the affirmative:*
> *(a) in the relevant period of negotiation did the parties intend to contract?*
> *(b) at the time when they are alleged to have contracted, had they agreed with sufficient certainty upon the terms which they then regarded as being required in order that a contract should come into existence?*
> *(c) did those terms include all the terms which, even though the parties did not realise it, were in fact essential to be agreed if the contract is to be legally enforceable and commercially workable?*
> *(d) was there a sufficient indication of acceptance by the offeree of the offer as then made to comply with any stipulation in the offer itself as to the manner of acceptance?"*

14. Mr Darling submitted that in this case question (a) could not be answered in the affirmative. He also submitted that if the court was to be satisfied that a contract had come into existence there must be an acceptance of a definite offer or, if it were permissible to infer an agreement from looking at the course of negotiations as revealed by the contemporary record and other evidence, the Court had to be satisfied that at a given time the parties must be taken to have agreed all the matters which they then thought necessary to form a contract.

15. In my judgment, the most helpful statements of the general principles which need to be considered and applied in this case are to be found in the judgment of Bingham J (as he then was) and Lloyd LJ in ***Pagnan*** (supra). At pp 610-611 of the report Bingham J said this:

> *"B.* The law *. . . The Court's task is to review what the parties said and did and from that material to infer whether the parties' objective intentions as expressed to each other were to enter into a mutually binding contract. The Court is not of course concerned with what the parties may subjectively have intended. As Lord Denning MR put it in* **Storer v Manchester City Council** *[1974] 1 WLR 1403, at p 1408H:*
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> > *'In contracts you do not look into the actual intent in a man's mind. You look to see what he said and did. A contract is formed when there is, to all outward appearances, a contract. A man cannot get out of the contract by saying, 'I did not intend to contract' if by his words he has done so. His intention is to be found only in the outward expression which his letters convey. If they show a concluded contract, that is enough.'*
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> *It is furthermore clear that where exchanges between parties have continued over a period, the Court must consider all these exchanges in context and not seize upon one episode in isolation in order to conclude that a contract has been made. There will be some cases where continued negotiations after a contract has allegedly been made will lead to the inference that the parties never in truth intended to bind themselves, as in* **Hussey v Horne-Payne** *(1879) LR 4 App Cas 311 . . .*
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> *Where the parties have not reached agreement on terms which they regard as essential to a binding agreement, it naturally follows there can be no binding agreement until they do agree upon those terms: see* **Rossiter v Miller** *(1878) 3 App Cas 1124, 1151 per Lord Blackburn. But just as it is open to the parties by their words and conduct to make clear that they do not intend to be bound until certain terms are agreed, even if those terms (objectively viewed) are of relatively minor significance, the converse is also true. The parties may by their words and conduct make it clear that they do intend to be bound even though there are other terms yet to be agreed, even terms which may often or usually be agreed before a binding contract is made; see* Love and Stewart *sup., per Lord Loreburn LC at p 476. As Lord Cozens-Hardy MR in* **Perry v Suffields** *[1916] 2 Ch 187 said (at p 192) approving the head note in* **Bellamy v Debenham** *(1890) 45 Ch D 481:*
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> > *'Though, when a contract is contained in letters, the whole correspondence should be looked at, yet if once a definite offer has been made, and it has been accepted without qualification, and it appears that the letters offer and acceptance contained all the terms agreed on between the parties, the complete contract thus arrived at cannot be affected by subsequent negotiation. When once it is shown that there is a complete contract, further negotiations between the parties cannot, without the consent of both, get rid of the contract already arrived at.'*
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> *The parties are to be regarded as masters of their contractual fate. It is their intentions which matter and to which the Court must strive to give effect. In this endeavour, help is gained from the observation of Lord Denning MR in* **Port Sudan Cotton Co v Chettiar** *[1977] 2 Lloyd's Rep 5, (at p 10):*
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> > *'In considering this question, I do not much like the analysis in the text-books of enquiring whether there was offer and acceptance or a counter-offer, and so forth. I prefer to examine the whole of the documents in the case and decide from them whether the parties did reach an agreement upon all material terms in such circumstances that the proper inference is that they agreed to be bound by those terms from that time onwards. That is, I think, the result of* **Brogden v Metropolitan Railway Co** *(1877) App Cas 666 and* **Hussey v Horne-Payne** *(1874) 4 App Cas 311.'*
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> *I think, furthermore, that the Court must bear constantly in mind the subject matter with which it is dealing. The relevant principles of the law of contract are, no doubt, of universal application, but the proper inference to draw may differ widely according to the facts of the particular case. One case may concern a protracted negotiation, perhaps conducted in writing through lawyers, between parties who have had no dealings of any kind before. Another may concern a series of quick-fire exchanges between professionals, both of them practitioners of the same trade,*

both having had many previous dealings, and with a wide measure of common experience, knowledge, language and understanding between them. One could not sensibly approach these cases in the same way. Inferences which it would be appropriate to draw in one case might be quite inappropriate in another. But the Court's task remains essentially the same: to discern and give effect to the objective intention of the parties." (emphasis added)

16. At p 619 of the report Lloyd LJ said this:

"*As to the law, the principles to be derived from the authorities, some of which I have already mentioned, can be summarised as follows:*

(1) In order to determine whether a contract has been concluded in the course of correspondence, one must first look at the correspondence as a whole (see **Hussey v Horne-Payne***).*

(2) Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. That is the ordinary 'subject to contract' case.

(3) Alternatively, they may intend that the contract shall not become binding until some further term or terms have been agreed; see **Love and Stewart v Instone***, where the parties failed to agree the intended strike clause, and* **Hussey v Horne-Payne***, where Lord Selborne said, at p 323: '. . . The observation has often been made, that a contract established by letters may sometimes bind parties who, when they wrote those letters, did not imagine they were finally settling the terms of the agreement by which they were to be bound; and it appears to me that no such contract ought to be held established, even by letters which would otherwise be sufficient for the purpose, if it is clear, upon the facts, that there were other conditions of the intended contract, beyond and besides those expressed in the letters, which were still in a state of negotiation only, and without the settlement of which the parties had no idea of concluding any agreement.' [Lloyd LJ's emphasis].*

(4) Conversely, the parties may intend to be bound forthwith even though there are further terms still be agreed or some further formality to be fulfilled (see **Love and Stewart v Instone** *per Lord Loreburn at p 476).*

(5) If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty.

(6) It is sometimes said that the parties must agree on the essential terms and that it is only matters of detail which can be left over. This may be misleading, since the word 'essential' in that context is ambiguous. If by 'essential' one means a term without which the contract cannot be enforced then the statement is true; the law cannot enforce an incomplete contract. If by 'essential' one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by ***'essential'*** *one means only a term which the Court regards as important as opposed to a term which the Court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound and, if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the Judge,* ***'the masters of their contractual fate'****. Of course, the more important the term is, the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when the parties enter into so-called* ***'heads of agreement'*** *. . .*"

17. In my judgment it is the second and sixth of Lloyd LJ's principles that fall to be considered and applied in this case. This is not one of the ordinary "*subject to contract cases*", but it is necessary to consider whether, even if it could be said that all essential terms were agreed between the designated negotiators, the parties intended that they should only become contractually bound when the putative agreement had been scrutinised and approved by the directors of the respective companies and/or when documents formally recording the approved agreement had been duly signed or executed.

18. It is also necessary to consider whether the negotiators did reach agreement on all matters which were regarded by them as being essential, and whether they themselves (or others who reviewed their respective work products) wished to keep matters "*in negotiation*" whilst what were perceived to be actual or potential problems with the negotiators' agreement were considered and evaluated.

19. In my view the court must be careful to avoid making an agreement for the parties which the parties did not themselves make. It may be that in the events which have happened one or other or both parties would now be better placed if a contract had been made; it may be that viewing the matter objectively and dispassionately the court concludes that it would have been "*better*" or "*more sensible*" if the parties had made a contract before the work was started, or in the very early stages of the works and before any potentially contentious issues had arisen. However it is a fact of commercial life that often negotiations can become protracted and complications then arise because the parties' respective appreciations of what would be acceptable and/or in their best interests change over time. In my view, not only are the parties "*masters of their contractual fate*" they are also and equally "to be left to their non-contractual fate" in the event that negotiations are allowed to become protracted and they then fail to conclude a contract.

20. The dictum of Lord Denning MR in ***F & G Sykes (Wessex) Ltd v Fine Fare Ltd*** (supra) upon which Mr Palmer relied cannot be considered without regard to the context in which it came to be said. In that case there was a written agreement. It was intended to govern the commercial relationship between a supplier of poultry and a supermarket chain for five years. It contemplated the parties agreeing figures for the numbers of birds to be supplied in the second and subsequent years of the contract. The Court of Appeal rejected the argument that

there was no binding contract covering the second and subsequent years of the agreed five year term. In the event of the parties failing to reach agreement on the numbers that "*difference*" could be referred to arbitration under the Arbitration clause and the Arbitrator would decide on an appropriate (reasonable) figure. Considered in this context Lord Denning's observation is both striking and apposite. Whenever parties have made a contract the Court will generally incline to "uphold" rather than "destroy" the bargain but, to my mind, that is a very different matter from the Court making an agreement for the parties in circumstances where they have failed to carry through their negotiations to the point where they have concluded their bargain. Furthermore, in my judgment, if substantial construction works are in fact carried out by one party at the request of the other whilst contract negotiations (which are never concluded) are on-going, I can see no reason why the Courts cannot determine any disputes which might arise between the parties in respect of the works in a manner which sensibly accords with the parties' reasonable contemporaneous aspirations (objectively understood). The position may well be less clear than it might have been if a contract had been concluded, but the law of restitution is possessed of flexible principles which, I believe, would be capable of achieving substantial justice in any given case. Full account can be taken of the extent of "*agreements*" or "*accords*" in fact reached regarding work that had been/was being/or was to be carried out even if final contractual agreement was never made and proper weight can be given to the extent of identified "disagreements" and/or other factors which prevented the contract from being concluded.

21. In practical terms, in a case such as this, if no contract was concluded, the price for which or the pricing level at which the building contractor offered to carry out the works might well be thought to indicate the upper limit of the remuneration to which he could reasonably claim to be entitled. It might also be thought that the value of the builders' work/the level of the remuneration to which he is reasonably entitled should be adjusted if, by reason of tardy performance, the employer can demonstrate extra expense or some loss which would not have been incurred or suffered if the works had been completed within an objectively determined reasonable time (see the observations of Slade and Bingham LJJ in ***Crown House Engineering v Amec Projects Limited*** (1989) 48 Build LR 32, 6 Const LJ 141, 54 and 57-58 of the former report). And, if that is right, it may perhaps be proper to have regard to any proposed level of liquidated damages which had been clearly and firmly established between the parties during the course of their negotiations when considering the extent of the expense or loss which ought to be recognised.

The evidence

22. The burden of establishing the contract lies on St David. Accordingly Mr Palmer opened the issue. He applied for and was given leave to file an amended summary of St David's case (bundle 1, pp 57-61 – hereafter references given simply as 1/57-61). His principal witness was Mr R Brennan, who, as I have already said, was one of the Special Project Managers for the Group of companies which includes St David (Affidavits at 2/1-21 and Supplementary Witness Statement at 2/24-29A). Mr Brennan was the key person on the St David side who was negotiating with Birse in the spring and summer of 1997. In so far as, with the aid of the contemporary documents, he recounted the course of the negotiations I accept much of his evidence. (I should perhaps make it clear that in so far as in his Supplementary Witness Statement Mr Brennan corrected errors he had made in his earlier Affidavits – for example he had mistakenly recollected attending one meeting on 9 June 1997 when he should have recollected that the main negotiating meeting had been held on 28 May 1997 with a subsequent/subsidiary meeting taking place on 9 June 1997 – it is his evidence as corrected that I accept.) There are, however, four parts of his evidence concerning negotiations that I do not accept.

23. I have concluded that Mr Brennan was in error in recollecting that a Sectional Completion Appendix had been produced before, and was discussed at, the meeting of 28 May 1997. I prefer Mr Boak's evidence at paras 4 and 5 of his Witness Statement and conclude that the document came on the scene after 18 June 1997.

24. I do not accept Mr Brennan's evidence that after discussing the report which was drawn up on 16 May 1997 with Mr Cresswell, he was "*authorised to conclude a binding contract with Birse*" (Supplementary Witness Statement para 6-2/25-26) and that he then told Mr Goff that he "*had authority to conclude the contract*" (cross-examination 23 May 2000). I have emphasized the word "conclude" in the evidence because there is no doubt that Mr Brennan and Mr Goff were the company's chosen negotiators who had the task of agreeing between themselves contract terms and proposed contractual documentation with which each of them was content and which each would then recommend to his superiors for endorsement and, in due course, signature. However, in my judgment that was as far as it went; both gentlemen were proceeding on the basis that each of them referred back as and when he thought it necessary during the negotiations and that each would be submitting their finalised package for internal scrutiny and approval before the intended contract could be considered "*finalised and ready for signature*". In my view Mr Goff's evidence in his Witness Statement gives the right overall feel for the negotiations and, as he said in cross-examination on 24 May 2000:

"*In May and June 1997 our job was to negotiate the terms of the contract up to the point of an accord,*"

and a little later: "*Roger [Brennan] and I had an agreement but I had to get it notified to see if the company was happy with what had taken place.*"

25. I do not accept Mr Brennan's evidence that: "*all four of us shook hands and agreed to leave the meeting with the understanding that the agreement reached would form the binding contract.*" (First Affidavit para 42-2/9 when the meeting in question was wrongly dated)

And: *"it is very significant that all four of us shook hands at the end of the meeting; it was a gesture that we had agreed the terms of the contract between St David and Birse."* (Supplementary Witness Statement para 11-2/27 – after the meeting had been given the earlier date of 28 May 1997)

26. I prefer Mr Goff's evidence that no significant demonstrative hand-shaking took place (Witness Statement, para 13-2/77-78). Furthermore, although by the end of the meeting on 28 May much progress had been made with the negotiations, it is clear that matters still remained to be discussed/agreed and there was, as yet, no complete accord between the negotiators.

27. Lastly, I do not accept Mr Brennan's evidence at paras 48 and 49 of his First Affidavit that he prepared and submitted to Birse *"two sets of contract documents for execution/signature"* on some date in the first half of July 1997 but after 2 July 1997. This is evidence which I do not simply *"not accept"*. It is evidence that I positively reject. My reasons for rejecting it (which I detail in the course of my factual findings) are linked with my acceptance of certain evidence given by Mr Boak to which I shall now turn.

28. In addition to those four parts of Mr Brennan's evidence concerning negotiations that I do not accept, I reject his evidence that he did not have the conversation with Mr Boak, which Mr Boak recounts at para 8 of his witness statement (2/82). Having seen and heard them both on this issue, unhesitatingly I prefer Mr Boak's evidence. Mr Brennan did tell him:

"to hold on to the contract [documents which had been handed over about a week earlier] and not to take [the matter] any further for the moment."

Mr Brennan told him:

"there was some internal criticism of the contract arrangements within St David and that Birse should not sign [the documents] and send them back for the time being."

29. The fact that such an instruction or request was given provides a logical reason why there was no activity of the sort that would otherwise be expected for some months (viz no chasing for return of signed documents) and a logical reason why there are further minuted discussions of the proposed contractual obligations on 31 October 1997 (4/372-375) and 14 November 1997 (4/398-400).

30. Mr Palmer's other witnesses were Mr EJ Cresswell, St David's Chief Executive (Witness Statement at 2/40-42A). Mr D Daniel, the Project Surveyor (Affidavit at 2/22-23 and Supplementary Witness Statement at 2/30-34A), and Mr PK Hurst, St David's project manager (Witness Statement at 2/35-39A). If the comments, whether opinions or impressions, are set aside and ignored, I found the factual evidence of each of these witnesses acceptable. Much of it constitutes helpful background or inessential detail and I see no need to refer specifically to much of it. One disputed matter which deserves a specific finding appears in para 10 of Mr Hurst's Witness Statement (2/38). This concerns what was said about programme C1289 Revision 6 at the meeting of 17 July 1997. I accept Mr Hurst's evidence, preferring it to that of Mr Cooper at para 15 of his Affidavit (2/46-47).

31. Turning to the witnesses called by Mr Darling on behalf of Birse, his principal witness was Mr VA Goff, Birse's Managing Quantity Surveyor and Area Business Leader. (Witness Statement at 2/74-78). Mr Goff was the negotiator for Birse until the beginning of July 1997 when he handed the job over to Mr Johnson (see below). He had left Birse's employment before the litigation began and, for personal reasons he had not wished to give affidavit evidence when the application was first being prepared. He said, in oral evidence, that after the first hearing he had read an article in the Construction press which he thought indicated some "wrong things" and he had then been prepared to give a Witness Statement. I accept his evidence. In supplementary oral evidence on 24 May 1997 he corrected para 11 of his Witness Statement in the light of the further information which Mr Boak had obtained as to the date on which the Sectional Completion Document was obtained. In commenting on Mr Brennan's evidence I have also dealt with Mr Goff's evidence.

32. Mr Darling's other main witness was Mr AJ Boak, Birse's Project Quantity Surveyor (witness statement at 2/80-82). Like Mr Goff, Mr Boak had left Birse's employment before the litigation began. He did not give affidavit evidence when the application was first being prepared but he was not questioned on this or the reason or reasons for his being willing to give his Witness Statement in April 2000. He made corrections to his Witness Statement in supplementary oral evidence and I accept his evidence. Again in commenting on Mr Brennan's evidence, I have also dealt with Mr Boak's evidence.

33. The other witnesses called by Mr Darling were Mr P Johnson, Mr Goff's successor from July 1997 onwards (Affidavit at 2/52-59), Mr CM Cooper, Birse's Project Manager (Affidavit at 2/43-50) and Mr RA Heath, Regional Manager of Birse's south-west region (Affidavit at 2/60-69 and Supplementary Witness Statement at 2/70-72). In common with the last three of the St David witnesses, if the comments, whether opinions or impressions, are set aside and ignored, I found the factual evidence of each of these witnesses generally acceptable. I have already mentioned that the one specific factual matter in Mr Cooper's evidence which I do not accept, preferring instead Mr Hurst's factual evidence. Here again much of the factual evidence constitutes helpful background or inessential detail, but I should perhaps also note that Mr Heath includes certain linking commentary when dealing with the contemporaneous documents, and he demonstrates the development of Birse's thinking when, in the Spring of 1998, things had not turned out as well as the parties had hoped they would in the summer of 1997, and when thought was being given to "interpreting" the events which had happened during the previous year.

The facts

34. Having set out my views on the witnesses whose evidence I have read and heard, I come to set out my factual findings. I should make it plain at the outset that in my judgment the contemporary documents objectively read very largely show what happened. Some linking narrative from those who were involved at the time has aided understanding, but the comments made by individual witnesses, each of whom was reviewing events and reviewing the documents in the light of a clear (or apparently clear) understanding of the parties' respective positions in relation to the preliminary issues seemed to me (a) to balance each other out and (b) to be of no assistance. To give just two examples:

    (1) It is right to say, as Mr Cresswell said at para 4 of his Witness Statement (2/41) and as Mr Heath accepted when cross-examined on 25 May 2000, that Birse did not expressly deny the existence of a contract until June 1998. And it is right to say that interim payments appear to have been dealt with from July 1997 onwards in the manner envisaged by the amended clause 30 which was one of the matters agreed by Mr Brennan and Mr Goff during the May and June meetings. Accordingly, it can be said that Birse acted consistently with there being a concluded contract in place. However, the adoption of the payment regime is equally consistent with ongoing negotiations with both parties envisaging that a contract containing the amended clause 30 would shortly be agreed. And, the fact that the contract alleged by St David was not denied by Birse before June 1998 is equally explicable on the basis that there was no need for Birse positively to "nail its colours to the mast" before then and that, in the context of delicate ongoing commercial discussions, it might well have been thought undesirable so to do.

    (2) It may also be right to say, as Mr Heath said at para 19 of his Affidavit (2/65) that Birse acted as it did because that was the appropriate way in which to behave: "*. . . within the partnering arrangement without continuing to try . . . to finalise a contract . . . had [Birse] believed that [a JCT contract was in place] we would, by this time, have been making applications for extension of time in respect of late information and design changes . . . and we would also have been making claims for loss and expense under clause 26 for similar reasons.*"

35. Accordingly it can be said that Birse acted consistently with there being no concluded contract in place and with their not wishing to take up a contractual (but potentially confrontational stance) in advance of knowing that St David was bound to proposed contract terms. However, the lack of claims notification is equally consistent with a realisation that Birse's own performance was not all that it might have been and with a commercial decision not to appear to be "claims conscious" in the early months of a contract where there was a potential for further work phases to be added by way of variation instructions.

36. With that said by way of introduction, I turn to the facts themselves. I think it convenient to begin with the letter of intent dated 11 April 1997 (3/11) which Mr Brennan sent to Birse. So far as material it said:

    "*. . . I look forward to meeting you on Friday 18th April . . . to discuss forms of contract and preliminary arrangements.*

    In the meantime please accept this notification as a letter of intent to employ your services under a partnership arrangement for the construction of the [Adventurer's Quay] development."

37. The reference to what was called a "*partnership arrangement*" with Birse needs a little explanation. What was intended was later described in Mr Brennan's report of 16 May 1997 and a convenient general summary of the scheme was given in a memorandum circulated for information.

    "*Partnering form of contract for Adventurers Quay*

    Shall be based on a 2 year programme for the construction of phases 1a, 1b, 2a, 2b and 3 inclusive of the shell and core works to each building plus all utilities up to the point of entry into the buildings and all associated external hard landscaping works.

    There shall be the facility to terminate the contract at the end of phase 1 if so required by St David and the costs of the preliminaries known prior to entering into the contract. A predetermined date shall be set for this purpose at which time the termination shall have no added costs other than those known at the point of contract. It should be noted that to develop up to and including phase 3 is far more cost effective than stopping at the end of phase 1b.

    The form of contract shall be based on a JCT 80 with amendments to suit the partnering agreement which shall be entered into.

    The budgets for each package on each phase shall be set prior to tendering procedures taking place.

    The tender documents shall be jointly prepared by St David and Birse Construction. Between 3 and 5 subcontractors shall be jointly chosen.

    The contract shall be entered into stipulating the start of the construction works, the duration of the contract works and milestone achievement dates for fit-out access and watertight dates.

    There will in affect [sic] be a series of subcontract packages entered into by Birse and St David. The costs to be paid for each subcontract shall be agreed prior to any orders being placed by Birse Construction, and St David's contract with Birse shall include the following:

    Budget allowed by St David = subcontract cost

    + Birse prelims

    + Birse OHAP

The opportunity to review returned subcontract tenders by St David Management and Directors to ensure compliance with the budget is available prior to placing any of the orders for construction to commence.

When costs are agreed between Birse and St David for a subcontract package then an order is issued by St David to Birse. At this point in time St David release any risks involved in managing the contract and Birse carry the risk with the following exceptions:

1. *A variation is issued changing the scope or specification of the works.*
2. *The design issued to Birse by St David's consultants is incomplete or unachievable. In the case of a variation being requird then this shall be costed and appraised by St David Management and Directors prior to awarding an instruction to proceed.*

In the event of elements of work being missed (to unable [sic] the scheme to work functionally) from the drawings and specifications then the costs to implement those works shall be shared 50:50 between St David and Birse.

Should the design be unachievable then St David should seek recourse from the consultant unless the design requires modification to enable it to work in a more efficient manner which the costs shall be shared 50:50 by St David and Birse. Variations issued to the contract shall be charged by Birse Construction nett of preliminary costs, unless the variation results in the following:

Prolongation of the overall contract period Acceleration requires additional resources Additional work required additional resources

In any event, all costs associated with a variation shall be costed prior to award and shall include any prolongation or acceleration.

Upon the subcontract package final account being mutually agreed by St David and Birse an assessment of buying gains achieved shall be carried out. A sliding scale of share gains on the following basis shall be written into the contract.

Share gain = First 2% = 50:50 ***Birse: St David***

Next 2% = 40:60 ***Birse: St David***

Next 2% = 30:70 ***Birse: St David***

To avoid interface problems between shell and core works and the fit-out trades, St David shall issue a specification of required levels of finishes to be achieved by ***Birse. St David*** *shall use this same document for fit-out package tender quotations and contract awards.*

Liquidated and ascertain damages shall be levied against Birse for non-completion of any of the scheduled dates indicated on the construction programme.

Each subcontract package shall be assessed on its own performance and poor financial performances shall not detract from any savings taken on previous or future subcontract awards. Any over costs of a subcontract package above the contract award issued to Birse by St David shall have the costs paid to the subcontractor by Birse.

Birse shall be responsible for all safety matters relating to the construction works up to the point when they are issued a completion notice in line with programmed dates for each phase of the works." (3/123A and 123B)

38. What was envisaged was a contractual relationship based upon the JCT Standard Form of Building Contract (*Without Quantities* 1980 Private Edition) but the concept of "partnering" was to be an integral part of the overall arrangements. In due course, a Charter was drawn up and signed by the parties (and others) at a "team building seminar" on 5 June 1997. The Charter reads:

"*Adventurers Quay, Cardiff Bay.*

CHARTER

To produce an exceptional quality development within the agreed time frame, at least cost, enhancing our reputations through mutual co-operation and trust.

Quality

- *To inspire, design and construct an award winning flagship development*
- *To enhance the reputation of the Team*
- *To work towards zero defects*

Time

- *To complete all aspects of the scheme within the agreed programme*

Commercial

- *To maximise profit for all parties*
- *To preserve the budget, minimise waste, promote buildability and economic design*

Relationships

- *To promote an environment of trust, integrity, honesty and openness*
- *To enrol subcontractors, suppliers and specialists into the Team ethos*
- *To promote clear and effective communication*

Safety

- *To work to the agreed safety plan*
- *To work within the safety policy of the Principal Contractor.*

General

– *To build within legal and statutory obligations*
– *To provide a bespoke service to purchasers*
– *To complete the entire project by mutual support*
– *To enhance the ethos of Partnering*
– *To build long term profitable relationships with all parties.*" (3/79)

39. Returning to the chronology, on 1 May 1997 there was a meeting (3/20-24) at which it was agreed that Birse and St David would:

"*Draw up construction programme . . . by Tuesday 6/6/97 initially. By Friday 9/5/97 a schedule of prelims shall be established for review by* [Mr Brennan]." (3/23)

40. In the meantime progress continued on site, for example piling began to be carried out. A preliminary construction programme C1289 Revision B (3/42) was duly tabled at a further meeting on 8 May 1997 (3/43-47) at which it was agreed that this should be reviewed by St David and be "*firmed up*".

41. On 12 May 1997 two meetings were held. The first was between Mr Brennan and Mr Goff and concerned the "*partnering*" arrangements. (Brennan First Affidavit – 2/5-6 and Goff Witness Statement – 2/76). Mr Goff set out "sliding scale gain share calculations" and Birse's preliminary costs as a percentage of construction costs. There was a discussion about cost. It was agreed that a JCT form of contract adapted for use with a "*gain share*" arrangement should be used. At the second meeting (3/48-49) Mr Brennan and Mr Goff were joined by Mr Lavell of St David and Mr Heath. This meeting was minuted. Its purpose was:

"*. . . to discuss financial matters . . . to enable contract particulars to be agreed. The main items of the discussion shall be:*
1) Preliminary costs.
2) Overhead costs (profit)
3) Buying gains/share of profits
4) Agreement of lowest complied bid
5) Form of contract/insurance 21-2-1
6) Other matters . . ."

42. The final paragraph of this minute reads:
"*The following was discussed as a programme of information exchange to enable a definitive financial basis to be achieved for a contract to be drawn:*
14/5/97 – Preliminary costs, programmes, contract comments, insurance clarifications;
15/5/97 – [Mr Brennan] to table information obtained from 14/5/97.
16/5/97 – Heads of terms to be established by St David for Birse comment/acceptance."

43. On 16 May 1997 Mr Brennan instructed Birse to commence construction of the visitors/sales centre on 19 May 1997 under Mr Hurst's direction. The letter made express provision for the placing of orders with trade contractors and for Birse to be reimbursed in full for costs expended with an overhead and profit percentage of 7.5%. It is common ground that the parties wished to deal with this isolated piece of work quite separately from the main work in relation to which they were negotiating contractual terms. According to Mr Daniel's evidence St David wanted to keep this part of the work separate from the main development because marketing activities came under a separate budget (2/30). It can be seen that Birse (Mr Goff) provided Mr Brennan with the draft of the letter which was sent to cover this work (3/53A-53E).

44. Mr Brennan's report on the terms of the proposed contract was prepared by him in consultation with Mr Goff at a meeting on 16 May 1997 (3/162 to 206). According to Mr Brennan, Mr Goff took a full copy of the report away for discussion with Mr Heath. According to Mr Goff he was not given copies of the pages headed "*Conclusion*" and "*Recommendation*" (3/205 and 206) which were intended for internal St David use. I do not need to resolve this particular difference in recollection for the purpose of deciding the issue but, in my view, Mr Goff's recollection is probably the more reliable on this point.

45. On 28 May 1997 a meeting took place between Mr Brennan and Mr Goff (accompanied by Mr Daniel and Mr Hurst). In his Affidavit Mr Brennan incorrectly dated the meeting as having taken place on 9 June 1997 but in his Supplementary Witness Statement he gave the correct date. Mr Brennan stated that the purpose of this meeting was to agree the contents of the Articles of Agreement and Preliminaries costs, and all other items in the report which had been issued earlier. He said that every point in the report was discussed and that it was agreed that the report would remain unaltered and be incorporated in the contract. He said that Birse proposed amendments to clause 30 at this meeting – different and elaborate financial arrangements being necessary (in place of the simple contract sum contemplated by the JCT form) to reflect/give effect to the "*partnering*" arrangement – and that he agreed to those proposals. Mr Brennan also said that he ran through each point in the Sectional Completion Supplement to the JCT form and agreed the necessary insertions. He said that he thought that the blanks were filled in by Mr Goff in manuscript and later typed in by St David. As I have already said, this is evidence that I do not accept. Consideration of the Sectional Completion Supplement post-dated 18 June 1997. Furthermore the contemporary documents clearly show ongoing consideration of the report after this meeting and after the later meeting on 9 June 1997 to which I will refer below. At this meeting considerable progress was

made in the negotiations but, quite clearly there was, at that time, no concluded accord between Mr Brennan and Mr Goff. The impression conveyed by paras 8-11 of Mr Brennan's Supplementary Witness Statement (3/26-27) is quite wrong.

46. At a design development meeting on 29 May 1997 (3/68-74) it is minuted that the overall contract period was to be 102 weeks as from 2 June 1997. Birse was to produce what was called "*contract programme*" for comment by St David prior to issue. (See para 6.3 on 3/73) On 5 June 1997 the "team building seminar" took place at which the Charter to which I have already referred was agreed and signed by the principal participants. Mr Brennan said in para 37 of his Affidavit (2/8) that he believed that the seminar: "*. . . indicated once more that all the representatives of Birse and St David regarded the conclusion of the contract as being imminent . . .*"

47. Mr Heath, who also attended the seminar, said, at para 12 of his Affidavit (2/63) that: "*I attended the Team Building Seminar on 5 June 1997. This was a most important meeting to agree a Charter, a fundamental document in a partnering arrangement. Mr Brennan states that he believed that everyone regarded [the] conclusion of the contract as being imminent. Contractual matters were not discussed in any detail at the meeting because we were dealing with the need for a fresh approach to the construction process with emphasis on co-operation rather than confrontation. I would certainly accept that by that stage all parties were optimistic that a contract would soon be concluded, but I also believed that no-one was under the impression at that stage that a contract had in fact been entered into by the parties. As a result of the meeting a Charter document was prepared and signed by all those attending . . .*"

48. There was a meeting between Mr Brennan and Mr Goff on 9 June 1997. The purpose of the meeting was to discuss programme dates. Dates were required for three stages of each of the phases in order that the proposed scheme of liquidated damages could be made workable. The stages were "*fit out access*", "*watertight*" and "*completion*". Whilst Mr Brennan and Mr Goff were together they telephoned Mr Hurst (at the site) to obtain dates upon which he (Hurst) and Mr Charlie Cooper could agree. Dates were agreed and faxed through to Mr Brennan and Mr Goff whilst they were still together (3/80). At some time that day or on the next day it became clear there was still a query on the proposed dates for phase 1B because Birse wished confirmation from Bison (the proposed pre-cast concrete works package contractor) before going firm on the dates which had been faxed through. This was discussed at a progress meeting held on 10 June 1997 (3/82-83) attended, amongst others by Mr Brennan, Mr Hurst and Mr Daniel for St David, and Mr Cooper (and two others) for Birse. The minutes record: "*contract programme to be issued following meeting with the proposed pre-cast supplier for 1B structure.*" (my emphasis)

49. The then existing draft programme was C1289 Revision 4. This was in the process of being revised at the time and it was agreed that the "*contract programme*" which was to be issued would be designated "*Rev 6*" – apparently this allowed for the possible production of an intermediate revision whilst facilitating the continuing preparation of draft contract documentation using a firmly established drawing number.

50. On 11 June 1997 Mr Brennan's secretary faxed an unproofed draft of proposed "Articles of Agreement" to Mr Goff for his perusal and comments (3/87A-87I). The manuscript notes on the documents are Mr Goff's. The documents were circulated to Mr Boak and Mr Cooper for their comments. The draft was corrected/amended. The details matter little beyond perhaps noting that Mr Brennan had incorrectly included "*revision number 5*" rather than "*revision number 6*" for the contract programme, and the "Appendix" which was included with those documents was not a Sectional Completion Appendix and was incompletely completed (3/87E-87G). A draft "contract letter" was faxed by Mr Brennan's secretary to Mr Goff on 13 June 1997 (3/96A-107). It is clear from the enclosures that Birse's comments on the unproofed draft which had been sent on 11 June 1997 had been taken on board by Mr Brennan; the contract programme was "*revision number 6*"; the Appendix had been "*tidied up*" but it was still not a Sectional Completion Appendix (3/102-104).

51. On 18 June 1997 Mr Boak went to the RIBA bookshop in Cardiff and purchased a copy of the Sectional Completion Supplement for the JCT Contract. His reason for so doing was, as explained by him at para 4 of his Witness Statement, that he had advised Mr Goff that the standard Appendix was inappropriate and that a Sectional Completion Supplement was needed (2/81). After purchasing the document he took a photocopy of the Appendix and completed it in manuscript. This is now at 3/67A-67C where it is out of chronological sequence. The completion dates stated by him do not tie up with the dates which the other documents (which had been circulated to him) appear to have fairly clearly established prior to 18 June 1997. According to Mr Boak, once he had filled the photocopy in he sent it to Mr Brennan.

52. Work continued on site during June 1997. According to the monthly report (3/108-111) piling was ongoing. Birse had completed mobilisation and were "*on programme with pile caps and ground beams to phase 1A*" (the programme being referred to was Revision 4). The meeting with Bison, the proposed pre-cast concrete works package contractor for phase 1B, which had been envisaged at the progress meeting of 10 June 1997, took place on 30 June 1997 (3/128-132).

53. On 2 July 1997 Mr Brennan prepared a letter addressed to Mr Goff. It reads:

> "*Please find attached the Articles of Agreement and Sectional Completion Supplement, to be read in conjunction with the Contract JCT 80 Private Edition without Quantities which shall form the basis of our agreement for commencing and completing the work for the above project.*
>
> *We look forward to working with yourselves on [what] will, no doubt, be a very successful contract project for all concerned.*" (emphasis added – 3/135F and 136)

54. The documents accompanying this letter included the Articles of Agreement (aptly described as "*home made*") and two completed Appendices. There was both a standard Appendix (3/140-142) and a Sectional Completion Appendix (3/157-159) included with the Sectional Completion Supplement. This had been added to the documents faxed on 13 June 1997. In a number of respects it had been completed differently to the manuscript version with Mr Boak had faxed through to Mr Brennan. The Sectional Completion Appendix said that the dates for completion of phases 1A and 1B were "*as programme number 1289 revision 6*" and for the rate of liquidated damages "see section 6 of Articles of Agreement" (3/157).

55. According to Mr Boak's witness statement (as corrected in oral supplementary evidence) he was handed a copy of the letter of 2 July 1997 with its enclosures by Mr Daniel (2/82). He said that he thought Mr Daniel only gave him one copy of the letter and enclosures, and in my judgment his recollection is probably right. There is nothing in the text of Mr Brennan's covering letter of 2 July 1997 (3/136) which suggests that more than one copy of the documents was sent at that time, or that signatures were being requested with the documents to be returned for St David to sign them thereafter. Mr Boak then goes on to say this, at para 8 of his witness statement (3/82):

"I did not deal with the [documents handed over by Mr Daniel] immediately. I think that I was waiting an opportunity to go through it with others. About a week later, before I was able to discuss it with anyone else, Roger Brennan saw me on site. He told me to hold on to the contract and not to take it any further for the moment. He said that there was some internal criticism of the contract arrangements within St David and that Birse should not sign it and send it back for the time being. I therefore took no further action with regard to it. It sat on my desk for a while and I then put it in a blue lever arch file on a shelf in my office. Nothing happened with it until I left site in December. I do not remember any pressure from Roger Brennan or anyone else to do anything further with it."

56. As I have already indicated I accept this evidence and reject Mr Brennan's denial of it. Precisely what type of signature process Mr Brennan then had in mind is not clear. Nothing which had been submitted on 2 July 1997 contained a signature page but perhaps he was expecting a straightforward reply to his letter, possibly coupled with initialled copies of the enclosed documents which would have provided the necessary signed assent in respect of those submitted documents.

57. What Mr Brennan said at paras 48 and 49 of his First Affidavit (2/9-10) was that after he had prepared and sent the letter of 2 July, together with its enclosures:

". . . I then incorporated the Appendix information supplied by Birse into the actual Appendix of two proforma JCT 80 contracts in manuscript. I inserted St David Limited as 'the Employer' and Birse Construction Limited as 'the Contractor' in the Articles. Peter Hurst was 'the Architect'. I took two further copy sets of the above documents, together with the two JCT 80 contracts which I had completed to the site for execution in July as agreed between Vince Goff and myself. I did not retain a copy of the JCT 80 contracts. Therefore, at this time, the only document not actually in place was Programme C1289 revision No: 6 which had to be prepared by Birse once Birse had gathered certain information from others and collated that information, supplier dates and the like, into the programme. The two sets of documents were then taken by Birse from site to Birse's office for execution, despite my agreement with Vince Goff that they would be executed and retained on site. My colleagues and I were not aware that Birse had removed the documents from site until further requests were made by St David for their execution.

. . . Thereafter, so far as I was aware, there was no further discussion about the contract until the end of October 1997 . . ."

58. As I have already said, I do not find this evidence credible. I accept Mr Heath's evidence at para 16 of his Affidavit (2/64) concerning the search for and the absence of any such documents. The absence of any copy of a covering letter in St David's disclosure is distinctly odd. The absence of any explanation of how Mr Brennan resolved for himself the problem of the two Appendices seems rather odd. The absence of any chasing letter when no signed contracts were returned is something else that is distinctly odd. Mr Brennan's failure to make and retain any copy of the submitted documentation also falls into the "*rather odd*" category. Furthermore, taken together the terms of the minutes of the meetings of 31 October 1997 and 14 November 1997 do not suggest that any "for execution" documentation had previously been submitted and not been returned (see below). Finally, if Mr Boak's evidence is reliable, which I believe it is, this part of Mr Brennan's evidence's is inconsistent with his having put matters on hold whilst St David considered the position. In short, this is evidence that I simply do not believe.

59. On 17 July 1997 progress meeting No 2 took place, attended once again by Mr Brennan, Mr Hurst and Mr Daniel for St David; and Mr Cooper, accompanied by Mr Emerson for Birse (3/232-235). The minutes record that the "contract programme" was issued and that the transfer slab and pre-cast superstructure programmes were confirmed. Mr Cooper is minuted as thinking that the programme was "tight but [that it] maintained access and watertight dates for fit-out". The programme referred to was Revision 6. The copy originally exhibited to Mr Brennan's Affidavit is dated 18 July but that is merely a reference to the time when that particular copy was generated. The programme was in simple bar-chart form. The key milestone dates for access, watertight and completion for both phases 1A and 1B were denoted by a lozenge. Thus for phase 1A handover/completion (activity one) was shown as 28 January 1998; watertight (activity 13) was shown as 1 December 1997; and access fit-out (activity 21) was shown as 27 October 1997. The dates for phase 1B were similarly indicated. Mr Cooper was at the meeting and received the minutes. If they had been materially inaccurate, I would have expected him to say so in 1997. I reject his evidence at para 15 of his Affidavit (2/46-47) that he said the

programme was "*too tight*", that it was very much a "*target programme*" and that he did not understand that it was being suggested that Birse should be committed to it. This programme was quite obviously the intended contract programme and all those involved, including Mr Cooper, must have well understood that at the time.

60. Thus, in my judgment, the position which had been reached by 18 July 1997 (the latest of the pleaded dates on which St David contends that the contract was made) was that the parties' negotiators had reached what might well be said to be a practical commercial accord but no completed JCT Articles of Agreement had been proffered by St David for signature by Birse and, more importantly, St David (by Mr Brennan) had informed Birse that "*the contract*" was not to be taken further for the moment because there was some internal criticism of the contract arrangements within St David. No detail of what the criticisms were was given to Mr Boak, but when one looks at the documents an obvious point which occurs to any lawyer is the inclusion of the two different Appendices and, with the benefit of knowledge of what was to happen later, it can be noted that no direct warranty documentation had been included. In any event, whatever the internal criticisms were it was open to St David to decide that it did not wish to be bound until those matters were clarified or resolved whether they were matters which others would categorise as "important" or "unimportant". In this context, in my judgment, Lloyd LJ's sixth principle is applicable.

61. Work continued on site and I have little doubt that both sides were expecting that the contractual situation would be resolved in a mutually satisfactory way within a comparatively short period of time. However, nothing further appears to have happened so far as contract discussions and/or documentation was concerned until 31 October 1997 when, at a minuted meeting, there was a discussion about "progress, programme and contractual obligations". The minutes of this meeting (4/372-375) and of the follow-up meeting on 14 November 1997 (4/398-400) were prepared by Mr Brennan. The fact that he refers to "*the contract*" rather than "*the project*" or "*the anticipated contract*" or "*the contract under negotiation*" is to my mind of little significance. The minutes of 31 October 1997 read:

"*Introduction*

This meeting was called following an items for discussion list being prepared by Birse Construction which was causing them concern over the procurement process and the standard/timing of the design. (The list referred to is reproduced at the end of the minutes). The format for the agenda of the meeting was to follow the articles of agreement as set out in the contract between St David and Birse Construction.

Section 1 Form of contract

Action

1.1 St David have had some ambiguities in the contract highlighted by their Solicitors and shall address these during the week commencing 3/11/1997.

St David

1.2 Birse were requested to review any comments that they have regarding the contract as none have been received since this issue on 2 July 1997.

BCL

1.3 The contract remains unsigned by Birse Construction.

BCL

Section 2 Programme and Scope of Works

2.1 Programme – Birse were asked to consider the durations stated on programme No 7 and to satisfy themselves that these durations are achievable given the design information known to date. The programme is not expected to be increased as far as completion dates are concerned but could be brought forward if benefits can be achieved.

BCL

2.2 Scope of Works – This has not changed since contract award.

2.3 Acceleration/Re-phasing – In accordance with programme No 7 the start date of phase 2A has been brought forward but the duration of the construction period for these blocks has been extended. Phases 2B & 3 duration's have not been altered but have been brought forward in time. Dave Daniel and Tony Boak are to review the prelims cost in association with the re-phasing during week commencing 3/11/1997.

St David/BCL

Partial access/completion dates – Due to the access date for fit out purposes being delayed, St David are willing to accept partial handover to allow trades to commence. Charlie Cooper has issued a series of dates for sectional completion of Phase 1A, Peter Hurst to qualify the specific requirements with regard to completion and location of individual plots in accordance with the mobilisation programme for the M&E contractor/screeding contractor. An agreed schedule shall be addressed on 3/11/1997.

St David/Birse

Section 3 Preliminaries

3.1 Fixed [cost] preliminaries exit within the contract for phases 1-3 inclusive.

3.2 Re-phasing costs shall be reviewed and incorporated into the instruction to proceed for phases 2 & 3.

3.3 Birse stated that not in accordance with the contract, St David are not releasing the budgets for the individual packages. Birse highlighted the advantages of releasing the budgets in that they could 1) highlight anomalies such that allowances could be re-scheduled to allow increased specification in other areas, and 2) that monies could be

reallocated and better spent once discrepancies were highlighted. RB stated that he would approach St David's Directors for possible release of budget information on a package by package basis and the exact timing of the release of this information.

St David

3.4 Level of staffing – St David asked Birse to consider the experience and the job allocation of staff that exist of site at present and satisfy themselves that they have the correct complement of staff with the correct experience working on the relevant elements for construction within this development. BCL confirmed at the meeting that they were satisfied with the allocation of staff which they have programmed but would reiterate this to St David week commencing 3/11/1997.

BCL

Section 4 Valuations and Payments

[s 4 not expanded upon or missing from Bundles]

Section 5 Variation Orders

5.1 It was agreed that variation orders shall be issued for all drawing information issues following the white card agreement and its complementary drawing/specification issue. There shall be a need to comment on the information quickly with regard to commercial and technical appraisal. It was suggested that a co-ordinator be appointed (whether already in employment on site, in a part role) to check and co-ordinate the following:

1. *Technical Design Changes*
2. *Commercial Checking of new drawing issues/specifications.*
3. *Check and maintain design flow information and chase up critical items.*
4. *Value engineer to reduce costs through better design/construction methods.*

BCL and St David shall consider who best and what capabilities are required of the person who may possibly be appointed for this role.

BCL/St David

Section 6 Design Faults

6.1 Birse highlighted at the meeting that the following scenarios are occurring which are causing them difficulties on site:

1. *Late information – individual package information is being offered for tendering/construction purposes in a piece meal fashion causing two areas of concern a) the time period between issuing a sub contract order and commencing the construction works on site is too short, and b) not enough time is allowed to evaluate the design issued.*
2. *The drawings are not always fully co-ordinated between the consultants – this means that staff allocated to production tasks on site are spending too much time querying interface details and chasing information. Birse did point out that this was not an excuse for non-achievement of quality standards on site.*

Roger Brennan agreed to re-approach the design team with BCL concerns in an attempt to ensure that design information is right first time, well co-ordinated and produced on time.

(Fundamentally dependant upon BLC/St David agreeing co-ordinators role).

St David

Section 7 Liquidated and Ascertained Damages

7.1 Fit out access present is overrun by one week. Both parties shall endeavour to wrap the costs of these damages up in an agreement to proceed with the following phases.

Section 8 Maintenance

8.1 It was highlighted that the maintenance/defects liability period of 12 months shall commence upon practical completion certificate for each phase. Completion of each phase is related to the completion of the external works of that particular phase.

8.2 St David requested that Birse achieve their zero defects policy by ensuring that no snagging items remain upon issue of the practical completion certificate for any one phase. BL stated that this was a principal aim of theirs. It was agreed that inspections would take place prior to scaffolds being dismantled or inspected as scaffolds are dismantled.

St David/BCL

Section 9 Insurances

9.1 St David have asked their Insurance Broker to review responsibilities of insurance when both BCL and St David are working on the same buildings. At present with the information known to date it is thought that both parties have adequate insurance and that responsibility has a clear definition. St David asked BCL to check with their Broker that they believe this to be the case also.

BCL

Section 10 Any Other Business

10.1 A team building seminar has been arranged for Wednesday 5 November 1997 at which the action points raised today can be raised in an attempt to form agreements by committee on the meeting date. (With the exception of the costs of the preliminary calculations yet to be done). Close of meeting.

ITEMS FOR DISCUSSION:

1) *Co-ordination of design – too many FRIs + CUIs – staff not supervising, spending too much time sorting queries + asking for missing information.*
2) *Prelim adjustment for accelerated programme.*
3) *Recovery of monies for siteworks.*
4) *Not enough time to value engineer*
5) *Buying gains non existent*
6) *Designs of buildings more complex than originally envisaged – eg PC, RC, steel etc.*
7) *Recovery of costs for putting right design errors/non-co-ordination of drawings.*
   - *Foundation brickwork A AX&J*
   - *Ducts."*

62. The minutes of 14 November 1997 read:

"Section 1 Form of contract

Action

1.1 Birse Construction shall issue a list of considerations with respect to the articles of agreement. St David shall review.

BCL

1.2 St David are reviewing the JCT standard form of contract where minor ambiguities exist. Once reviewed, it will be offered to Birse Construction for signing.

St David

1.3 There is a common aim to sign the contract prior to the Christmas break.

St David/BCL

Section 2 Programme and Scope of Works

2.1 BCL have employed a free-lance planner for the past two weeks who has now completed the external works programme. The draft external works programme was issued at the meeting.

2.2 Another planner, also free-lance, shall start work on Wednesday 19 November 1997 and after two weeks should complete the detailed programmes for all phases of the development.

2.3 This planners services are available for St David to link the fit out packages to the critical path of the shell and core works and this planner is available for one month only, commencing on the date described above. St David to review the extent of works they wish the planner to undertake.

St David

2.4 The draft initial preliminary figures have been issued by Birse to St David on 13 November 1997. These figures do not reflect the anticipated rephasing of the development. BCL offered to complete the preliminary calculations by Friday 21 November 1997.

BCL

2.5 Partial access for Phase 1A – Screeding shall commence to the first floor of Block A, AX&J on Monday 17 November 1997. Ground floor shall commence on 24 November 1997. St David requested that Birse issue access dates for each apartment by Friday 21 November 1997 so that St David can programme their fit out works accordingly.

BCL

Section 3 Staffing

3.1 Birse reiterated that they need the budget information to be able to reconcile when compliant bids fall within or outside the budgets.

3.2 Birse issued the following statement regarding personnel on site:

1. *Paul Button – he is experienced in building construction as opposed to civil engineering and shall reduce his involvement on site works to enable him to review all drawings for inspection and resolve design problems/ambiguities.*
2. *It is intended that Tony Boak, Q.S. shall leave site in two to three weeks and Sam John will take over. Sam started on 10 November 1997.*
3. *Tim Ball, Sub Agent, started on 5 November 1997. Tim's role shall be to ensure that the quality is improved in terms of the products produced on site and complement the brickwork foreman in achieving higher standards generally.*

4 Value engineering to reduce costs through better design/construction methods shall be reviewed by Charlie Cooper and Tim Ball on an ongoing basis. Ideas shall be offered through Peter Hurst in the first instance. Birse were asked to review the requests they make with regard to the potential costs involved in changing designs to accommodate construction savings.

BCL

Section 4 Variations Orders

It was agreed that Birse construction would be issued variation orders covering all information issued after a White Card is agreed. The variation orders must be commented upon with regard to 1) delays to the contract 2) disruption to the contract 3) cost implications and 4) programme implications.

Section 5 Design Faults

St David were pleased to hear that BCL recognised the need to change internal roles to cater for checking of drawing information. St David shall issue RB report on Monday 17 November 1997 recommending that all consultants review their systems for the production of drawing information.

Section 6 Liquidated and Ascertain Damages

BCL pointed out that any overrun so far on fit out access is not clearly attributable to any one factor. St David requested Birse to review any costs they felt to date or delays to date, be brought to St David's attention immediately to avoid any claim situations developing.

BCL

Section 7 Maintenance

7.1 St David shall approach OV Webb for them to carry out the snagging inspections for the works.

St David

7.2 BCL were asked to highlight snagging inspection dates on the master programme that they shall be producing over the next two weeks.

BCL

Section 8 Insurances

8.1 No detrimental comments have been received from either BCL or St David's Insurance Brokers.

Section 9 Any Other Business

9.1 None. Close of meeting."

63. I have set out those minutes in full in order that the minuted comments made in relation to "*Section I Form of Contract*" at each of these meetings can be appreciated in the context of an ongoing project with a developing potential for claims from the contractor (late information, variations and the like) and counterclaims from the employer (unsatisfactory performance, lateness, incompletion). St David did not disclose to Birse the nature or extent of the "*ambiguities in the contract*" which had been highlighted by their solicitors but it is noticeable that Birse was invited to review the documents issued to them on 2 July 1997 and to put forward any comments it had. In the context, the reference at s 1.3 of the minutes of 31 October 1997 to the contract remaining unsigned by Birse seems a little strange – perhaps Mr Brennan sought and obtained confirmation that the documents which had been submitted almost four months earlier had not, as a matter of fact, been signed by Birse. Any such action on the part of Birse might have been thought to have indicated that, contrary to St David's wish to give further consideration to the proposed contract terms, Birse had regarded the negotiations as already concluded on the basis of what St David had come to consider unsatisfactory documentation. However whatever precisely may have been meant by that minute, the position which had been reached between the parties by 14 November 1997 is clearly stated in s 1 of the second of the minutes. Each of them is said to be reviewing matters. Most importantly in the context of the issue which I have to decide, St David was reviewing the contract because, in its view unparticularised "*minor ambiguities*" existed.

64. Mr Brennan expressly confirmed in his evidence that s 1.2 of the minutes of the meeting of 14 November 1997 accurately reflected what he had said at the meeting and the sentence "once reviewed it will be offered to Birse Construction for signing" can, so it seems to me, only be read as indicating that St David had no present intention to bind itself to contractual terms as they then stood and/or to sign some already existing and finalised contract documents. St David did not wish to proceed to finalise matters until after its own review had been completed and the "minor ambiguities", whatever they might be, had been dealt with to its satisfaction. In other words, if I may be permitted still to use a latin phrase which has a well understood meaning in a legal context, on 14 November 1997 St David wished there to be a "*locus poenitentiae*". In my judgment such a wish was different from or inconsistent with a belief that there was already a binding contract which St David wished, to some extent to renegotiate.

65. After these two meetings, there was another period of apparent inactivity so far as the contract documents were concerned. According to Mr Brennan (para 65 of his First Affidavit – 2/12) Birse did not put forward any considerations with respect to the Articles of Agreement for St David to review and I see no reason to doubt this. However, having read the minutes of the two meetings, I think it fairly clear that Birse was signalling to St David that one way or another developments over the period since Revision 6 of the contract programme had been prepared needed to be addressed in a manner which each side felt it could accept. Quite obviously there were a number of alternative ways in which that could be done – a later revision of the programme could be agreed, or variation orders which dealt with the question of delays and disruption by reference to Revision 6 could be issued (see s 6 of the minutes of the meeting of 14 November 1997). St David would have had to be extremely näive not to have picked up on the signals Birse were giving and I do not think that its senior management was in any sense näive.

66. During January 1998 there were discussion concerning, and agreement was reached on the Preliminaries Costs for phases 1A, 1B, 2A and 2B (See para 3 of Mr Cresswell's Witness Statement – 2/41-42 – and 4/485 to 488). Phases 2A and 2B were then added to the scope of the work which Birse was undertaking by way of

Variation Orders – phase 2A being added on 12 January 1998 (4/453) while the discussion referred to above was still ongoing; phase 2B was added on 5 February 1998 (4/516 to 521) after the agreement on Preliminaries Costs had been reached. Both Variation Orders identified Revision 7 of the programme as the programme for the varied works. At the same time as the parties were discussing the addition of Phases 2A and 2B, the first formal written notification from St David of an intention to recover costs from Birse was sent. This came in a letter dated 19 January 1998 (4/460) which stated that the delay in handing over phase 1A had seriously compromised the fit-out programme. In order to reduce delay measures to achieve a rapid drying out of the building were to be undertaken. St David said that such measures would have been unnecessary "had the watertight dates remained as the contract programme" and it therefore intended to recover these costs from Birse. Birse (Mr Cooper) responded on 26 January 1998, saying:

"Dear Peter

Adventurers Quay, Cardiff

Drying out – Phase 1A

We refer to your letter of 19 January 1998 regarding the above, and feel disappointed that you have resorted to written correspondence without first communicating your intentions verbally to either our site or management team. Furthermore we consider your actions to be out with the spirit and charter of the contract.

Whilst we do not intend to enter into protracted argument on this matter we would point out that your letter implies that all of the delays undoubtedly suffered on Phase 1A are solely attributable to ourselves. To this we strongly disagree.

We would further contend that this building has become wet as an inevitable consequence of carrying out the works during the winter months, not withstanding the delays, and measures to employ drying out methods would have been necessary in any event.

On a final note our understanding of the JCT 80 Conditions of Contract allows no right of set off against us given the circumstances described."

67. The reference to and reliance on the JCT Conditions of Contract is consistent either with an understanding that the contract already existed or with an understanding that these were the intended terms that would apply retrospectively once the intended contract had been finalised and signed. On 2 February 1998 Mr Brennan wrote to Birse on the subject of contract documents. The letter reads:

"Dear Paul

Adventurers Quay, Cardiff

Contract Documents

Please find enclosed a complete set of contract documents for your signature, seal and return. I would be grateful if you could sign and seal on the following pages and return the contract documents to myself at the Chipping Sodbury offices.

Page 5 Insert your registered office address

Page 8 Initial the amendments as sealed

Page 9 Sections A2-A5

Amendment 16 page 4 Initial your registered address Main Contractor Warranty dated 19 December 1997.

Please ensure that within the seal provided that two Directors or one Director and the Company Secretary sign in each individual case their initials.

Thank you for your attention to this matter and I look forward to receiving the contract documents no later than 6 February 1998, as agreed between your Mr Rob Heath and our Mr Euan Cresswell." (4/489)

68. Copies of the two standard forms that were apparently enclosed with the letter appear in bundle 5, but copies of other of the documents are to be found in bundle 2 at pp 490-516A. There were some discrepancies in the documents which Mr Heath described at para 23 of his Affidavit (2/66). St David had introduced into the contract package proposed main contractor and sub-contractor warranty agreements dated 19 December 1997 (4/509-516A) which had not previously been discussed or agreed with Birse. Mr Heath's reaction to the documents is described at paras 24-27 of his Affidavit (2/67). I accept this evidence but I see no need to set it out in detail. Mr Heath then proceeds, briefly, to describe the way in which the relationship between the parties broke down from March 1998 onwards after St David signalled its intention to deduct liquidated damages – see paras 28 onwards of his Affidavit (2/67-69). Again I accept this evidence (in so far as it is factual evidence) and I see no need to set it out in detail. For the purposes of this issue I believe it is sufficient to record that St David's invitation to Birse to sign and return the documents handed over to them on 2 February 1998 was not accepted.

69. Practical completion of Phase 1A was certified on 1 July 1998. Birse left site on 11 August 1998 maintaining that no contract existed between it and St David (4/722). On the next day St David responded asserting that a contractual relationship existed on the basis of the documents which have been referred to in the letter of 2 July 1997, and saying that it treated Birse's action as an abandonment and constituted a specific default as referred to in clause 27 of the JCT conditions (4/723).

Conclusions

70. The defendant's letter of 2 July 1997 only sent documents which were *"to form the basis of our agreement"*. The letter looked forward to a future event and did not purport to conclude or record an already existing agreement. The documents then sent were incomplete and required at least one further addendum. After programme Revision

6 came into existence on 17 July nothing more happened for a number of weeks or months. The reason for this was, I believe, explained by Mr Boak and it is consistent only with the parties intending to maintain what I have previously called a *"locus poenitentiae"* whilst matters were further considered. This is a case in my judgment where the parties did intend that the contract should only be concluded when the documents agreed between the respective negotiators had been considered and approved by their corporate superiors, been properly drawn up and been signed or executed.

71. It is quite clear that in the autumn of 1997, at the two important meetings, the minutes of which I have set out in full, the parties acted towards one another on the basis that the contract was still in the course of negotiation. In my judgment they did not act on a basis consistent with their having already made some preliminary agreement which was to be put into a more formal or appropriate form. They clearly acted on the basis that contract negotiations between them were continuing. By December of 1997 St David had concluded that it wished to include further terms – that is to say the main contractor's warranty and the sub-contractor's warranty – and documents evidencing this were included within the package which was delivered on 2 February 1998. There was no concluded agreement before February of 1998 and, unsurprisingly in the circumstances, no agreement was concluded thereafter.

72. In conformity with the notion that the parties are "*the masters of their contractual fate*", it seems to me that the position which existed in this case was that for good, bad or indifferent reasons, in July of 1997 St David put what was intended to be a "temporary hold" upon the conclusion of the contract. That hold was intended to be and was an effective hold and it came to last far longer than originally anticipated. The hold remained until after the end of the year and once St David had lifted the hold, the reality was that Birse was no longer willing to enter into a contract on terms which St David wished it to accept. In those circumstances, the issue falls to be determined in favour of Birse and accordingly the application for a stay must be dismissed.

MR. H. PALMER Q.C. (instructed by Messrs. Masons) appeared on behalf of the Applicant(Defendant).
MR. P. DARLING Q.C. (instructed by Messrs. Osborne Clarke OWA, Bristol) appeared on behalf of the Respondent(Claimant).