Hescorp Italia SpA v. Morrison Construction Ltd, Impregilo UK Ltd [2000] ABC.L.R. 03/17

JUDGMENT : His Honour Judge Hicks QC : TCC : 17th March 2000

Introduction

1. The background to the issue which I have to decide is one all too familiar in this court. The parties were in negotiation for a construction contract - in this instance a steelwork sub-contract. They both contemplated that a formal contract would be entered into - in this instance a contract by deed. Meanwhile work began and continued. When it reached practical completion there was still no such formal contract. That remains the position. On the footing that there was no contract the Claimant sues for £397,025.14 as the value of the work it has done at the First Defendant's request. The First Defendant alleges that a contract was entered into, albeit not in the formal manner contemplated, that the contract price was £362,500.00 and that it is entitled to set off a counterclaim for damages for delay amounting to £276,945.81 plus any damages it may have to pay to the employer for the same reason, estimated to exceed £100,000.00.

2. The applications before me are by the Claimant for summary judgment under Part 24 of the Civil Procedure Rules and/or for an order for interim payment under Part 25.

3. The Claimant issued proceedings against both Defendants jointly, *"trading as Morrison-Impregilo Coventry Construction Joint Venture",* and alleged in the Particulars of Claim that they were a partnership. Only the First Defendant had at the date of the hearing before me filed an Acknowledgment of Service and although in form the applications seek relief against both Defendants Rule 24.4(1) prohibits (with exceptions which do not here arise) applications for summary judgment against a defendant who has not filed such an acknowledgment. There is no such prohibition in Part 25, but when the matter was argued there was no indication that the application for interim payment had been served on the Second Defendant and the Claimant was not seeking any order against it. In Mr Royce's skeleton argument for the First Defendant it is alleged that there was no partnership between the Defendants, but a joint venture agreement, and the point is taken that (as I understand the submission) in those circumstances relief can be obtained only against both jointly, not one alone. That issue was not, however, canvassed in oral argument, which under constraints of time was confined to one important element of the application for summary judgment, and as I understand it both the Claimant and the First Defendant wish me to rule on that element and to leave other issues over, including this one. In the remainder of this judgment I shall for brevity refer simply to *"the Defendant",* although on the one hand the correspondence was conducted in the name of the joint venture while on the other hand, for the reasons I have given, only the First Defendant appeared before me.

4. The central issue between the parties, and the one on which I am invited to rule, is whether they entered into a contract. It is therefore necessary to examine the history of the negotiations and dealings between them, which is for the most part documentary. I must return later to discuss the law applicable to that issue and the test to be applied when addressing it on an application for summary judgment, but in order to focus and limit the consideration of the facts it is convenient to record at the outset that there are three respects in which it is in dispute whether the parties reached agreement. They are the completion date, the measure of liquidated damages for failure to complete in time and the nature and effect of the requirement that the contract be executed as a deed. I shall therefore concentrate my attention on those aspects.

The history

5. On 29 April 1998 the Defendant issued an invitation to tender, stating that it had been awarded the contract for a project described as *"Arena and Leisure World"* at Spon Street, Coventry. The invitation was to tender for a work package described as "*arena - design and erect structural steelwork*" in accordance with "the Principal Contract and Sub-Contract Conditions". It includes among what are described as *"relevant extracts from the Principal Contract Conditions"* the following:

   3. Conditions of contract JCT 1981 + amendments
   4. Liquidated and ascertained damages £30,000 per week
   5. Sub-contract on site duration 8 weeks
   6. Period for commencement of sub-contract works 3rd August 1998.
   7. Eight weeks from 3 August is 28 September.

   There is also the following sentence: *"If the sub-contractor's tender is accepted it is a requirement that you enter into a formal sub-contract agreement".*

6. The Defendant's standard "*sub-contract conditions*" included as clause 4 a lengthy provision as to progress and completion which required the sub-contractor to carry out the sub-contract works so as to ensure completion of the "*Principal Contract Works*" by the completion date under the main contract, or in default to pay or allow forthwith to the Defendant, without prejudice to and pending final ascertainment or agreement of its loss or damage, "*such sum as [the Defendant] shall bona fide estimate as the amount of such loss or damage, such estimate to be binding and conclusive .... until such final ascertainment or agreement".*

7. After some exchanges which neither party relied upon as material the Claimant, in its then name of Imprefeal SpA, wrote to the Defendant on 19 June 1998 with what were described as amendments to a quotation dated 8 June 1998. The letter included the following:

   8. Providing that the award of the contract would be within June 23rd, we can confirm to you that we agree on the completion date of November 8th, 1998, for the arena structural steelworks.

9. The liquidated and ascertained damages repayment will be based on a penalty of the 0.5% .... of the Lump Sum amount, for each week of delay, up to the maximum limit of the 5% .... .

8. On 7 August 1998 the Claimant wrote to the Defendant again, pointing out that the condition for its agreement of a completion date had not been met and that, in effect, any such agreement had therefore lapsed. The letter also included the following:

.... with reference to the "Sub-contract order" of [the Defendant] proposed to us as the contract form, ... our legal dpt. consider it as extremely unbalanced: as an alternative, we can agree to use the enclosed "Form of sub-contract" of the Federation of Civil Engineering Contractors.

9. On 29 September 1998 the Defendant wrote to the Claimant "to summarise the present situation". The letter included the following:

Programme *The Joint Venture accept a 2 week extension to your original programme for re-design and are willing to consider a further 4 weeks for the continental summer holiday impacting on your procurement period.*

Liquidated and Ascertained Damages *You are advised that we are subject to £30,000 per week liquidated and ascertained damages for any delays to the works.*

Six weeks from 28 September 1998 was 9 November.

10. At some unidentified date, but presumably shortly before the order of 25 January 1999 to which I shall next refer, there was a "post-tender interview" or "pre-order meeting" between the Defendant and the Claimant, recorded in what are clearly pre-printed minutes, completed or adapted as necessary. The copy of the minutes signed on behalf of the Claimant includes four relevant items. Item 4.2.1, unaltered as printed, reads: "The sub-contract conditions will be [the Defendant's] Standard Terms and Conditions of sub-contract". Item 4.2.2, as printed, reads: "The sub-contract will be under seal/hand". The word "hand" has been deleted in manuscript. Item 5.2, as printed, provides for the manual entry of a series of "agreed sub-contract programme dates" for the commencement and duration of each section of the works, but the only entry reads "to be agreed". Item 23, as printed, reads: "Other Matters". Underneath has been written, in one hand: "Liquidated and Ascertained Damages: £30,000 per week". The words after the colon have been deleted and replaced, in another hand, by the following: "Deleted because the agreed L.A.D. repayment is to be based on a penalty of the 0.5% .... of the lump sum amount, for each week of delay, up to the maximum limit of the 5% .... as stated by Imprefeal/Hescorp Italia SpA with the letter dated 19th June 1998".

11. According to the Claimant's chronology the Claimant had in October 1998, at the Defendant's request, commenced production of the required structural steel. On 25 January it started work on site. On the same date the Defendant wrote to the Claimant with a "sub-contract order", asking the Claimant to sign and return the order and all incorporated documents. The Claimant did not at that stage do so.

12. On 2 March 1999 there was a meeting on site. Its purpose, according to the Defendant's project manager, Mr Amin, who was there, was "to discuss and conclude all outstanding matters", but it is common ground that that was not achieved. There were differences, in particular, as to price, liquidated damages and completion date. Mr Amin's evidence on the last point was that the Defendant's Mr Bagnati told the Claimant's representatives that the Defendant was not going to change the contractual date for completion, "which I understood to be 22 November 1998".

13. On 3 March 1999 the Claimant wrote to the Defendant with a "summarisation of the final position". As to completion it read: "The updated final expected completion date is March 15th 1999". As to liquidated damages it reiterated the position set out in the letter of 19 June 1998 (paragraph 7 above), describing it as "agreed during the meeting at your Coventry job site on June 16th 1998".

14. On the same date there was a further meeting, this time at a hotel in Birmingham. The participants were Mr Amin and a Mr Price for the Defendant and Mr Michelini, the Claimant's commercial manager, of whom Mr Amin and Mr Michelini have signed witness statements. Both say that agreement was reached on price and liquidated damages. All three signed a document of that date in the following terms:

11. The following terms were agreed between Hescorp Italia and Morrison Impregilo JV:

1) Lump sum price for steel to be £362500.00

2) LAD clause to be as Hescorp Italia letter dated 19th June 1998.

15. On 12 March 1999 the Claimant wrote, referring to the Defendant's letter of 25 January (paragraph 11 above) and returning the sub-contract order "signed with the following amendments". The amendments specified include a completion date of 15 March 1999 and a liquidated damages clause in the terms of the Claimant's letter of 19 June 1998.

16. On 18 March Mr Amin sent a fax to Mr Michelini. It included the following:

12. I am extremely annoyed and would like to inform you that the completion date .... was not agreed as being 15/3/99.

13. We never agreed to this date, both parties discussed the same at our meeting in Birmingham on the 3rd March 1999 and we both said that the Contract be left as it is with the completion date as per previous discussions.

.... The completion dates were at issue but because we could not agree we decided to leave the matters to our respective organisations to sort out.

17. On 26 March the Defendant wrote to the Claimant. The letter referred to Mr Amin's fax of 18 March, reiterated the Defendant's refusal to accept a completion date of 15 March 1999 and concluded:

    14. We are now aware that you may not finish until the 12th April 1999. The position is that we do not accept that you are entitled to change or revise the completion data [sic] at all.

    15. We have informed you of the consequences of this delay for our Joint Venture and stated that we will seek full recovery of the damages that we may suffer. Your suggestion that liquidated damages be limited to 5% of the lump sum amount is not, and has never been, acceptable to us or the joint venture as you are (and always have been) well aware and it was reconfirmed to me by Mr Michelini on 2nd March at Coventry.

    16. Our site running costs for any delay for which we hold you responsible amount at £12,000 per week and we are presently looking at a ten week overall delay. We will look at recovering these costs from Hescorp as well as such costs as our client may seek to recover from us.

18. On 19 April 1999 the Claimant replied, restating its position. The letter included the following:

    17. The contract clauses have been negotiated, by our side, as a whole matter concerning the price, the completion date and the liquidated and ascertained damages.

    18. The very low price that we conceded to you, is strictly related to the acceptance of the final expected completion date of March 15th, 1999, and to the agreed limitation of the liquidated and ascertained damages up to the 5% of the Lump Sum amount.

19. The Claimant's works were completed on 20 April 1999.

20. On 20 May 1999 the Defendant wrote, formally rejecting the Claimant's amendments to the order of 25 January 1999 and resubmitting the order in its original form for "engrossment", which in the context must have been intended and understood to mean signature.

21. On 1 June 1999 the Claimant returned the order signed. It had again restored its version of the liquidated damages clause, but now accepted the original completion date of 22 November 1998 "*with a due comment*". The comment read "*without prejudice of our right to the [extension] of time which should be allowed*".

22. That was rejected by the Defendant on 21 June 1999 on two grounds. The first was want of due execution as a deed. The second was that liquidated damages must be £30,000 per week. The Defendant also sent a fax on the same date, in response to pressure by the Claimant for payment, stating that there would be no point in meeting to discuss payments "because the hold up due to disagreement about the Contract Conditions".

23. On 30 June 1999 the Claimant replied to the letter of 21 June. The objection to the form of execution had been met, it said, by the submission of a new copy of the order signed in the way required by the Defendant. It remained insistent on its version of the liquidated damages clause.

24. There were further exchanges between the parties, but it is not in dispute that, if any contract was ever entered into, that occurred during those already reviewed. Mr Royce, for the Defendant, relied in his written skeleton on a letter from the Defendant dated 21 September 1999, but that was merely an assertion, after the event, of a 21 June contract.

The law

25. The necessary and sufficient conditions for the formation of a contract are agreement (usually in the form of offer and acceptance), consideration and contractual intent. Where substantial commercial organisations embody or record the progress and outcome of their negotiations in documents, as happened here for much of the time, issues as to the legal consequences of those negotiations are primarily to be resolved by construing the documents in their factual setting. Leaving aside the law as to misrepresentation, mistake and rectification, none of which features here, the wishes and intentions of the individuals participating and their beliefs, then or later, as to the effect of the documents or oral exchanges, are irrelevant except to the limited extent to which matters of shared knowledge or understanding at the time may be part of the factual setting.

26. These are, in my understanding, elementary and familiar propositions. In their application to this case the presence of consideration is not in doubt. Nor, properly understood, is that of contractual intent, for although the Claimant's case is that there was no contract that is because it denies that agreement was reached on essential terms; it does not allege that had there (objectively) been such agreement it was nevertheless not intended by the parties to have legal consequences.

27. That leaves the requirement of agreement and in particular, on the facts of this case, the question whether all essential terms were at some point settled. I have described at the outset the setting in which those questions here fall to be decided, and indicated that it is a familiar one in the construction industry and, therefore, in this court.

28. As to authority Mr Royce relied on a passage from the judgment of Lloyd LJ in ***Pagnan S.p.A. v Feed Products Ltd*** [1987] 2 Lloyd's LR 601. The issue there was whether there was a concluded contract for the sale and purchase of corn pellets by American sellers to Italian buyers. Bingham J found that there was. He referred at page 612 to four matters relied upon by the plaintiff buyers as excluding the formation of a contract. He disposed of the first and third by findings of fact. As to the second, the absence of agreement on the loading port or range of loading ports, he found that there was no express agreement but held that the law of England applied, under which there was an applicable rule allocating the choice of port to the buyer in the absence of any express term, custom or other reason to the contrary. As to the fourth, the absence of agreement on loading rate, demurrage and

despatch, or carrying charges, he again found that there was no express agreement but that appropriate terms could be implied.

29. The buyers appealed. In argument on this last point Mr Rokison, on their behalf: "*.... went out of his way to make it clear that he does not submit in this case that the agreement upon the remaining points such as rate of loading, rate of demurrage and so on was essential in order to make the contract work. He concedes that any gap in those respects could have been filled by implication of law. But that is not, he says, what the parties intended. They intended to agree these matters between themselves. Until they had done so, therefore, there was to be no binding contract. (page 618)*

30. The trial judge had, as appears above, expressly found the facts as to the parties' intentions in terms incompatible with that argument. It would have been sufficient for the Court of Appeal to uphold that finding, as they did. Before doing so, however, Lloyd LJ, with whom Stocker and O'Connor LJJ agreed, set out some propositions of law in the passage on which Mr Royce relied. I extract what seem to me to be the relevant parts:

(1) In order to determine whether a contract has been concluded in the course of correspondence, one must first look to the correspondence as a whole.

(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. [I interpose that the relevance of that proposition here is to the requirement of execution as a deed.]

(3) .... [the parties] may intend that the contract shall not become binding until some further term or terms have been agreed .... .

(4) Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled .... .

(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 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 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 parties enter into so-called "heads of agreement". (page 619)

31. In ***Pagnan*** the Court of Appeal was upholding a decision that a contract had been formed and Lloyd LJ was therefore, in his proposition 6, particularly concerned to emphasise that the court cannot make "*essential*" a term which the parties regarded as inessential. How far that can be carried is not a matter with which I am here concerned; what is clear, in my view, is that the Court of Appeal fully accepted the converse principle that there is no contract if the parties are not in agreement on what they regard as an essential term. And "[of] course the more important the term the less likely it is that the parties will have left it for future decision".

Summary judgment - the test

32. By rule 24.2 of the Civil Procedure Rules the court may give summary judgment against a defendant on the whole of a claim if:

(a) it considers that -

(ii) that defendant has no real prospect of successfully defending the claim ... ; and

(b) there is no other reason why the case .... should be disposed of at a trial.

33. Mr Royce did not submit that if the Defendant had no real prospect of successfully defending the claim there was any "other reason" within head (b) for withholding judgment. The test to be applied to the application for summary judgment is therefore simply whether the Defendant has any such prospect.

Contract or no contract?

34. It is convenient to deal first with the requirement that the contract be by deed, because it differs in important respects from the others and can be disposed of more briefly. It differs because the dispute is not about whether it existed (it did) or about whether it was ever met (it was not), but about its meaning and effect. Consensual requirements of that kind for embodiment of the contract in some specified form (statutory requirements are a different matter) may be of two kinds. On the one hand the effect may be that until so embodied the contract is not binding. That is an example of what Lloyd LJ, in his proposition (2) in ***Pagnan***, called the ordinary *"subject to contract"* case (see paragraph 30 above). On the other hand the effect may be that if (as is not excluded) a binding contract is entered into without the specified formality, one of its terms will be that it shall be embodied and executed in the appropriate form.

35. Into which category such a requirement falls in a particular case is a factual question as to the common intention of the parties and, if that intention is expressed in a document, of the true construction of that document.

36. It is sufficient to say, on this point, that the few references in the evidence to the requirement that the contract be embodied in a deed do not so clearly entail the "subject to contract" interpretation (if indeed they favour it at all, which I am not deciding) as to give the Defendant no real prospect of successfully contending that that requirement was not an obstacle to the formation of a contract. If that were the sole such obstacle raised by the Claimant, therefore, the Claimant would fail.

37. Miss Dumaresq, for the Claimant, referred me to ***J. Jarvis & Sons PLC v Galliard Homes Ltd*** (unreported, 12 November 1999), in which the Court of Appeal upheld the finding of His Honour Judge Toulmin CMG QC that there was no contract because (among other reasons) the existence of a binding contract was subject to the execution of an agreement under seal. That, however, was a decision on its own different facts and does not assist.

38. The Claimant is, however, entitled to rely independently on the contention that the parties were always at odds on one or both of the terms as to the date for completion and as to the measure of liquidated damages for delay. I accordingly turn to examine that contention.

39. The Defendant has at earlier stages advanced various dates, and in particular 1 June 1999, as being that at which a contract came into existence, but in his submissions to me Mr Royce's primary case was that it happened on 3 March 1999. He had, however, a subsidiary argument which as I understood it fell back on the 1 June date.

40. As to the measure of liquidated damages Mr Amin, Mr Michelini and the document which they and Mr Price signed are at one in attesting that agreement was reached at the meeting on 3 March 1999 described in paragraph 14 above. The only question is whether Mr Amin and Mr Price had actual or ostensible authority to agree and sign. The Defendant's case is that they had actual authority, and Mr Amin says in his witness statement that although he went to the meeting without any authority to accept the Claimant's formula, and told Mr Michelini so, a point came at which he telephoned the Defendant's commercial manager and obtained authority to accept. Only then did he and Mr Price sign the document.

41. The Claimant relies chiefly on the fact that the Defendant itself, in effect, very quickly denied Mr Amin's authority at a time when the Claimant was inferentially relying on it. There was first the letter of 26 March 1999 quoted in paragraph 17 above, written by Mr Bagnati. Then there were the letters of 20 May and 21 June 1999, summarised in paragraphs 20 and 22 above respectively. They were both written by Mr Amin himself. It may be of some significance, however, that in both he seems concerned to distance himself from any personal assertion on the point. On 20 May he regrets that "the Joint Venture Board are unable to agree with the amendments", and on 21 June that "we have been informed by the Joint Venture Board" that liquidated damages must be £30,000 per week, and that "[no] authority was given by the Joint Venture Board" to vary that sum.

42. Each party has now reversed its position. Had it been necessary and possible to decide the factual issue at this stage I should have been inclined to find that Mr Amin had authority, but it is not necessary to go that far. It is sufficient that the Defendant can plainly not be said to have no real prospect of succeeding on it.

43. As to the completion date, however, the position is very different. The Defendant's own evidence is that on 2 March 1999 their Mr Bagnati had told the Claimant that the Defendant was not going to change the "contractual date" of 22 November 1998. The Claimant's letter of 3 March gives the "expected" completion date as 15 March 1999. Mr Amin states that at the meeting on that date Mr Michelini argued for agreement of a revised date but he (Mr Amin) refused. The signed document of 3 March, clearly intended as an important record of outstanding matters agreed, is silent on the subject. The letter and fax of 12 and 18 March from Claimant and Defendant respectively (paragraphs 15 and 16 above) repeat their disagreement. In my judgment the Defendant has no real prospect of establishing that there was agreement on 3 March 1999 in this respect.

44. Mr Royce seeks to meet this difficulty by submitting that where parties have agreed all other material terms failure to agree a completion date is not fatal, because a term for completion in a reasonable time will be applied. I accept that in appropriate circumstances that may well be so, for example where work has not yet started, any conceivable completion date would be in the future, the parties have not already taken up sharply contested positions on the issue and there is no concurrent dispute about the measure of damages for delay. I am wiling to assume, also, that there may be other circumstances in which a term as to completion date may be implied.

45. Here, however, work had begun some six weeks earlier and the Claimant's proposed completion date was only twelve days away, while the Defendant's was over three months in the past and two months earlier than the actual start date. The dispute was in any realistic sense hardly concerned, if at all, about the date when the work should finish. It was about the establishment and quantification of a claim by the Defendant against the Claimant for delay, much or most of it already incurred. As such it was intimately and inseparably connected with the concurrent dispute about the measure of liquidated damages, because the amount due involved both. A concession on one might be bargained against a gain on the other. If one were agreed without the other then for all practical purposes there was no agreement.

46. I am satisfied that both parties well understood this (see, for example, the Claimant's letter of 19 April 1999 quoted in paragraph 18 above, which although later than 3 March is in my view indicative of the commercial

realities which both parties must have had in mind throughout) and that for the purpose of the principles set out in paragraphs 27 and 31 above they regarded the completion date as an essential term requiring to be settled if there were to be a contract. In my judgment the Defendant has no real prospect of establishing otherwise or, in consequence (given my finding at the end of paragraph 43 above), of showing that a contract was entered into on 3 March 1999.

47. Mr Royce cited section 14 of the Supply of Goods and Services Act 1982, but that simply supplies an implied term as to the time for performance, given an existing contract silent on the point. It does not touch the question whether, failing resolution of a difference between the parties on the date for completion, a contract has been entered into at all.

48. Mr Royce's alternative submission was that *"in any case by 1 June 1999 the completion date was no longer in issue"*. It is true, of course, that on that date the Claimant returned the order form signed, the completion date shown being *"22 November, without prejudice [to] our right to the [extension] of time which should be allowed"* (paragraph 21 above). Leaving aside the objection that the qualification vitiates the acceptance of the Defendant's date, which being arguable fails to satisfy the summary judgment test, the contention that the parties were at one on 1 June 1999 faces the insuperable obstacle that there was at that date no agreement on the measure of liquidated damages. The order signed by the Claimant again contained its version, but as already recounted in paragraphs 17, 20 and 22 above and repeated in paragraph 41 the Defendant had emphatically insisted on its own figures on 26 March and 20 May 1999 and did so again in rejecting the signed documents on 21 June. The Defendant has no real prospect of establishing that a contract was entered into by the Claimant's signature of the order form on 1 June 1999.

49. Mr Royce's use of the words "*was no longer in issue*" may imply a contention that the partial agreement reached on 3 March remained in existence, rather like an abandoned jig-saw puzzle, available at any time to be completed by the insertion of the missing piece. If so, that must be rejected. In the classical language of offer and acceptance a rejected offer lapses. Even if those are thought nowadays to be unduly restrictive categories in which to analyse the process of contract formation the facts reviewed in the last paragraph make it abundantly clear that by 1 June 1999 the term as to liquidated damages to which Mr Amin had agreed on 3 March was no longer acceptable to the Defendant, if it ever had been, as part of any contract into which it was prepared to enter.

50. Mr Royce drew particular attention to clause 4 of the Defendant's conditions, as summarised in paragraph 6 above, and submitted that it was *"part of any contract entered into*" and must be read in conjunction with any liquidated damages provision. I was not clear how that affected the issue whether any contract was in fact entered into, nor did Mr Royce go on to submit that it did, or if so in what way. There is certainly no sign that it lessened the importance which each party attached to imposing its own version of the liquidated damages clause. If they had clause 4 in mind, of which there is no evidence, they presumably appreciated that it provided only for payments *"without prejudice to and pending final ascertainment"* of damages for delay, so that the provision governing final ascertainment retained its importance.

51. The Defendant has therefore no real prospect of establishing that a contract ever came into existence. It follows that the Claimant is entitled to be paid for its work, as on a quantum meruit.

Summary judgment - other defences

52. On that basis the Claimant applies for judgment for £397,025.14, which on its pleading and evidence is the "quantum meruit" value of its work, alternatively for £358,322.85, the value admitted by the Defendant in its evidence on the application.

53. There being no contract the Defendant cannot pursue the contractual counterclaims referred to in paragraph 1 above. It wishes, however, to rely on some or all of the same facts in support of a defence that the value of the Claimant's work falls to be reduced because of delays in carrying it out or because defects have, in addition to making the work itself less valuable, caused extra expense to the Defendant or exposed it to claims by the employer. Its evidential admission of value referred to in paragraph 52 above is, as I understand it, of gross value before any deductions of that kind.

54. The Claimant denies both that as a matter of law any such defence exists and that as a matter of fact the Defendant's complaints can be made good. I do not, however, have to decide who is right on either of those issues. The question for me is whether there is no real prospect of the Defendant's being able to make its case good. On the evidence before me I am clear that the factual dispute cannot be dismissed in that way. As to the legal issue, the Court of Appeal held in ***Crown House Engineering Ltd v Amec Projects Ltd*** (1989) 48 BLR 32 that it was not appropriate for determination on an application under Order 14. Text-book writers agree that the point is undetermined. Although points of law, unlike factual disputes, may sometimes properly be disposed of at a summary hearing, and although decisions under Order 14 are arguably not direct authority as to the position under the Civil Procedure Rules, I have come to the conclusion that it would be no more appropriate to decide this particular point here, under rule 24.2, than the Court of Appeal held it to be in the ***Crown House*** case under Order 14.

55. For those reasons, and given that a quantum meruit claim is, in the absence of an unqualified admission as to quantum, inherently unliquidated I conclude that the Claimant is not entitled to summary judgment for any specified sum of money.

Remaining issues

56. On a claim for unliquidated damages the appropriate order on findings that the defendant had no defence on liability, but that the claimant had not to the same standard established the amount of his recoverable loss, would be one for judgment for the claimant for damages to be assessed. Although this is a money claim, not one for damages, it is at first sight analogous in that respect, and the terms of rule 25.7(1)(b) (paragraph 58 below) support that approach, which would lead to the entry of judgment for the value of the work done by the Claimant, to be assessed on a quantum meruit basis. The Defendant, however, wishes to keep open the point, which has not yet been argued, that the matters which it wishes to advance by way of defence (see paragraph 53 above) will or may reduce the sum due to the Claimant to nil, and that in those circumstances the application for summary judgment should be dismissed or there should be unconditional leave to defend. The application for summary judgment will therefore be adjourned.

57. That being so the application for an interim payment must also be adjourned, not only because I have not been addressed on such matters as the strength and apparent value of the matters to be advanced by way of defence, but also (and logically first) because the answer to the question whether there is to be summary judgment for a sum to be assessed determines the approach to the issue whether there is to be an order for interim payment.

58. Rule 25.7(1) of the Civil Procedure Rules provides, so far as relevant, as follows:

19. The court may make an order for interim payment only if -

(a) [deals with admissions];

(b) the claimant has obtained judgment against [the] defendant for damages to be assessed or for a sum of money (other than costs) to be assessed;

(c) except where paragraph (3) applies, it is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money (other than costs) against the defendant .... ; or

(d) [deals with claims for mesne profits].

59. If, therefore, there is summary judgment, jurisdiction to make an order for interim payment arises under head (b) and there will be no need to satisfy the requirements which would otherwise arise under head (c), although paragraphs (4) and (5) of the rule will still apply:

(4) The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment.

(5) The court must take into account -

(a) contributory negligence; and

(b) any relevant set-off or counterclaim.

60. If, on the other hand, there is no summary judgment, the Claimant will have to satisfy the court that there is jurisdiction under head (c).

61. Both applications are therefor adjourned for further argument, in the light of my finding that there was no contract.

Delia Dumaresq for the Claimant (Solicitors: Bevan Ashford, Exeter)
Darryl Royce for the First Defendant (Solicitors: Hammond Suddards, Leeds)