CA on appeal from TCC, Mr Recorder Uff QC, before Brooke LJ, VC, Sedley LJ; Jacob LJ. 16th December 2003.

JUDGMENT : Lord Justice Jacob :

1. This appeal, by permission of Simon Brown LJ, is from a decision of Mr Recorder Uff QC sitting in the Technology and Construction Court. He decided certain preliminary issues ordered by HHJ Richard Seymour QC. Those issues were:
   i) Whether the claimant had entered into any binding contract or contracts with the first and second defendants or either of them as alleged in the re-amended particulars of claim; and
   ii) If and insofar as the claimant did enter into any contract or contracts with the first and second defendants or either of them, what were the terms of such contract or contracts as to the making by the first and second defendants or either of them of any payments to the claimant.

2. The Judge uncontroversially describes the parties as follows: *"The claimant, which is effectively Mr Dinkha Latchin, is an experienced architect of Iraqi origin who has worked for many years, with success, on the international architectural circuit. The second defendant, Mr Nadhmi Auchi is a highly successful international businessman, also of Iraqi origin. The first defendant (GMH) is described as an international investment company with interests in real estate, construction, hotel and leisure industries, incorporated in Luxembourg but with its central management in London. Mr Auchi is or was at the relevant time Chairman and Chief Executive Officer (CEO) of GMH and a substantial shareholder both directly and indirectly. Mr Auchi's indirect shareholdings were through a chain of subsidiary and associated companies in many of which Mr Auchi also held executive offices. One of these is Compania Rentistica (the third defendant), of which Mr Auchi is President. It is sufficient for present purposes to refer to the chain of companies headed by GMH as the GMH Group, although ownership and control of the different companies was more complex than this suggests. Rentistica held, directly or indirectly, interests in a number of prestigious properties in Tangiers, which form the principal subject of this action. At the relevant time both Mr Auchi and Mr Latchin were resident and domiciled in England. Since then Mr Latchin has moved his operations to Dubai."*

3. The Judge describes the claims as follows: *"The claim, in a nutshell, is for payment of architectural fees, the calculation or assessment of which does not presently concern the Court, arising out of the following projects:*
   Project 2: commencing in about April 1994, Mr Auchi produced sketches and design studies for refurbishment of the existing Hotel Villa France to a four star standard. The work involved visits to Tangiers and continued until February 1995.
   Project 1: was a development of Project 2 which followed on from February 1995 when Mr Latchin contends that he was informed that the refurbished hotel was to be to five star standard. The work continued until March 1996 involving further sketches, plans and drawings.
   Project 3: from about May 1994 this work concerned the development of the Old English Tennis Club in Tangiers, involving sketches and drawings of three separate plans. The work continued until January 1996.
   Project 4: was for a private villa for Mr Auchi, situated on elevated land above Tangiers and involved plans and drawings produced between about December 1995 and August 1996."

4. The Judge notes that Mr Latchin produced a large number of drawings and prints concerning the four projects but that there is little on either side by way of records of the events between April 1994 and August 1996. There was a conflict of evidence between Mr Latchin and Mr Auchi.

5. The Judge considered in detail the history of the relationship between the parties and the work being done by Mr Latchin. He makes specific findings as to the happening of certain meetings, some of which were denied. Although he did not accept parts of Mr Latchin's evidence (particularly as to a specific agreement and the basis for his payment, which was said to have been on RIBA terms), he concluded by saying this: *"Having reviewed the evidence and surrounding circumstances, which to me seem relevant, I have come to the conclusion that, as regards whether or not meetings and other events took place, the evidence given by Mr Latchin is broadly to be accepted. To a large extent, the conflicting evidence of Mr Auchi and Mr Al Juma was to the effect that a meeting or event had not taken place rather than putting forward alternative evidence. For the avoidance of doubt, I do not find that the evidence of Mr Auchi or Mr Al Juma contained deliberate untruths, but rather that they should not have disbelieved Mr Latchin when he approached them seeking payment."*

The Mr Al Juma referred to was Mr Auchi's brother in law, resident in Tangiers and the general manager of Rentistica.

6. So there is a general acceptance of Mr Latchin's evidence. This extends beyond the specific facts mentioned in the judgment – as the quoted passage makes clear.

7. The Judge concluded that although there was no express agreement reached at any time, there came a point when an agreement for fees to be paid must be implied. He did so in the following two paragraphs: *"In my judgment, while it was understood between the parties in April 1994 that Mr Latchin's work would not be remunerated, and I am not persuaded that this changed in May 1994, there must have come a point in the relationship between Mr Auchi and Mr Latchin when each, had they addressed the question, would have recognised that there was no longer an intention that further work would be unremunerated. At this point, further work carried out at the defendant's request or with their consent would carry a right to reasonable payment. This could be negatived by express stipulation on behalf of the defendants that the work was still regarded as speculative. It was in this context that questions were put to Mr Auchi at the end of his evidence as to whether he had ever said to Mr Latchin face to face that he would not be paid unless the building licence was obtained. In response Mr Auchi accepted that, while it was his understanding that Mr Latchin would not get paid he (Mr Auchi) had never said this to Mr Latchin. Mr Al Juma in cross-examination similarly agreed that he had not said explicitly to Mr Latchin that he would not get paid if no licence was obtained. Given this evidence I am satisfied that there did arrive a point at which further work would be remunerated and it falls to determine what that point was.*

Reviewing the facts and circumstances set out above, I am confident that, by January 1995, when Mr Auchi or Mr Al Juma instructed Mr Latchin to switch his work on the Hotel Villa France to a five star design, they would, if asked, have recognised that both future work and the work currently being carried out by Mr Latchin would be remunerated in the absence of a clear statement to the contrary. I have already found that there was no intention in May 1994 that Mr Latchin was then to be paid. At some time between these dates the conduct of the parties was such as to give rise to an intention that any further work would be remunerated. Doing the best I can on the evidence presented, I assess this as 1 September 1994. This finding applies to all work carried out by Mr Latchin thereafter, on Projects 2, 1, 3 and 4."

8. The Judge then went on to conclude that this implied contract was with both GMH and Mr Auchi personally.

9. Mr Peter Coulson QC, for the appellants, challenges both these findings. To some extent his argument interlinks them for, in relation to the finding of an implied contract, amongst other things he asks forensically "who is the counter party to the contract?" Nonetheless it is convenient to deal with the questions separately.

Was there an implied contract?

10. Mr Coulson did not pursue the principal argument foreshadowed in his skeleton argument which was that, as framed, the preliminary questions related only to contract and did not cover any other legal basis for recovery, particularly quantum meruit, or unjust enrichment. He realistically accepted that whatever the theoretical basis of recovery, essentially the same questions had to be asked here.

11. There was no dispute as to the applicable legal principles. Thus although we had a number of cases cited to us (as they were to the Judge) I can conveniently just take the concise summary by Mance LJ in ***Baird Textiles Holdings v Marks & Spencer*** [2002] 1 All ER 737 [2001] EWCA Civ 274:

"[59] For a contract to come into existence, there must be both (a) an agreement on essentials with sufficient certainty to be enforceable and (b) an intention to create legal relations.

[60] Both requirements are normally judged objectively. Absence of the former may involve or be explained by the latter. But this is not always so. A sufficiently certain agreement may be reached, but there may be either expressly (i.e. by express agreement) or impliedly (e.g. in some family situations) no intention to create legal relations.

[60] An intention to create legal relations is normally presumed in the case of an express or apparent agreement satisfying the first requirement: see ***Chitty on Contracts*** *(28th edn., 1999) vol 1, para 2-146. It is otherwise*

when the case is that an implied contract falls to be inferred from parties' conduct: Chitty, para 2-147. It is then for the party asserting such a contract to show the necessity for implying it. As Morison J said in his para 12(1), if the parties would or might have acted as they did without any such contract, there is no necessity to imply any contract. It is merely putting the same point another way to say that no intention to make any such contract will then be inferred.

[61] That the test of any such implication is necessity is, in my view, clear, both on the authority of ***The Aramis*** *[1989] 1 Lloyd's Rep 213,* ***Blackpool and Fylde Aero Club Ltd v Blackpool BC*** *[19990] 3 All ER 25, [1990] 1 WLR 1195,* ***Wilson & Co A/S v Partenreederei Hannah Blumenthal, The Hannah Blumenthal*** *[1983] 1 All ER 34, [1983] 1 AC 854 and* ***Mitsui & Co Ltd v Novorossiysk Shipping Co, The Gudermes*** *[1993] 1 Lloyd's Rep 311, cited by the Vice-Chancellor, and also a matter of consistency. It could not be right to adopt a test of necessity when implying terms into a contract and a more relaxed test when implying a contract – which must itself have terms."*

12. Of particular importance here is the necessity test. It is not good enough if the parties' conduct is ambiguous – consistent with a contract but also consistent with the absence of a contract.

13. Mr Coulson uses that principle in the following way. He starts with the Judge's finding that during their meetings in April and May 1994, the parties did not make a contract. Nonetheless Mr Latchin started work in the hope that if and when the projects materialised (which would depend on permission from the Tangiers authorities) he would get the job of architect. His conduct at that time is referable to this future hope. Nothing then changed, submits Mr Coulson, other than that Mr Latchin did some more work – which is just as referable to that hope as the earlier work. So, he submits, the conduct was ambiguous throughout. He relies on the Judge's finding that "Mr Latchin's real interest was in being appointed architect when and if any of the projects succeeded."

14. He reinforces his argument by asking what happened on the 1st September 1994 which turned work being done in hope to work being done under a contract for fees. He submits that the judge identified nothing at all – just plucked a date out of the air.

15. Powerful though these submissions are, I reject them. It is first necessary to take into account the evidence as to what happened in September. Mr Latchin's witness statement says this: *"In early September 1994, I went to see Mr Auchi at the London offices and gave him a presentation of the proposals for Project 2. The presentation involved a number of plans, sections, and elevations. These are the documents disclosed at 71-82 and 95-103. They show the siting of the building on the land. The building is u-shaped to give maximum views of the sea and gives a larger than usual car park for use by the public as well as hotel guests.*

Mr Auchi approved my designs and instructed me to take the work to Tangiers so that the designs could be submitted to the relevant authorities. As a result, I contacted Mr Al-Juma and arranged for the visit. My passport shows that I went to Tangiers on 22 September 1994.

Following Mr Auchi's instructions, I approached Mr Dhimni Mohamad Architect DENA, 45 Bd, Mohammed V, Tangiers, an architect who was known to me as a colleague of Mr Khinani, an architect on the villa I had previously worked on in Tangiers (referred to in para 18 above). While Mr Auchi and Mr Al Juma were always responsible for getting my drawings ready for submission, Mr Al Juma was not able to do so (i.e. get the drawings annotated) without my input. So I approached Mr Dhimni and asked him to annotate the drawings in Arabic. I was keen to supervise this work because I wanted to make sure the translation was correct. I requested that Mr Mohamad annotate the drawings. I arranged this on the understanding that he might then be appointed by Mr Al Juma to be the local architect on this project. He agreed to do this work accordingly. Mr Al Juma was aware of this and it was done with his agreement. Later on Mr Al Juma decided not to appoint Mr Mohamad.

I stayed in Tangiers on Project 2 until 15 October 1994 to assist Mr Mohamad in annotating and labelling the designs in Arabic. No amendments were made to the designs in Morocco; they were simply annotated/labelled in Arabic for submission to the planning authorities. It would, in any case, have been impossible for any such amendments to be made in Morocco, as any amendments needed the strict approval of Mr Auchi. My passport shows me leaving Tangiers on 23 October 1994.

Back in London, Mr Ciric and I did further detailed work to improve the functional design of the various areas including service, car parking, cafeterias, restaurants, conference halls etc. We had got to the point where it was

necessary to have the design of the structural grid done by other consultants and it was needed to appoint a structural engineer and a services engineer. It was further agreed with Mr Auchi during one of our progress meetings that these should be Moroccan companies."

16. Although the Judge makes no explicit finding that Mr Auchi instructed Mr Latchin to go to Tangiers in early September, his general acceptance of Mr Latchin's evidence (particularly the happening of meetings) covers this – particularly as the judge does refer to the actual visit to Tangier subsequent to the meeting (see paragraph 19).

17. So by September Mr Auchi was positively instructing Mr Latchin to do substantial amounts of work and necessarily to incur the expense of a significant trip to Tangiers. Mr Auchi knew Mr Latchin was a professional architect who earned his living by fees.

18. The Judge said this*: "While it was understood between the parties in April 1994 that Mr Latchin's work would not be remunerated, and I am not persuaded that this changed in May 1994, there must have come a point in the relationship between Mr Auchi and Mr Latchin when each, had they addressed the question, would have recognised that there was no longer an intention that further work would be unremunerated."* And

"I am confident that, by January 1995 when Mr Auchi or Mr Al Juma instructed Mr Latchin to switch his work on the Hotel Villa France to a five star design, they would, if asked, have recognised that both future work and the work currently being carried out by Mr Latchin would be remunerated in the absence of a clear statement to the contrary"

19. These are clear applications of the well-known "officious bystander" test – the test for implication of a term into a contract. That is indeed a test of necessity. The Judge was applying the right test.

20. Did he nonetheless misapply it? I think not. It was open to the Judge to look at the commercial and human realities of the position. Indeed he was bound to do so. Although Mr Latchin was of course interested in the ultimate job, it does not follow that he would do unlimited work, not only of a general design nature but down to the point where a structural engineer was needed, for nothing. Nor is it consistent with work being done purely "on spec" for Mr Auchi or Mr Al Juma to be giving Mr Latchin instructions and for Mr Latchin to be accepting and acting on them at his expense and by now expending significant amounts of time on the commissioned work.

21. In the absence of any other facts, the giving to, and carrying out of, instructions by a professional normally gives rise to an implied promise to pay – because no other explanation of those facts makes commercial sense – necessity compels the conclusion. Given that is so, it was for Mr Auchi to explain why the work being done at his behest was not to be paid for. The Judge said: *"While I do not consider that the initial arrangement entered into by Mr Latchin and Mr Auchi gave rise to an implication that the work to be carried out would be remunerated, I do not find that anything which passed between them was indicative of an intention that this situation would continue indefinitely and irrespective of the amount of work that Mr Latchin carried out."*

22. This amounts to holding that the normal implication flowing from instructions and work done stands rebutted for an initial period only. This was the sort of overall evaluation of the effect of the evidence which it was for a trial judge to make and which can only be interfered with by this court if shown to be wrong in principle. None is shown here.

23. Moreover I think it was well within the Judge's function to form an overall impression of when the normal implication of a duty to pay "kicked in." He chose 1st September which, as one can see from the quoted evidence, is when the work, in Mr Males QC's expression, "went up a gear." So much more work was by then being ordered and done, that, even though the earlier preparatory work had been on the basis only of a hope (including that of approval by Mr Auchi), a line had been crossed. The work was moving on to a more detailed phase, the outline design work having been approved in principle by Mr Auchi.

24. Mr Coulson complains that there has been a reversal of the burden of proof -that it is for the claimant to prove facts giving rise to an unequivocal inference of a contract. That is of course so as regards the legal burden. But what his argument overlooks is that here, absent any contrary arrangement, there

would have been an implied obligation to pay from the outset. So the evidential burden shifted to the defendants to rebut the normal presumption. They could not show that it was agreed that all the work was agreed to be contingent on regulatory approval – the most that was shown is that described by the judge which I have quoted above.

25. There is another consideration which suggests that at some point an obligation to pay for the work arose. Take the point in January 1995 when a lot of work had been done (particularly on the hotel) – the point the Judge chose for his officious bystander question. Suppose Mr Latchin had just refused to do any more and refused permission for the use of any of his work without payment of an outrageous fee. Could it really be said that he could do that, that he could hold the various projects to ransom? I think the officious bystander would have said "of course not." In legal language there was a licence to use the drawings by then, a licence that could not be withdrawn but was one which had to be paid for.

26. The Judge does not expressly advert to this point, which I raised in the course of argument. It can fairly be said that these two Iraqi gentlemen would not have the law of copyright in mind. I agree that is probably true in so many words. But you do not have to be a copyright lawyer to see that you need permission to use drawings and that if they have been produced by a professional, you will need to pay him for that permission. That is no more than fundamental commercial morality.

27. Another point raised by Mr Coulson was the absence until October 1995 of any request for payment (which I think the judge accepted was made then but only orally and only to Mr Al Juma) and the absence of any written request for payment until October 1998. He says this supports his contention that all the work was done speculatively and that Mr Latchin's notion that he should be paid is a deliberately raised late claim.

28. But the Judge accepted the explanation for the late request (namely that Mr Latchin was still hoping to be appointed for the actual jobs and did not want to upset the apple-cart) and unhesitatingly rejected the afterthought or deliberately late suggestions.

29. Moreover I am impressed by the fact that when Mr Latchin did send a bill (in fact to a GMH company whose name he took from some offices) in March 1999, the response, written by Mr Auchi's personal assistant, was to the effect "wrong company." It was not, as one might have expected if it had been the case, "no contract with anyone." It was a fair inference for the Judge to draw that at that time Mr Auchi was not contending that there was no contract with anyone. The judge said the response was "significant" and I think it was.

30. Accordingly I can see no sufficient reason for concluding that the Judge was wrong. He applied the right legal test and there was sufficient evidential material for his conclusions on the facts.

The parties to the contract

31. I turn to the question of whether GMH and Mr Auchi were properly held to be the contractual counterparties. The Judge said this: *"I find that Mr Latchin dealt with Mr Auchi on Projects 2,1 and 3 knowing or believing that he represented some company but with no knowledge as to which. This situation continued during all four projects, despite the work in Tangiers being done through Rentistica. I find that Mr Auchi was in fact acting in his capacity as CEO of GMH, the company. It is relevant that at the commencement of Mr Latchin's work, as I find, it was uncertain which of the companies within the GMH group might be expected ultimately to take on the work of development and therefore which might be expected to take over Mr Latchin's work by novation or assignment had the arrangements continue to this point. GMH were the overall controlling company and I am satisfied that Mr Auchi. As Chairman and CEO, was in fact and in law acting on their behalf or purporting to do so. Mr Latchin, as I find, was content to deal with any company for whom Mr Auchi was authorised to act and accordingly both principal and agent may be sued, see Tehran-Europe v ST Belton [1968] 2 QB 545. As regards Project 4, it was not made clear whether any company would be involved, and I find that Mr Auchi was acting in a personal capacity"*

32. Mr Coulson did not challenge the finding that Mr Latchin had no knowledge of which company Mr Auchi was acting for and was content to deal with any company. His point was that it was necessary for the claimant who asserted a contract with a particular company to prove that the contract was in fact made with that company.

33. It was common ground that, for procedural reasons that are not entirely clear to us, it was not open to Mr Coulson positively to contend that if there was a contract, it was with Rentistica. The reasons were concerned with a judgment of HHJ Seymour QC by which Rentistica were struck out as 3rd defendant. I need say no more because, as I say, the position was common ground. That did not stop Mr Coulson hinting that if there was a contract, then it was in fact with Rentistica, the Moroccan company within the GMH Group. He did it skilfully, as part of his central submission that it was for the claimant to prove that the contract was with GMH.

34. I do not think any of this matters. The Judge held as a fact that Mr Auchi was acting for GMH. The only question is whether there was evidence which could support that finding. There plainly was. Mr Auchi accepted that when he received approaches from architects and designers for design work for companies within the GMH group, he did so acting for GMH. Only when the matter comes to the point of investment and development did the local company take over. That never happened here – and in any event if it did these defendants were precluded from asserting that Rentistica had taken over.

35. So the position is this. Mr Latchin thought (correctly) that Mr Auchi was acting for a company. Mr Auchi was indeed acting for a company. Although undisclosed, that company was GMH. GMH is the counterparty as regards the contracts for projects 2,1 and 3.

36. But I am not satisfied that there was any contract with Mr Auchi personally as regards these contracts. They were all proposed commercial developments obviously to be carried out by a company, as indeed Mr Latchin expected. There was simply no evidence that either party intended Mr Auchi to be a party to the contracts. The ***Teheran-Europe*** case to which the Judge referred is not authority for the proposition that where one party thinks he is dealing with an agent for an undisclosed principal, and that is in fact so, the agent is liable as a contractual party.

37. As regards project 4, Mr Auchi's personal villa, I see no reason to fault the Judge's finding that this was a personal contract with Mr Auchi.

38. In the result I would dismiss this appeal save in relation to the finding that Mr Auchi personally entered into binding contracts as regards projects 2, 1 and 3.

39. **Lord Justice Sedley:** I agree.

40. **Lord Justice Brooke:** I also agree.

Order: (Order does not form part of the approved judgment)

41. Appeal of the first defendant is dismissed save in relation to the finding that Mr Auchi personally entered into binding contracts as regards projects 2, 1 and 3.

42. The answers to the preliminary issues given in paragraph 49 of the judgment of Recorder Uff QC dated 19 February 2003 be varied to read as follows:
    (i) The claimant did enter into binding contracts with the first defendant in relation to projects 2, 1 and 3;
    (ii)The claimant did enter into a binding contract with the second defendant in relation to project 4;
    (iii) The terms of the contracts in relation to payment are that the claimant is entitled to reasonable remuneration for the work instructed to be carried out in relation thereto save that the claimant is not entitled to remuneration for work carried out in relation to projects 2 and 1 prior to 1st September 1994.

43. The parties to exchange written submissions on costs in accordance with the timetable announced in a letter to the parties with a view to the court making a ruling on paper, although if application is made for an oral hearing it will be considered.

44. Interim order for costs in the court below and the costs of the appeal, without prejudice to the possibility of a further interim order as to costs following written submissions, that the first defendants pay the claimant £120,000 on account of his costs in the court below and £40,000 in respect of his costs in the Court of Appeal within 14 days, with no direction regarding security for costs.

Peter Coulson QC and Alex Hill-Smith (instructed by Dean and Dean) for the Appellant
Stephen Males QC and David Lewis (instructed by Davies Battersby) for the Respondent