CA on appeal from HHJ Cyril Newman QC before Otton LJ; Buxton LJ; Mr Justice Hooper : 31st July, 2000

JUDGMENT : LORD JUSTICE OTTON : This is the decision of the Court

1. This is an appeal and a cross-appeal from the decision of (the late) HH Judge Cyril Newman Q.C. on a trial of a preliminary issue. The action arises out of a claim for damages for breach of contract, breach of statutory duty and negligence for alleged defects in the new build and refurbishment work at the Sidney Russell Comprehensive School in Dagenham, Essex. The respondent is the local authority ("the Employer") who agreed to retain the appellant (´the Contractor') to *´design and build'* the works.

2. It is the Employer's case that there are a substantial number of defects in the school buildings designed and constructed by the Contractor. It is the case for the Contractor (the appellant in this appeal) that the claim cannot succeed because, under the contractual arrangements, the appellant has what is known as the "conclusive evidence" defence, which becomes effective following the agreement of the Final Account and Final Statement. The parties have agreed that, for the purposes of the preliminary issue, the Final Statement and Final Account have been agreed.

3. In April 1991 the respondent sent out a "*Brief*" which set out in "general and non-exhaustive terms" (1/86) the nature of the works it wanted designed and constructed on the school site. On 22 August the appellant submitted what it described as "*Outline Specifications*" for the work. By letter dated 27 August 1991 the appellant quoted some £2.7m for the work. The offer was said to be "*based on the design illustrated by the drawings and specification appended to this offer*" and "*subject to the contract being let under the JCT with Contractor's Design (1981) Form of Contract, unamended*". By a later letter dated 29 August the quotation was increased by some £14,000, but otherwise in similar terms.

4. On or about October 1991 the appellant sent to the respondent an order for the work dated 9 October 1991. Work started in December 1991. (1/86)

5. The agreement between the respondent and the appellant was completed on 28 April 1992 ("28 April Agreement").

6. That document provides (2/97-98):

   "WHEREAS:

   (1) The Contractor has submitted the annexed Tender (hereinafter called "the Tender") dated 27th August 1991 for the execution completion and maintenance of the works (hereinafter called "the Works") as described in the Tender, and the Specification.

   (2) The Employer has accepted the Tender subject to the terms hereof and to the provisions of the Royal Institute of British Architects Conditions of Contract (hereinafter referred to as RIBA Conditions of Contract) hereunto annexed amended by the Tender documents.

   NOW THEREFORE IT IS HEREBY AGREED as follows:-

   1. IN consideration of the Agreement hereinafter contained on the part of the Employer the Contractor shall and will execute complete and maintain the Works in all respects to the satisfaction of the Controller of Development and Technical Services for the time being of the Employer in accordance with and on the terms and conditions set out in the Tender and Specification and shall and will faithfully observe and perform the provisions of the said RIBA General Conditions of Contract amended by the Tender documents.

   2. IN consideration of the Agreement hereinbefore contained on the part of the Contractor the Employer hereby agrees with the Contractor that the Employer shall and will pay to the Contractor for the execution completion and maintenance of the Works as hereinbefore described the price or prices set out in the Tender.

   3. THAT the provisions of the Tender, the Specification and the said RIBA General Conditions of Contract amended by the Tender documents shall be deemed to be part of the Agreement as if the same had been fully set forth herein."

7. The date in paragraph 1 of the recitals appears to be wrong. It should be 29 August. The reference to the RIBA General Conditions of Contract is to the "Standard Form of Building Contract with Contractor's Design, 1981 Edition, incorporating Amendments 1:1986, 2:1987, 3:1988, 4:1988, 5:1989, published by the Joint Contracts Tribunal, referred to in this judgment as the "JCT 1981 Conditions".

8. In November 1992 the Employer's Senior Clerk of Works issued a certification to the effect that practical achievement of the Works had been completed on 6 November 1992 and that the defects liability period would expire a year later (2/189).

9. The clause said by Mr Martin Bowdery Q.C. on behalf of the appellants to give them the defence of "conclusive evidence" is clause 30.8.1 of the JCT 1981 Conditions (2/136).

> *"30.8.1 the Final Account and Final Statement when they are agreed or become conclusive as to the balance due between the parties in accordance with clause 30.5.5. or the Employer's Final Account and Employer's Final Statement when they become conclusive as to the balance due between the parties in accordance with clause 30.5.8 shall, except as provided in clauses 30.8.2 and 30.8.3 (and save in respect of fraud), have effect in any proceedings arising out of or in connection with this contract (whether by arbitration under article 5 or otherwise).*
>
> *"1.1 as conclusive evidence that where it is stated in the Employer's Requirements that the quality of materials or the standard of workmanship are to be to the reasonable satisfaction of the Employer the same are to such satisfaction…"*

10. Sub-clauses 30.8.1.2 and .3 contain similar deeming provisions regarding extensions of time and reimbursement of monies due to the Contractor. Clause 30.8.1 can benefit both the Employer (e.g. 30.8.1.3) and the Contractor (e.g. 30.8.1.1).

11. Clause 30.9 provides: *"Save as aforesaid no payment by the Employer shall of itself be conclusive evidence that any design, works materials or goods to which it relates are in accordance with this Contract."*

12. The definitions of various expressions used in the JCT 1981 Conditions are to be found in clause 1.3 which apply "*unless the context otherwise requires or the Articles or the Conditions … specifically otherwise provide"*. The word "*Articles*" is defined as the Articles of Agreement, which are in the form of a template to be filled in appropriately. The word "*Conditions*" means clauses 1 to 35 and other immaterial clauses annexed to the Articles of Agreement.

13. The phrase "Employer's Requirements" is defined in clause 1 in the following way: "See the First Recital" (2/107). The First Recital is to be found in the Articles of Agreement. It states: *"whereas the employer is desirous of obtaining the* ***construction*** *of …... (hereinafter called `the Works') …... for which Works he has issued to the Contractor his requirements (hereinafter referred to `the Employer's Requirements')"*

14. The Second Recital states: *"the Contractor has submitted proposals for carrying out the Works (hereinafter referred to as the `the Contractor's Proposals')"* which include the sum which he requires to carry out the works. Clause 1.3 of the JCT 1981 Conditions gives to the expression "*Contractor's Proposals*" the meaning in this Recital. The Third Recital sets out that "*the Employer has examined the Contractor's Proposals …*" and *"is satisfied that they appear to meet the Employer's Requirements"*. There then follows the template of the "*Articles of Agreement*" to do the work, to which is to be annexed a signed copy of the Employer's Requirements and the Contractor's Proposals.

15. For reasons which have not been explained but which we infer were through inadvertence, the Articles of Agreement, including the first recital, had been struck out by the parties. Thus there is no express contractual provision defining ***"Employer's Requirements"*** or ***"Contractor's Proposals".*** The remainder of the JCT 1981 Conditions remain in force unaltered except in so far as "amended by the tender documents" (clause 1 of the 28 April Agreement). This latter proviso is not relevant in this case.

16. The judge found, and this was not disputed before us, that the 28 April Agreement was a substitution for the deleted Articles of Agreement.

17. Clause 2 of the JCT 1981 Conditions imposes on the Contractor the obligation to carry out the Works in the Employer's Requirements and in the Contractor's Proposals. Clause 2.2 provides:
"Nothing contained in the Employer's Requirements or the Contractor's Proposals … shall override or modify the interpretation of that which is contained in the Articles of Agreement, the Conditions …."

18. Clause 2 includes a design warranty (2.5). (*To which reference will be made hereafter*)

19. Clause 6 requires the Contractor to comply with statutory obligations, except in so far as the Employer's Requirements state specifically that they comply with such obligations. Clause 6.1 provides:

".1.1 Clause 6.1.1.2 shall apply except to the extent that the relevant part or parts of the Employer's Requirements state specifically that the Employer's Requirements comply with Statutory Requirements.

.1.2 The Contractor shall comply with, and give all notices required by any Act of Parliament, any instrument, rule or order made under any Act of Parliament, or any regulation or byelaw of any local authority or of any statutory undertaker which has any jurisdiction with regard to the Works or with whose systems the same are or will be connected including Development Control Requirements (all requirements to be so complied with being referred to in these Conditions as `the Statutory Requirements') and the Contractor shall pass to the Employer all approvals received by the Contractor in connection therewith.

.2 If the Contractor or the Employer finds any divergence between the Statutory Requirements and either the Employer's Requirements (including any Change) or the Contractor's Proposals he shall immediately give to the other written notice specifying the …. amendment for removing the divergence, and with the Employer's consent (which shall not be unreasonably delayed or withheld) the Contractor shall entirely at his own cost save as provided in clause 6.3 complete the design and ***construction*** *of the Works in accordance with the amendment and the Employer shall note the amendment on the documents referred to in clause 5.1."*

20. Clause 8.1 imposes on the Contractor the obligation to use materials and goods "of the respective kinds and standards described in the Employer's Requirements, or, if not therein specifically described, in the Contractors' Proposals or specifications." All workmanship is to be of the same standard (clause 8.1.2). Clause 12 deals with changes in the Employer's Requirements. Clause 16 deals with ***"Practical Completion"*** and the ***"Defects Liability Period"***. We are told that a number of the clauses in the JCT 1981 Conditions were not relevant to the contractual arrangements and therefore otiose, albeit not deleted.

21. Finally, in addition to the obligations in JCT 1981 Conditions is the obligation on the appellant (the Contractor) in clause 1 of the 28 April Agreement : *"(to) execute complete and maintain the Works in all respects to the satisfaction of the Controller of Development and Technical Services for the time being of the Employer in accordance with and on the terms and conditions set out in the Tender and Specification…."*

    The word ***"Works"*** in the first recital of the 28 April Agreement is defined as the works described in the key Tender and Specification. The word "*Works*" is also defined in JCT 1981 Conditions (clause 1, 2/107) as the "*works briefly described in the [deleted] First Recital and referred to in the Employer's Requirements and the Contractor's Proposals*" but by virtue of clause 3 of that Agreement the respondent is also bound by the obligations imposed on it by the JCT 1981 Conditions. That, of course, includes clause 30.8.1.

22. The importance of a ***`conclusive evidence'*** type of clause is underlined in a passage from a judgment given by H.H.Judge Newey QC in ***Darlington Borough Council v. Wilshier Northern Ltd.*** (1993) 37 Con. LR 29, at 47, which referred to : *"the desire of both contractors and employers in the* ***construction*** *industry to bring about early conclusions to disputes between themselves. Contractors, having finished the works and put right any defects which have arisen during the defects liability period, wish to put the contracts behind them and be free from future claims. Employers are content that should be the position, so long as there are no deliberately concealed or otherwise hidden defects."*

23. The Court of Appeal in ***Crown Estate Commissioners v. John Mowlem & Co. Ltd*** (1994) 70 BLR. 1 considered clause 30.9.1 of the 1980 Form, which, by contrast with clause 30.8.1 in the 1981 Form, provides that a Final Certificate has effect as *"conclusive evidence that where the quality of materials or the standard of workmanship are to be to the reasonable satisfaction of the Architect the same are to satisfaction."*

24. Stuart-Smith LJ (at page 15) identified three possible options :

    "Case A Criteria stipulated in the contract documents, for example to British Standard Specifications
    Case B Standards and quality not stated in the contract documents, in which case there is an implied term that materials will be of a reasonable quality and fit for their purpose and workmanship will be to a reasonable standard
    Case C Standards and quality expressed to be to the architect's satisfaction."

25. The Employer had argued that only case C fell within the clause ("the narrow **construction**"). The Court rejected that argument and adopted the wider **construction** of clause 30.9.1 embracing cases A, B and C.

The Preliminary Issue

26. The preliminary issue the subject of these appeals is in the following terms : *"Are all or any of the claims advanced by the plaintiff subject to a defence of conclusive evidence by reason of the operation of clause 30.8.1 of the JCT 1981 Conditions and, if so, which?"*

27. The learned judge held that : *"All the claims advanced by the plaintiff are subject to a defence of conclusive evidence by reason of the operation of clause 30.8.1 of the JCT 1981 conditions, save and except for those claims which are based upon any failure to meet any statutory requirements which, under the provisions of clause 6 of the Conditions, are the responsibility of the defendant."*

28. In their Notice of Appeal the defendants (the Contractors) contend that *"the learned judge erred in holding that those claims advanced by the plaintiff which are based upon any failure to meet any statutory requirements are not subject to a defence of conclusive evidence by reason of the operation of clause 30.8.1. ....."* They seek a Declaration that all the claims advanced by the plaintiff are subject to a defence of conclusive evidence.

29. By way of their Notice of Cross-Appeal the Employer contends that the *"learned judge erred in law in holding that the claims advanced by the claimant other than those which are based upon any failure to meet any statutory requirements which, under the provisions of clause 6 .... are the responsibility of the defendant, or any of those claims, are subject to a defence of conclusive evidence by reason of .... 30.8.1."* They seek a Declaration that none of the claims advanced by the respondent are subject to a defence of conclusive evidence.

30. We considered it logical to deal first with the Employer's Cross-Appeal.

The Employer's Cross-Appeal

The Construction of the Contract (Ground 4)

31. Mr Justin Fenwick QC on behalf of the Employer contended that the learned judge wrongly construed the Contract in finding that the Employer's Requirements for the purpose of clause 30.8.1 were all those works described in the Clause 1 of the Agreement under Seal dated 28 April 1992 (i.e., those works to be executed, completed and maintained to the satisfaction of the claimant's Controller of Development and Technical Services).

32. Mr Fenwick submitted that on the true **construction** of the Contract, the words "employers requirements" referred to :
(a) the Brief provided by the Employer to Contractor in about April 1991 or
(b) the Tender and Specification.

33. Alternatively there were, in this case, no employer's requirements over and above those set out in the Tender and Specification. In any event, the words do not refer to all of the obligations under the contract, as the learned judge found. Neither the Brief nor the Tender and Specification contains a provision that the quality of materials or the standard of workmanship are to be to the reasonable satisfaction of the employer. Therefore, clause 30.8.1.1 is otiose (like other clauses in the Brief or the Tender and Specification) and cannot prevent its claim from succeeding.

34. The learned judge roundly rejected the Contractor's submission that clause 30.8.1.1 should be construed so as to refer to the Brief. He said : *"not only is that a document which is outside the Contract, it is common experience within the industry that the Brief is developed and in my judgment it would be very unsafe to find that it was the intention of the parties to refer to such an early initiating document in this context."*

35. We respectfully agree. The Brief was not referred to in the Contract. Instead the parties chose to define the Works by reference to the Tender and Specification and the requirement to satisfy the Employer. However, even if the brief were the Employer's Requirement this would make no difference. It would still be subject to the overriding requirement of obtaining the Employer's satisfaction under clause 1.

36. Leading counsel further contended that in view of the fact that the First Recital in the 1981 Form incorporated within the Agreement under Seal is deleted (as were all the Recitals) there are no *"**Employer's Requirements**"* upon which clause 30 can operate.

37. The judge found as a fact that the Agreement had been substituted for the deleted part of the 1981 Form. However, clause 30.8.1.1 had not been deleted and, in accordance with the ordinary canons of **construction**, the Court should be slow to conclude that this is otiose. We agree with the judge's reasoning and his conclusion. He stated : *"Clause 1.2 of the Conditions requires both ... "The Agreement", the Conditions and the Appendices to be read as a whole and otherwise sets out rules of **construction** which the Court as a matter of law would apply. In my judgment, on its true **construction**, the Employer's overriding requirements that the execution, completion and maintenance of the work shall "in all respects" be to the satisfaction of the Employer is what clause 30.8.1 bites upon."*

38. We are satisfied that these findings are unassailable. The judge was correct in concluding that the words *"**The Employer's Requirements**"* in clause 30.8.1.1 refer to "overriding requirements" contained in clause 1 of the Agreement, that *"the execution, completion and maintenance of the works shall in all respects be to the satisfaction of the Employer"* and that "it is the Contract as a whole which contains the sum of the Employer's requirements." The fact that the Recitals to the Conditions have been crossed out does not mean that there are no Employer's Requirements. The expression "Employer's Requirements" means simply what it says, namely that which the Employer wants done. This is to be found in Clause 1 and in the definition of *"**Works**"* as defined in the First Recital of the Agreement by reference to Tender and Specification. Thus the Employer's overriding requirement was that the Works should be in all respects to the satisfaction of the Employer in accordance with Clause 1. The Contract as a whole contains the Employer's Requirements. The Contract obliges the Contractor to *"execute, complete and maintain the Works in all respects to the satisfaction of the Controller ... in accordance with and on the terms and conditions set out in the Tender and Specification ... ."*

The 1981 Form contrasted with the 1980 Form (Ground 3)

39. Mr Fenwick submitted that the learned judge was wrong in law to construe 30.8.1 of the 1981 Form in the same way as clause 30.9.1.1 of the 1980 Form as regards the conclusiveness of the Final Account and Final Statement. In order to substantiate that assertion and by way of a background to the individual points for determination in this appeal, Mr Fenwick embarked upon an elaborate analysis of the two Forms and the effect of the changes incorporated in the later Form. Principally, the 1980 Form concerned an Employer who had retained its own independent expert, the architect, able to assess the quality of the workmanship carried out by and the materials used by the Contractor. By contrast, the 1981 Form was directed to the situation where it was the Contractor who carried out both design and build functions. We accept this distinction and we do not consider it necessary to construe the material parts of either Form in order to reach our conclusions.

40. Mr Fenwick contended that clause 30.8.1.1 contains more explicit wording : *"Where it is stated in the Employer's requirements ...."*

41. For this reason alone the narrow **construction** is applicable. Since the Employer's requirements do not contain the necessary *"**explicit wording**"*, there is nothing to which the clause can apply and the Contractor "conclusive evidence" defence must fail in its entirety.

42. The learned judge was not attracted by the Employer's arguments that there was a fundamental distinction between the 1980 and 1981 provisions which was of relevance to the facts of this case. He preferred the Contractor's contention that the differences were more apparent than real and that the Scheme of each contract was very similar. It was submitted that the Employer in the person of its Controller of Development Technical Services had a degree of control not dissimilar to that of the Architect under the 1980 Form and that the Scheme of both Forms was sufficiently alike for the wider **construction** of the Court of Appeal in ***Mowlem*** to apply to this Contract. The learned judge said : *"If the question turned on the basis of the standard forms alone, the Plaintiffs would have a stronger argument if only because of the reduction in the requirements for specific qualities of materials or standards of workmanship in this form of contract compared with the one under which an architect is employed. Nevertheless, I would have felt obliged to follow the Court of Appeal's decision and would have applied the wider interpretation as I found*

Mr Fenwick's submissions sufficiently undermined by Mr Royce's reply as to conclude that, although different in the above respects and in that the Contractor has the wider responsibility of design, selection of materials (unless specified) and the preparation of claims for payment, there is sufficient control retained by the Employer to bring the contract within the ratio for the application of the wider ***construction****."*

43. We accede to Mr Bowdery's primary submission that since, in this case, all the Works had to be to the satisfaction of the Employer (which will necessarily encompass "***the quality of materials***" and *"**standard of workmanship**)*" there is a direct parallel with the ***Mowlem*** case in the interpretation of Condition 30.8.1. We do not accept that the absence of a designated Architect under this Standard Form (as opposed to the Standard Form in ***Mowlem***) is a relevant distinction. The Employer may choose to perform the functions assigned to him personally or through a qualified agent.

44. We therefore conclude that the learned judge did not err in law in construing clause 30.8.1 of the 1981 Form in the same way as clause 30.9.1 of the 1980 Form as regards the conclusiveness of the Final Account and Final Settlement. It follows that we must reject Mr Fenwick's argument that the learned judge wrongly considered himself bound by the reasoning of the Court of Appeal in ***Mowlem's*** case when construing clause 30.8.1 of the 1981 Form

Design (Ground 1)

45. The Employer contends that the learned judge wrongly construed the contract so that Clause 30.8.1 of the 1981 Form operated upon defects in design of the work. The employer relied upon :
    (1) the presence of the express design warranty undertaken by the Contractor in clause 2.5.1.
    (2) the absence of the architect third-party against whom the Employer (under the 1980 Form) would have recourse.
    (3) the wording of clause 30.8.1 which provides for conclusiveness as to the quality of materials and the standards of workmanship but ***does not*** provide for conclusiveness as to design.

46. Before the learned judge Mr Fenwick, for the Employer, submitted that clause 30.8.1 cannot apply to breaches of the obligation of the Contractor to complete the design of the works, particularly having regard to the express design warranty in clause 2.5.1. That imposes the like liability in respect of design as "*an architect or .... other appropriate professional designer*" would have to the Employer. Judge Newman rejected the argument and held: *"In my judgment, I find the inclusion of design wholly consistent with the true* ***construction*** *of this Contract as I have found it to be. Mr Royce points to clause 30.9 ... as showing such consistency and I agree."*

47. Before us Mr Fenwick submitted that the learned judge's conclusion :
    (a) overlooks the clear distinction in the 1981 Form between design and workmanship responsibilities;
    (b) is inconsistent with the express design warranty found in clause 2.5.1 of the 1981 Form (but not in the 1980 Form) ;
    (c) is incompatible with the limitation clause in 30.8.1.1 to quality of materials and standard of workmanship.

48. In short, leading counsel contended that there is no scope for construing the clear words of clause 30.8.1.1 as including design allegations. Insofar as the learned judge appears to have been influenced by clause 30.9 it is difficult to see how this clause can have any bearing on the matter. The fact that clause 30.8.1.1. (expressly) refers only to work and materials, which is an exception to the general proposition that : *"No payment by the Employer shall of itself be conclusive evidence that any design, works, materials or goods to which it relates are in accordance with the Contract."*

49. Does not give rise to an implication that clause 30.8.1.1 covers the whole of the subject matter as clause 30.9.1. The fact that within the same clause the sub clause .9 refers to "***design***" as a separate and additional category of contractual requirement distinct from *"**works**"* and *"**materials***" strongly suggests that the reference in 30.8.1.1 to only the latter two contractual requirements, and that the omission of "***design***" was deliberate and reflected the intention of the parties.

50. Mr Bowdrey on behalf of the Contractor submitted that "Works" are defined by reference to the Tender and Specification. The fact that the tender refers to a "*quotation and for the design and* ***construction*** *of the extension to ... [the school],* shows that the "*Works*" therefore comprise both design

and **construction**. Clause 1 of the Agreement required "*the Works*" to be to the satisfaction of Employer in all respects and this therefore included the design. Design is encompassed within Condition 30.8.1.1 and has to be to the satisfaction of the Employer in accordance with clause 1 of the Agreement.

51. We consider the argument of Mr Fenwick to be well-founded. In our judgment there is no scope for construing the clear wording of clause 30.8.1.1 as including design allegations. The judge's conclusion that 30.8.1 applies to the breach of the Contractor's obligation to complete the design of the works, in our judgment, does overlook the clear distinction in the 1981 Form between design and workmanship responsibilities. The learned judge appears to have been influenced by clause 30.9 : *"save as aforesaid, no payment by the Employer shall of itself be conclusive evidence that any design, works, materials or goods to which it relates are in accordance with this Contract."*

52. We find it difficult to see how clause 30.9 can have any bearing on the matter. The fact that clause 30.8.1.1 refers only to work and materials, is an exception to the general proposition *"that no payment by the Employer shall of itself be conclusive evidence ... etc."* This does not give rise to an implication that clause 30.8.1.1 covers the whole of the subject matter of clause 30.9. The fact that within the same clause (clause 30) one sub-clause (30.9) refers to "*design*" as a separate and additional category of contractual requirement (distinct from "works" and "materials") strongly suggests that the reference in the sub-clause to 30.8 to only the latter two contractual requirements, and the omission of "*design*" was deliberate and reflected the intention of the parties. Moreover the Contractor's design warranty expressly provides (2.5) : *".1 In so far as the design of the Works is comprised in the Contractor's Proposals ...., the Contractor shall have in any respect of any defect or insufficiency in such design the like liability to the Employer, whether under statute or otherwise, as would an architect or, as the case may be, other appropriate professional designer holding himself out as competent to take on work for such design, who acting independently under a separate contract with the Employer, had supplied such design for or in connection with works to be carried out and completed by a building contractor not being the supplier of the design."*

53. We consider that Mr Fenwick's submissions on the effect of this clause are correct. It underlines (and underlies) the role of the Contractor in the design of the works. It also The position of the Contractor is analogous to that of an independent architect. The Employer has divested himself of the design responsibilities. These have been assumed by the Contractor. To hold otherwise would mean the Employer has no remedy against anyone where he has no responsibility for design and yet he is hoisted with the final and overall responsibility. Our conclusion would appear to be in conformity with the overall range of JCT Standard Forms of Contract. It is not without significance that the title of the instant Contract is "Standard Form of Building Contract - *with Contractor's Design."*

54. Accordingly we set aside the judge's conclusion and find for the Respondents on this issue.

Latent Defects (Ground 2)

55. The Employer contends that the learned judge wrongly construed the Contract so that clause 30.8.1 operated upon latent defects in the Works.

56. The learned judge accepted the Contractor's contention that had the parties wished to exclude latent defects from the conclusiveness effected by clause 30.8.1 they could easily have done so in the same way as they expressly excluded fraud. He continued : *"Alternatively, the employer can forgo his "to his satisfaction" clause and rely upon the contractual terms, which the [Employer] in effect seeks to do here, but, at the same time, retain collaterally its comprehensive satisfaction clause in clause 1. By operation of that "tailor-made" clause 1 of the agreement the plaintiff aggregated to itself final, and indeed, absolute control. This is not a criticism ... in retaining that final control .... they brought themselves, in my judgment conclusively within the ratio decidendi of the Court of Appeal in* ***Crown Estate Commissioners v. John Mowlem****. Having retained that right, they took the corresponding responsibility of satisfying themselves as to the Works "in all respects" and in agreeing "Final Account" and "Final Statement" they provided conclusive evidence of their satisfaction as to the quality of all materials and the standard of all workmanship and that they conform to those required by the contractual terms and of the completion of the works in accordance with the "wider* ***construction****" adopted by the Court of Appeal in the above case."*

57. Given that we would allow the Cross-Appeal on design faults, we are now only concerned with latent defects arising from the quality of the materials and workmanship. Mr Fenwick submitted : *"A defect*

which is latent in the sense that it was not discoverable on reasonable inspection by the Employer, cannot, ... be a matter in respect of which the fact that the workmanship and/or materials were to the reasonable satisfaction of the Employer is in any way conclusive. If the defect was not reasonably discoverable by the Employer, then, ex hypothesis, the Employer cannot have been satisfied with this aspect of the materials or workmanship."

58. In support leading counsel placed heavy reliance upon the observations of Professor Ian Duncan Wallace, QC in "***Not What The RIBA/JCT Meant ...*** " (1995) Const L.J. 184 and in particular at 188 : *".... the unreasonableness and the anti-consumer aspects of the "wider **construction**" [in the **Mowlem** case], covering all defects whether latent or patent ... must be obvious to any but the blindly partisan of observers in the c**onstruction** industry .... . The inevitably rapid covering up of many defects or omissions of workmanship, and the often insuperable difficulties of detecting latent defects in many types of goods or materials ... must, if an unqualified immunity is to be obtained on Final Certificate, play straight into the hands of those contractors or suppliers and sub-contractors prepared to cut corners on the quality of workmanship or materials, as against their more responsible competitors .... By any responsible standards, the "wider **construction**" of the post-1976 wording represents a policy disaster for all private and public owners' reasonable interest in a vitally important area of **construction**, by removing at a stroke the pre-1976 exceptions to immunity of latent defects in materials or workmanship, and by benefiting not merely contractors maximising their profits by policies of under-compliance .... but also .... suppliers of sub-standard work or materials with similar policies..."*

59. Leading counsel contended that because of the much more limited involvement of the Employer, as opposed to the more active role of the architect, the Duncan Wallace proposition applies particularly under the 1981 Form. It is only in this respect where the standard is variable and depends upon the assessment of the "inspector" that such assessment and approval should be final. It cannot cover either (1) those cases where there is an absolute obligation, such as a requirement that steel be to a particular grade (unless the Employer has approved the changes) or (2) those items about which the inspector could not be reasonably satisfied because they are not discoverable upon reasonable inspection.

60. We are unable to accede to this argument. On its proper **construction** clause 30.8.1 makes no distinction between patent and latent defects (save in so far as bad work may have been fraudulently concealed). If the Employer had wished to exclude latent defects from the conclusiveness effected by clause 30.8.1.1 this could easily have been done so in the same way as it has expressly excluded fraud. Although we are of the opinion that the assumption of the responsibility for the design was fundamental to a "***with Contractor's design***" Standard Form of Contract we do not accept that the Employer has no supervisory responsibility (or expertise) when retaining a contractor on a design and build contract. With this exception we agree with the reasoning of the judge. The Standard Form assigns several functions to the Employer which require him to form an opinion. For example, when drawing up a Schedule of Defects pursuant to clause 16.2, the Employer must form an opinion as to the state of the works. Similarly with regard to extensions of time when the Employer considers them "***fair and reasonable".*** The Employer had retained the right, and the responsibility, of satisfying themselves as to the Works "in all aspects" (save as to design). We agree that in agreeing the Final Account and Final Statement they provided conclusive evidence of their satisfaction as to the quality of all materials and the standard of workmanship including (in the absence of their exclusion) all defects, patent or latent (save for fraud). We are not persuaded that in this case the Controller of Development and Technical Services had been divested of this responsibility.

61. Accordingly we would dismiss the Appeal against this finding of the judge.

The Contractor's Appeal

Statutory Requirements

62. Mr Bowdrey, on behalf of the Contractor, submitted that the learned judge erred in holding that the claims advanced by the plaintiff based upon any failure to meet any statutory requirements are not subject to conclusive evidence.

63. In reaching his conclusion the judge distinguished the statutory requirements from other requirements under the Contract on the basis that the statutory requirements remain the contractor's responsibility under Condition 6.1.1.2 and no expression of satisfaction of the Employer can discharge the Contractor unless the statutory requirements have been met. The learned judge's reasoning was as

follows : *"There is a clear difference between what is required by an Employer, who can then express his satisfaction as to it and be bound by that expression, and what is required by Parliament. In respect of statutory requirements, what is required by Parliament is paramount and if those requirements have not been met, they must be made good. This contract in Clause 6 divides the responsibility for this between the parties. In clause 6.1 by the exception "to the extent that the relevant part or parts of the Employer's requirements (including any change) or the Contractor's Proposals there is a mutual duty to inform the other and then it is the responsibility of the Contractor to inform the Employer in writing of his proposed amendment for removing the divergence..... Statutory obligations were not specifically considered in C**rown Estate Commissioners v. John Mowlem & Co. Ltd** and, for the above reasons, in my judgment they fall outside the ambit of even the "wider **construction**", actual compliance with such requirements is paramount over the interests of the parties."*

64. Before us Mr Fenwick maintained the submissions made before, and accepted, by the learned judge in relation to this issue. He further contended that the Contractor's obligation to comply with statutory requirements is distinct from those requiring him to use materials and workmanship of the appropriate quality and standard. Clauses 6.2.1.1 and 6.2.1.2. contemplate that the Employer Requirements and statutory requirements may diverge, and that statutory requirements would then prevail. He further submitted that, in a contract such as this for building works to a local authority school, the Court should be slow to infer that the local authority, having taken the precaution of obtaining its own contractual remedy for non-compliance with important statutory safeguards, intended that any such remedies be thwarted by clause 30.8.1.1.

65. We are unable to accept this line of reasoning. We acknowledge that there is a clear distinction between a contractual requirement to comply with regulations, bye laws, Acts of Parliament etc. and the obligation imposed by law to build in a particular way or to a specified standard. As a matter of contract the parties can divide the statutory obligations between them, but this cannot affect the statutory liability of the employer or the contractor. In our judgement clause 1 of the Agreement required the Contractor to carry out the works in all respects to the satisfaction of the Employer. The "works" included the contractual obligations under Condition 6. We accept the argument advanced on behalf of the Contractor that Condition 30.8.1.1 refers to *"**the quality of materials**"* and *"**the standards of workmanship**"* without distinction and, in particular, it does not exclude compliance with statutory requirements. Thus once the Final Account and Final Statement are agreed this is conclusive evidence under the Contract that the Contractor has discharged his obligations as regards the quality of materials and the standard of workmanship. The contractual obligation under condition 6 is therefore discharged although this cannot, of course, affect the Employer's or the Contractor's statutory liability.

66. On this issue therefore we would allow the appeal, reverse the decision of the learned judge and grant a declaration to this effect.

Conclusion

67. In summary, we would delete from the Declaration the words. *"save and except for those claims which are based upon any failure to meet any statutory requirements which, under the provisions of clause 6 of the Conditions are the responsibility of the Defendant."* and substitute : "*Save and except for those claims which are based upon any failure of design."* To that extent the Appeal and the Cross-Appeal are allowed.

Order: appeal allowed in part as indicated; cross appeal allowed in part as indicated. No order as to the costs of the appeal (All costs arising out of preliminary issues to be reserved to trial judge). (Order does not form part of approved judgment.)

MR MARTIN BOWDERY QC (instructed by Squire & Co, London EC1V 4RF) for the Appellant

MR JUSTIN FENWICK QC/PAUL SUTHERLAND (instructed by Masons, London EC1R 0ER) for the Respondent