CA on appeal from QBD Salford District Registry, Official Referee's Business (His Honour Judge Gilliland QC) before Roch LJ; Tuckey LJ; Otton LJ. 16th April 1999.

LORD JUSTICE ROCH:

1. I will ask Lord Justice Tuckey to give the first judgment.

LORD JUSTICE TUCKEY:

Introduction

2. This is an appeal by the plaintiffs, Rackline Limited, from the judgment of His Honour Judge Gilliland QC, sitting as an official referee in Salford, who on 19th May 1997 dismissed their claim against the defendants, the National Library of Wales ("the Library").

3. In 1993 the Library wished to build a third library building at its premises in Aberystwyth. Rackline tendered for the design, supply and maintenance of the mobile shelving required for the new building. They were only awarded the design contract. They alleged that the Library were contractually bound to procure that they were awarded the sub-contract to supply and to award them the contract to maintain the shelving. They claimed damages for breach of that contract in the shape of loss of profits and other wasted expenditure in a sum in excess of £400,000.

4. The judge, who tried liability only, held that there was no such contract. Rackline say he was wrong for a number of reasons, which it is not possible to understand without considering the contractual history and the judgment in a little more detail. Rackline also claimed payment of more than £50,000 for prototype shelving which they made. The judge rejected this claim because this was part of the work required by the design contract for which Rackline had been fully paid. Rackline say that he was wrong as a matter of construction of the design contract.

The Contractual History

5. Because the shelving was estimated to cost about one-third of the £9m total cost of the new building, the Library decided to go out to tender for this work before the main contract. The tender documents were sent to Rackline on 17th December 1993.

6. The tender instructions are important. In paragraph 1, under the heading "Generally", they said:

"1.1 The Tenderer is to submit three Tenders to the National Library of Wales being for:-

(1) the design of storage equipment;

(2) the manufacture, supply, installation and initial maintenance of storage equipment; and

(3) on-going maintenance.

1.2 It is the intention of the Authority that work involving the design and manufacture and installation of the storage equipment shall be carried out in two stages. The first stage being the design, for which a direct contract with the Authority is intended; the second stage will be the manufacture, supply, installation and initial maintenance which is to be carried out as a direct sub-contract under Condition 62 of the Main Contract for the construction of the Third Library Building.

1.3 In addition, the Authority also requires Tenderers to submit a tender for the on-going maintenance of the storage equipment over a five year period commencing at the end of the Maintenance Period of the Main Construction Contract.

1.4 Tenderers should note that the assessment of Tenders will take account of the aggregate total of the three Tenders."

7. Then at paragraph 3, under the heading "Acceptance of Tenders", the tender instructions said:

"3.1 The Tender is to remain open for acceptance for the periods stated, after which the Contractor is free to withdraw, offer to negotiate a revised Tender based on the original prices or retain his original Tender price. ...

3.2 The Tender for the Design of the Storage Equipment shall remain open for acceptance for three calendar months from the date for submission of tender.

3.3 The Tender for the manufacture, supply, installation and initial maintenance sub-contract shall remain open for acceptance until [21st] August 1994 (being the date of expiry of the tender acceptance period for the Main Construction Contract tenders). The Main Contractor will award the manufacture and installation sub-contract within 7 days of date of the award of the Main Construction Contract.

3.4 The Tender for the on-going Maintenance shall remain open for acceptance until the end of the Maintenance Period of the Main Construction Contract.

3.5 Tenderers are required to complete an undertaking that if awarded the Design Contract they will subsequently execute a sub-contract under Condition 62 of the Contract with the Main Contractor ... "

8. The tender documents included a draft of the design contract with the Library which Rackline subsequently entered into. The detail of this agreement is relevant to the issue about the prototype and I will deal with it when I come to this issue.

9. The schedule of works for the manufacture, supply, installation and initial maintenance of the shelving (which I will abbreviate, where possible, by referring simply to "supply") also formed part of the tender documents. It included, under the heading "Sub-Contract":

"Subject to the following paragraph the Form of Contract under which the work is to be executed will be as the Model Form included as Appendix A to this Schedule of Works.

The Main Contractor and Sub-Contractor will be able to amend the Conditions of Contract upon which this tender is based, or to use an alternative form of contract if so desired, and shall have opportunity within the Main Construction Contract Tenders to make any financial adjustment to the value of this tender caused by such amendments or alternative. ...

The Sub-Contractor will be required to enter into a Sub-Contract with the Main Contractor selected by the Authority to execute the Main Construction Works as a Sub-Contractor in accordance with Condition 62 ..."

10. Then, a little later on, under the heading "Particular Conditions", it said:

"Period in which Sub-Contract Works can be carried out on site:-

To be agreed with Main Contractor.

For information only, the following dates are anticipated for the Main Construction Contract Works:-

Commencement 18th May 1994

Watertight 9th December 1994

Completion 15th December 1995."

11. On 27th January 1994 Rackline submitted three tenders (£20,000 for the design and about £2.6m for the supply) in accordance with the tender instructions. The tender for the design contained the undertaking that if they were awarded the design contract they would enter into the sub-contract with the main contractor on the terms set out in their tender for the supply. By the tender for the supply, Rackline agreed: *"... that this offer shall pass to the Main Contractor for the Main Construction Works to be appointed by the Authority and we undertake to enter into a Sub-Contract under Condition 62 ... with the Main Contractor and we shall not adjust the value of this tender based upon the terms and conditions as set out in the tender documentation."*

12. Rackline's three tenders were accompanied by a letter which contained a number of qualifications, including the following:

"Consolidated Bid

It is assumed that Rackline would be awarded all three tenders and that this bid is a consolidated bid and cannot be separated into discreet (sic) elements."

13. This qualification was discussed at what was described as a "pre-let meeting" with the Library's consultants on 10th February, after which Rackline wrote to the Library on 11th February. The terms of the letter were the subject of amendment, but in its final form the letter said:

"Consolidated Tender Bid

Rackline accept that the contract will be issued in up to three elements. The design element, the supply element, and the on-going maintenance element. It is accepted that the design element will be placed first to enable any outstanding features of the design to be finalised prior to the main supply contract being placed by the main contractor. Rackline accept that in the unlikely event of the supply contract failing to materialise, then there will be no financial penalty to the Library or to the consultants and that the design fee would remain in full and final settlement of the contract."

14. On 16th February 1994, as the judge found, Mr Russell, one of the Library's consultants, told Mr Horan, Rackline's Managing Director: *"You've got it. I am pleased to tell you that your bid for the third bookstack has been successful."*

15. The following day the Library's Director of Administration and Technical Services sent a letter of intent to Rackline, saying: *"Further to your tender and subsequent clarification correspondence relating to the above I am pleased to inform you that the National Library of Wales intends to appoint you to the Shelving Design Contract element of the works subject to your submitting your Business Plan ... and executing the formal written contract in the near future."*

16. At a meeting on 24th February 1994 the Library's architects asked Rackline to provide a programme showing how and when they proposed to carry out the sub-contract works. Rackline sent their programme and other documents to the Library on 17th March. There was a meeting on 13th April between Mr Russell and Mr Horan. In a letter written on 4th May Mr Horan listed the points which had been discussed at this meeting. Point 1 was: *"Rackline will be a 'Pre-designated Sub-Contractor" not a 'Nominated Sub-Contractor'."*

17. Point 11 was: *"It is understood that the DESIGN CONTRACT will terminate once the design is finalised and that thereafter there will be no interaction between the Library and Rackline."*

18. By letter of 5th July 1994 Mr Russell confirmed receipt of the final specification and drawings for the shelving and that the design was complete. By this time Rackline had built a prototype of a full storage bay which had been successfully load tested and a copy of the report of this test had been supplied to the Library.

19. In the meantime, the main contract had gone out to tender. Rackline were told about this in a letter of 7th April 1994, which said: *"We can also confirm that the Library has received permission from the Welsh Office to go out to tender for the ... Main Contracts. It will now be important to confirm the procedures and agenda that you will follow when negotiating with the companies."*

20. The tender documents included Rackline's tender for the supply of the shelving and their programme, which showed that they intended to start the installation in January and complete it at the end of July 1995. The bills of quantities required the contractor to enter into a domestic sub-contract with Rackline and contained identical terms about the form of that contract to those contained in the schedule of work to which I have already referred. They were to complete the sub-contract agreement within one week of the date of the main agreement.

21. Trafalgar House were the successful tenderers. The main contract was executed on or about 27th July 1994. It was agreed that the work would start on 1st August 1994 and be completed by 15th December 1995. However, the delayed start of the main contract meant that the sub-contract which Trafalgar House offered Rackline required them to start the installation in May 1995 and complete it by the end of that year.

22. This had substantial cost implications for Rackline, whose suppliers would not hold their prices to accommodate this delayed programme. Neither Rackline, Trafalgar House or the Library were willing to bear this increase in cost and attempts to resolve the impasse failed with the result that Trafalgar House, with the Library's consent, appointed another sub-contractor to supply the shelving.

The Judgment

23. Rackline's primary case at trial was that the Library had made a single contract with Rackline for all three stages of the work relating to the shelving. This offer was contained in their three tenders and their letter of qualification and what followed it and was accepted at the meeting on 16th February and/or the meeting on 24th February and/or by their entering into the design contract and/or orally at the meeting on 13th April and/or by conduct thereafter, in particular by taking possession of the test report on the prototype.

24. The judge rejected this case. Put simply, his reason was that Rackline had not offered to enter into a single contract. He said: *"... in my judgment there is nothing in the terms of any of the design or the supply tenders or the remainder of the tender documentation which would justify the conclusion that the tenders are not to be understood in their ordinary sense and are not to be treated as separate offers in accordance with their terms which upon acceptance would give rise to a separate design contract and a separate supply contract.*

In my judgment, Rackline never made what could in law be said to be an offer which on acceptance by the Library was capable of giving rise to a single contract for all three stages of the shelving work."

25. A little later on, he said: *"The terms of the tenders are in my judgment inconsistent with any notion of a single contract coming into existence and they are consistent only with separate contracts coming into existence upon acceptance of the particular tenders. There is no suggestion that the terms of the tender documents were expressly varied by agreement between Rackline and the Library so as to give rise to a single offer or a single contract for all three stages."*

26. The judge went on to consider whether there had been any such variation by the letter of qualification and what followed it. He concluded that the letter of 11th February negatived the qualification since it maintained: *"... the separation of the award of the shelving ´contract' into three sections or parts".*

27. These conclusions made it strictly unnecessary for the judge to decide whether there was an acceptance of the offer of a single contract by the Library, but he held that there was not, rejecting each of Rackline's alternatives.

28. Of 16th February, he said: *"There is nothing in the evidence to indicate that Mr Russell on behalf of the Library intended by this conversation to enter into an immediately binding contract with Rackline and I do not consider that Mr Horan understood that an immediately binding contract had come into existence. The proper inference from what occurred in my judgment is that the Library was requiring that the formal documentation should be executed and that any contract would arise upon the delivery and execution of the contract as a deed by both parties."*

29. Of 24th February, he said: *"Nothing, it seems to me, was expressly or impliedly said at the next meeting on 24 February which could amount to an acceptance and, although it is clear that it was assumed that Rackline would be the sub-contractor, no one actually gave any assurance at this meeting that this would be the case, and the evidence is consistent with everyone assuming that the main contractor would in due course appoint Rackline as the sub-contractor."*

30. The judge did not think that any of the later events relied on carried the matter any further.

31. Of the meeting on 13th April when Rackline were told they were pre-designated contractors, he said: *"´Pre-designation' in the context of the meeting on 13 April, by which date the formal design contract had already been entered into, does not mean anything more than the Library had selected Rackline as the person to carry out the design work and the person with whom it was intended that the main contractor would in due course enter into a sub-contract under Condition 62. The term does not have any clear or precise meaning and it does not imply that the Library was thereby promising or had promised that the main contractor would enter into the sub-contract."*

32. Rackline's alternative case, added by amendment in the course of the trial, was that if there was not a single contract there was a collateral or implied contract that the Library would procure Rackline's appointment as the supply sub-contractor. Rackline argued that such an agreement came into existence on 11th February or at the meeting which preceded it, alternatively at any one of the later dates on which they said a single contract had been concluded.

33. In rejecting Rackline's case put in this way, the judge said: *"The real difficulty however ... is that neither the documentation nor what was said at the pre-let meeting and what is recorded in that letter [of 11th February] demonstrate, either when taken separately or together, a clear intention on the part of the Library to undertake responsibility for seeing or procuring that the sub-contractor would actually enter into the sub-contract with Rackline if it obtained the design contract. If Rackline had asked the Library or if the reasonable bystander had asked both of them whether the Library had promised to procure the appointment of the successful tenderer for the design work as sub-contractor to carry out the supply work on the terms of offer from that tenderer, it seems to me quite impossible*

to say with any confidence ´Yes, of course'. The difficulty in the way of giving an affirmative answer is that although the parties had actually adverted to the possibility that there could be circumstances in which no sub-contract might come about although the design contract had been entered into, nothing was actually said at the pre-let meeting which could amount to a promise by the Library that it would procure the appointment of Rackline as sub-contractor if it were to obtain the design contract or which shows that both of them assumed that any such promise was being or had been given. What was actually said was that the Library intended that the same contractor would carry out all three elements of the shelving work. An intention that that should happen is however not the same as a promise that that would actually come about."

34. He reached similar conclusions in relation to the later dates relied on by Rackline in the alternative.

35. Rackline also put their case at trial on the basis of estoppel, but the judge rejected this and there is no appeal against that part of his judgment.

Grounds 1 and 2 of the Appeal

36. Grounds 1 and 2 of Rackline's notice of appeal challenge the judge's findings that there was no single contract, alternatively no collateral or implied contract. The arguments advanced by Mr Black QC, on behalf of Rackline, in support of these grounds are essentially the same since their objective is to establish in one way or another that the Library contracted to procure that the main contractor would enter into a sub-contract for the supply of the shelving on the terms of Rackline's tender.

37. In support of his contention that there was a single contract Mr Black submits that Rackline's offer can be spelt out of the tender documents as varied by the letter of 11th February. This offer, he submits, was accepted in one of the ways contended for before the judge. References in the letter to a *"consolidated tender bid*" and to "*the contract*" show that a single three-stage contract was contemplated. If this was not the case the Library's objective, which was to obtain a designer and for that designer to supply and maintain the shelving, would not be met. That would not make commercial sense.

38. I do not accept these submissions for the reasons which the judge gave. The tender instructions called for three tenders. Each was to remain open for acceptance for a different time. The tender for the supply was an offer to the main contractor and not to the Library. Like the judge I think it is impossible to spell out of the tender documents the offer of a single contract. If this had been what the Library wanted for their commercial purposes it would have been easy for them to have made that clear in the tender documents. So the only question is whether the letter of 11th February altered what was clearly spelt out in the tender documents. I cannot see that it did. Although it refers to a "*consolidated tender bid*", this is simply the heading under which the qualification had been raised by Rackline. What appears under this heading is consistent with the tender documents and is inconsistent with the qualification which asserted that Rackline would be awarded all three tenders. The letter recognised in terms that the supply contract might fail to materialise so that Rackline would not be awarded all three contracts.

39. Even if there was an offer of a single contract, I think Rackline are in considerable difficulty on the question of acceptance. The judge made findings of fact upon the various ways in which they had put their case, to which I have referred, which I do not think can be assailed on this appeal.

40. So I turn to the alternative way in which Mr Black puts his case. Here, as well as the arguments in support of his primary case, he relies on the fact that it was the common intention of the parties that Rackline would be awarded the supply contract. In this context he submits that intention can be equated with promise because the Library had it within their power to procure that Rackline were awarded the sub-contract. Furthermore, Rackline were obliged to enter into the sub-contract if they got the design contract and their tender for supply was accepted in time. The tender documents promised that the main contractor would award the sub-contract within seven days of the award of the main contract. The Library's conduct, he submits, in telling Rackline that they had got the job and were the pre-designated sub-contractors and asking them to prepare a programme is referable only to there being a contract of the kind alleged and is entirely inconsistent with there being no such contract.

41. These are telling points and one is bound to sympathise with Rackline's position. But can one spell out of this material a collateral or implied agreement that the Library would procure the main contractor to enter into a sub-contract worth several million pounds with Rackline? I regret that I do not think one can, again substantially for the reasons given by the judge. The language of procurement, as Mr Darling QC, counsel for the Library, described it, is entirely absent from this material. The fact that both parties intended that Rackline should get the sub-contract is not enough. An intention to contract does not create a contract, still less an intention that someone else should contract. It does not follow that because Rackline were required to enter into the sub-contract if their tender was accepted the Library must have agreed to require the main contractor to do likewise. The promise that the main contractor would award the sub-contract within seven days of the main contract was not a promise that it would be awarded to Rackline. It simply ensured that the sub-contract would be awarded promptly. The conduct relied upon by Rackline is equivocal. It is consistent with the parties' expectation that Rackline would be awarded the sub-contract, but it does not establish that the Library had committed themselves to ensuring that this would happen. So for these reasons I reject the alternative way in which Mr Black puts his case.

The Prototype

42. It is common ground that if the prototype did not have to be made under the design contract Rackline are entitled to be paid a quantum meruit for it.

43. The contract is dated 16th February 1994, although it was executed some time later.

44. Clause 3.1 of the contract defines the obligations of the designer. It says: *"In consideration of payments to be made by the Library in accordance with Clause 4.1, the Designer shall provide the Design services necessary to achieve the Library's objectives in relation to the shelving and storage systems as set out in Clause 1, including, without limitation, the services listed in the First Schedule to this Agreement."*

45. So that clause takes one back to Clause 1 and to the first schedule. Clause 1.1 says: *"The Project is more fully described in the ´Authority's Requirements' for the third Library Building shelving and storage system (´the Objectives'), a copy of which is attached to and forms part of this Agreement."*

46. I.3 says: *"The ´Design' is defined as the preparation of a specification and drawings for every item in connection with the full scope of storage equipment, all as required by the Authority's Requirements in the First Schedule hereto, to the level of a fully commented submission (as defined in the Authority's Requirements). At this point (the design freeze) the design development will be complete."*

47. The first schedule, under the heading "Objectives", at paragraph (a), says: "*Client's Requirements are set out in the attached Document entitled ´Client's Requirements' with 5 Appendices."*

48. Appendix 3 of those appendices sets out structural data and requirements. The prototype which Rackline made is described at Appendix 3/6, under the heading "Prototype Testing at Works". It says: *"A prototype is to be prepared of a sample bay ... with capacity to fully load the shelves. The purpose of this prototype is to assess the performance of the ... shelving ... and to provide a full scale sample for general inspection and comment."*

49. There are then some further details about how the prototype is to be constructed, loaded and tested. This part of the appendix continues:

"This works prototype bay is also to be used for demonstrating and testing of the first produced single units of all other mobile equipment items. ...

The tendering supplier is to particularly note the overall requirement that such at works inspection and testing is required for all mobile items and that this overall requirement is to include at works inspection of the first produced single units ...

These prototypes may be the first produced items for any or all of the equipment which then continue to be part of the overall supply provided that subsequent inspection and service on site shows no damage or detriment whatsoever arising generally or in consequence of the at works testing or inspections. ..."

50. The remaining paragraphs of the first schedule to which I have referred say:

"(b) Anticipated Prototype Stage: two weeks after appointment.

(c) Anticipated major Interface Stage: [7th March 1994]

(d) The design will have two interim stages:

The Prototype Stage is defined as the presentation of Prototype items required in the Client's Requirements as a fully commented submission (as defined in the Client's Requirements).

The Major Interface Stage is defined as the preparation of a specification and drawings of all items that interface with the Main Contractor's Works to the level of a fully commented submission (as defined in the Client's Requirements). All such items are to be identified as part of the Prototype Stage."

"Fully commented" is not defined in the Client's Requirements, but this is probably intended to be a reference to "comment", which is defined to mean

"acting or modifying accordingly and resubmitting as frequently as necessary until status of ´no comment' is recorded ..."

51. I have already referred to the making and testing of the prototype. On 25th March 1994 Rackline submitted an invoice to the Library for £7,000 which was for:

"The design work and production of prototype mobile library shelving system, as per our Drawing ...

Order Value - £20,000.00

35% due now"

52. 35% was the proportion of the total fee due under the design contract on completion of the major interface design, that is to say the second interim stage of the design described in the first schedule of the contract which was to be completed by 7th March 1994.

53. The judge held that the prototype made by Rackline was made as part of the prototype stage referred to in the first schedule of the design contract, and so Rackline were not entitled to additional payment for it. It made commercial sense, he said, to ensure, as part of the design process, that the shelving shown and described in the drawings and specification would work in practice.

54. Before us, Mr Black submitted that references to *"prototype"* in the schedule could not refer to the prototype made by Rackline. It would have been impossible to produce such a prototype within two weeks of their appointment as designers and Appendix 3/6 refers clearly to something which has to be made by the supplier and not the designer. The word "*prototype"* in the schedule, he submits, should be read as meaning samples or no more than drawings of prototypes.

55. I cannot read the contract in this way. The schedule says in terms that the prototype stage is defined as the presentation of prototype items required in the Client's Requirements. This takes one to Appendix 3/6. The sample

bay is required for general inspection and comment and to assess the performance of the shelving. This is appropriate to the design stage and there is nothing in the language of this part of the appendix to suggest that the obligation to produce that prototype falls on the supplier. The latter part of the appendix does refer to the supplier, but it is introduced by the words: *"This works prototype bay is **also** to be used for demonstrating and testing of the first produced single units ..."* (Emphasis added)

56. I therefore think that the prototype stage referred to in the first schedule included the production of the prototype which Rackline made. It does of course make commercial sense for the designer to be required to demonstrate as part of the design process that his design will work in practice. The requirement that the prototype should be "a fully commented submission" supports this conclusion, the intention no doubt being that the Library and its consultants could have their say before final approval of the design. Mr Black's point about the time needed to produce such a prototype is much blunted by the fact that within a relatively short time of their appointment Rackline were claiming payment for the prototype.

57. For these reasons I think the judge was right on each of the issues which he had to decide and I would dismiss this appeal.

LORD JUSTICE OTTON:

58. I agree.

LORD JUSTICE ROCH:

59. I also agree.

Order: appeal dismissed with costs.

Mr M Black QC and Miss Gardner (instructed by Messrs Lake New & Hurst, Stockport) appeared on behalf of the Appellant Plaintiff.
Mr P Darling QC (instructed by Edwards Geldard, Cardiff) appeared on behalf of the Respondent Defendant.