Birse Construction Ltd v McCormick (UK) Ltd (Formerly Mccormick (UK) Plc) [2005] ABC.L.R. 07/26

CA on appeal from TCC (HHJ Peter Coulson QC) before Clarke LJ; Carnwath LJ ; Mr Justice Patten. 26th July 2005

Lord Justice Clarke :

Introduction

1. This appeal arises out of an order made by His Honour Judge Peter Coulson QC on 9 December 2004 on the determination of three preliminary issues in a construction dispute between the appellant ("Birse") as "Contractor" and the respondent (McCormick") as "Employer" which arose out of a contract signed in September 1995. Fluor Daniel Ltd ("Fluor") was the "Managing Contractor" and acted as the agent of McCormick. The contract price was £4,003,487.

2. The vast bulk of the contractual "Work" was completed by November 1996 and on 15 November 1996 Birse was able, as the judge put it, to compromise its claim for the direct costs of all Changes to the Work in the agreed sum of £952,870. In the meantime, on 14 November 1996 (the day before) Birse had made a formal claim for additional Site Establishment costs to reflect delay and disruption to the Work and additional time on site. The claim, which was expressly excluded from the agreement made on 15 November, relied on 29 separate events, each of which had occurred between November 1995 and November 1996. Birse issued a further claim document dated 29 April 1997, which was a resubmission of the 14 November 1996 claim. The claim form in this action was not issued until 23 May 2003. It follows that any cause of action which accrued before 23 May 1997 would be statute barred. The amended particulars of claim are based on the claim document of 29 April 1997 and the same 29 events but the amount claimed is now the reduced sum of £546,764. McCormick says that the claims are statute barred.

3. The judge determined three preliminary issues. They were all determined against Birse, which only appeals against his determination of the first issue. Chadwick LJ granted permission to appeal, albeit on only one ground and not others. Birse renews its application for permission to appeal on the grounds on which permission was refused.

The Preliminary Issues

4. The preliminary issues considered and determined by the judge were these:

"Preliminary Issue 1

Upon the assumption that:

a) any or all of the events ("the events") in paragraph 8 of the amended particulars of claim occurred;

b) the events constitute additions, deletions or revisions to the Work and thereby constitute Changes as defined in the first sentence of Article 14.1 of Part III of the contract but subject always to any other terms of the Contract; and/or

c) the events give rise to an entitlement to amend the lump sum for Site Establishment pursuant to Article 8.3 of Part II of the contract using the rates set forth in Attachment 14.2 to that part, subject always to any other terms of the Contract;

are the claimant's claims at paragraphs 9.1 to 9.4 of the amended particulars of claim statute-barred pursuant to the Limitation Act 1980?

Preliminary Issue 2

Was Fluor obliged to fairly and properly assess and/or estimate and/or agree Birse's entitlement in response to Birse's claims submitted on 14 November 1996 and/or 29 April 1997?

Preliminary Issue 3

If it was, and upon the assumption that:

(i) Birse's claims are not defeated by the time limits in articles 14.2, 14.3 and 17, Part III (or elsewhere); and

(ii) McCormick by itself or through Fluor failed to fairly and properly assess and/or estimate and/or agree Birse's entitlement on 13 August 1997 and/or on or after 2 September 1997;

are the claims at paragraph 9.5 of the amended particulars of claim statute-barred pursuant to the Limitation Act 1980?"

5. The judge answered the questions as follows. The answer to Preliminary Issue 1 was "yes". The answer to Preliminary Issue 2 was "Yes", subject to the qualification that, pursuant to an implied term of the Contract, Fluor was obliged fairly and properly to assess and/or estimate and/or agree Birse's entitlement in respect of claims by Birse in support of an adjustment to the Contract Price and/or amendment to the Lump Sum but there was no separate duty to so act in response to particular claims. The answer to Preliminary Issue 3 was "yes"

6. In this appeal Birse only challenges the judge's answer to Preliminary Issue 1. As the judge correctly observed, this preliminary issue is concerned with the accrual of Birse's cause of action under the Contract in respect of its claim for additional Site Establishment costs and its resolution turns primarily on the true construction of the Contract.

The Contract

7. The judge set out the structure and terms of the Contract in considerable detail. It is not necessary to do so in anything like such detail for the purposes of this appeal. The scheme of the Contract was that Birse was entitled to be paid a series of lump sums for carrying out the Work. One of those lump sums was in respect of Site Establishment costs, which were agreed as £261,300. If the Contract was completed without any Changes whatsoever and on time Birse would have been entitled to be paid the total Lump Sum Contract Price of £4,003,487, including the sum of £261,300 in respect of Site Establishment costs. The total price was payable in

instalments, less a 5% retention, via what was called the Milestone Payment Schedule. There is some inconsistency in the contract but the judge held that the Site Establishment element of the lump sum was payable according to the Milestone Payment Schedule and that is accepted.

8. The judge summarised the position with regard to the Lump Sum Contract Price in this way in paragraph 32 of his judgment:

"Accordingly, the provisions of the Contract in respect of payment for the Work were straightforward. The Lump Sum Contract Price was broken down into four constituent figures, of which three (mobilisation, demobilisation, and Site Establishment) formed one composite sum of £468,263, whilst the principal part of the Lump Sum Contract Price, namely the cost of actually carrying out the Work itself, was £3,535,224. The total Lump Sum was to be paid in accordance with the fixed, pre-set instalments set out in the Milestone Payment Schedule at Attachment 3; once one of those Milestones had been achieved, an invoice would be sent off by the Contractor, Birse, and the relevant amount paid within 30 days. Since the precise amount of the payment to be made on the achievement of any given Milestone date was agreed in advance as part of the Contract itself and was set out in the Milestone Payment Schedule at Attachment 3, there was no need for any interim valuations, certificates, or assessments, or any of the other paraphernalia of the interim accounting process required by the standard forms of building and engineering contracts. They were simply not necessary, a saving of effort and cost which is identified as one of the specific benefits of a fixed stage payment system at paragraph 4–023 of Hudson.

9. The second of the assumptions made for the purpose of this preliminary issue was that each of the events constituted Changes as defined in the first sentence of Article 14.1 of Part III of the Contract. Article 14.0 was entitled CHANGES and provided as follows:

"14.1. Managing Contractor shall have the right, at any time the Work is in progress, to order additions, deletions and/or revisions to the work. (Hereinafter referred to as "Change/s"). Contractor will be advised of such Change/s by receipt of an approved for construction drawing or a written authorisation to perform specific work and Contractor shall immediately proceed to perform the additional and/or revised Work in strict accordance with and subject to all terms and conditions of this Contract. The provisions of this Contract shall apply to all Changes. Contractor will be advised of the names of Managing Contractor personnel authorised to issue changes to the work.

14.2 If Contractor believes that any information received from Managing Contractor in the form of additional and/or revised information drawings, specifications, exhibits or other written notices from Managing Contractor, any instruction or interpretation by Managing Contractor, or any occurrence meets the criteria for Change/s that affects either (i) Contractor's cost for performing Work or (ii) the schedule of Work, Contractor shall, within five (5) working days, notify Managing Contractor in writing and, if Managing Contractor agrees, Managing Contractor will issue a written authorisation in accordance with section 14.1 set forth above.

14.3 Contractor shall submit to Managing Contractor within five (5) working days after receipt of an approved for construction drawing or a written authorisation, a detailed take-off with supporting calculations and pricing for the change together with any adjustments in the schedule required for the performance of Work as changed. Pricing shall be in accordance with the pricing structure of this contract and shall clearly define increase, decrease or no change in payment under this Contract. Where applicable prices are not included in the Contract new prices shall be determined on the basis of extrapolation or interpolation against similar existing prices.

14.4 Contractor shall not perform Changes in the Work in accordance with this Article 14 unless Managing Contractor has issued written authority to proceed with the Change, such authority being in the form specified in section 14.1 above.

14.5 After Managing Contractor and Contractor agree on the financial effects of a change, Managing Contractor shall incorporate each such Change into a written amendment setting forth the agreed adjustments to the Contract Price. The adjustments, once made, shall not be renegotiable.

14.6 Payment of approved Changes in the Work shall be made in accordance with the provisions of Article 34.0 but invoices in respect of Changes may not be presented until a fully authorised amendment has been issued by the Managing Contractor and signed by the Contractor.

14.7 Notwithstanding the provisions of this Article 14 there shall be no change to Contract Price or Schedule of Work by reason of any Change should Contractor fail to provide Managing Contractor with the written notice of a change, and/or quantification thereof as required by Sections 14.2 and 14.3 herein, within the time periods stated.

14.8 There shall be no adjustment to Contract Price or Schedule of Work should Contractor proceed with a Change to the Work on the basis of any instruction that is not in accordance with Section 14.1.

14.9 In the event that the Managing Contractor and the Contractor cannot reach agreement on the extent of an authorised Change to the Contract Price or Schedule of Work, or if Managing Contractor does not accept Contractors assertion that a Change in the Work has occurred and Contractor maintains such an assertion, Contractor shall comply with the Article 17.0 entitled "Claims". Contractor shall proceed with the work if officially instructed to do so.

14.10 ..."

10. As the judge observed in paragraph 34 of his judgment, other detailed provisions as to how the Change mechanism would operate in practice were set out in Exhibit A to Part III. Exhibit A was entitled "Contractors Co-Ordination Procedure" and included section 5 which was headed "INSTRUCTIONS TO CONTRACTORS". Section

5.3 made detailed provisions for Contract Work Authorisations (CWAs) and Contract Work Orders (CWOs), which the judge quoted but for present purposes it is sufficient to summarise their effect as the judge did. In short, the procedure was that Fluor would issue to Birse a CWA and, unless the CWA instructed otherwise, Birse was obliged to proceed with the work that was the subject of the CWA. Within five days of receipt of the CWA, Birse had to submit a completed CWO which, if agreed, would set out the agreed costs of a CWA. Even then, the CWO was a provisional agreement and would not itself trigger a right to payment. Birse would only be entitled to payment once the CWO had been "consolidated" by Fluor into a contract amendment.

11. As indicated above, under Article 14.3 the pricing of a Change was to be "in accordance with the pricing structure of this Contract" and, where applicable prices were not included in the Contract, new prices were to be determined "on the basis of extrapolation or interpolation against similar existing prices". Part II of the Contract made express provision for the use of the Unit Prices in the Contract in this regard. Thus, for example, Article 8.0 of Part II provided for the use of various Attachments including Attachment 14.2, which provided for Site Establishment Unit Rates, and Attachment 14.3, which provided for various Unit Prices for different types of work. Article 8.9 expressly provided for the Unit Prices in Attachment 3 to be used to value Changes in the Work when instructed by Fluor.

12. However, in paragraph 37 of his judgment, the judge held that, given that the Unit Prices (and Rates) in Attachment 14.3 did not relate to or cover Site Establishment Costs (because the figure for such costs in the Contract was the total of a number of separate lump sums) Mr Nissen was right to submit on behalf of McCormick that the proper valuation of Changes would *not* include anything other than the Unit Prices and/or Rates, and would not therefore include any valuation by reference to the lump sums in Attachment 14.2, which was the Attachment dealing with Site Establishment Costs. Thus, the judge held that the valuation of Changes would not include a valuation of any Site Establishment element. Mr Darling does not seek to challenge these conclusions in this appeal.

13. In paragraphs 38 and 39 of his judgment the judge summarised the mechanism for payment for agreed Changes. In doing so he relied upon Article 34.0 of the Contract which provided by Article 34.4 as follows:

"Company shall make payment within 30 calendar days from receipt by Managing Contractor of an invoice presented in accordance with the requirements of this contract. Managing Contractor shall advise rejection of an unacceptable invoice within 14 calendar days of receipt."

The judge thus held that once a Contract Amendment had been agreed in respect of a particular Change, the Contractor would invoice for the additional sum set out in the Amendment and it would be paid within 30 days from the date that the Fluor received the invoice from Birse. The judge accepted Mr Nissen's submission that there was not, and was not intended to be, any coincidence of timing between the Milestone Payment dates and the dates that invoiced Contract Amendments would fall due to be paid. He said, in my opinion correctly, that they operated entirely independently of one another.

14. The position was different in respect of disputed Changes and was governed by Article 14.9, which is quoted above. In the event of a dispute, the provisions of Article 17.0 of the Contract applied and Birse was bound to proceed with the work if "officially instructed to do so". Article 17.0, which was entitled CLAIMS, provided, by Article 17.1, as follows:

"Subject to the provisions of Article 14.0, Contractor shall give Managing Contractor written notice within five (5) working days after the happening of any event which Contractor believes may give rise to a claim by Contractor for an increase in Contract price, or in time for performance of the work. Within ten (10) working days after the happening of such same event, Contractor shall supply Managing Contractor with a statement supporting Contractor's claim, which statement shall include Contractor's detailed estimate of the Change in Contract Price and/or Schedule of Work together with all substantiating documentation.

Company shall not be liable for, and Contractor hereby waives, any claim or potential claims of Contractor of which Contractor knew or should have known, and which was not reported by Contractor in accordance with the provisions of this Article. Any adjustments in Contract Price or time for performance of the work shall not be binding on Company unless expressly agreed in writing by the Company or Managing Contractor, and any such adjustments in Contract Price so agreed in writing shall be paid to Contractor by Company. No claim hereunder by Contractor shall be allowed after final payment is made pursuant to provisions set forth in article 43.0."

15. As appears from the third assumption, it was assumed for the purpose of the preliminary issue that the 29 events gave rise to an entitlement to amend the lump sum for Site Establishment pursuant to Article 8.3 of Part II of the Contract using the rates set forth in Attachment 14.2 to that Part, subject always to any other terms of the Contract. Article 8.3 provided:

"SITE ESTABLISHMENT

This item covers the Contractor's overhead costs and other general expenses to maintain the Site Establishment on the Work Site for performance of the Work and shall include the following:

- …
- *In the event of additional time spent on Work Site to perform the Work or increase in Site Establishment resources to perform the Work and Managing Contractor agrees that these are due to effects other than those within the responsibility of the Contractor, the lump sum for Site establishment shall be amended using the rates set forth in Attachment 14.2."*

16. The judge held in paragraphs 44 to 47 of his judgment that, where the parties agreed an increase in the Lump Sum for Site Establishment, the correct approach under the contract was as in the case of agreed Changes discussed above. Thus, they both required a formal amendment, in the standard form, against which an invoice could then be raised and payment of any amendments to the Lump Sum in respect of Site Establishment would be made in accordance with the article 34.4 invoicing procedure described above. In other words, following the agreement and issue of a contract amendment, Birse would send Fluor an invoice for the agreed amount of the amendment, which would in turn fall to be paid in 30 days.

17. The judge held in paragraph 48 that, in the event of a dispute, the claims procedure set out in Article 17 of Part III (as set out above) would again apply. His reasons were these. The words of Article 17 were not restricted to claims in respect of Changes only. They were wide enough to include any disputed claims, including disputed claims for additional Site Establishment costs under Article 8.3. Therefore, to make such a claim, Birse would have to follow the same "five-day plus five-day" procedure identified in Article 17 quoted above. Accordingly any claim for additional Site Establishment costs made in accordance with article 17 and either rejected or not responded to promptly by the Managing Contractor, would at that point give rise to a dispute between the parties in respect of that claim. For my part, I agree with that analysis, to which I return below.

18. Article 39.0 was entitled FINAL PAYMENT AND RELEASE and provided:

"39.1 Company shall not be obligated to make final payment, which shall include the release of retention, to Contractor until the following requirements have been accomplished to the satisfaction of Managing Contractor:

a) Contractor has delivered to Managing Contractor a release certificate satisfactory to Managing Contractor that Contractor has fully performed under this Contract and that all claims of Contractor for the Work are satisfied upon the making of such final payment, that no property of the Company and/or Managing Contractor or property used in connection with the Work is subject to any unsatisfied lien or claim as a result of the performance of the Work, that all rights of lien against Company and/or Managing Contractor property in connection with the Work are released (including without limitation, if Managing Contractor requests, releases of lien satisfactory in form to Company executed by all persons who by reason of furnishing material, labour or other services to Contractor for the work are potential lienors against Company and/or Managing Contractor's property), and that Contractor has paid in full all outstanding obligations against the work; and

b) Contractor has delivered to Managing Contractor satisfactory proof that all costs have been satisfied and paid, that there are no unsatisfied claims for injuries to persons or property which Managing Contractor is not reasonably satisfied are covered by insurance, and that no other indebtedness exists in connection with the Work for which Contractor is responsible; and

c) Contractor has delivered to Managing Contractor any and every document, receipt, statement of account, affidavit or assurance which Managing Contractor requires as necessary or appropriate and is within Contractor's possession, responsibility or control to ensure immunity to Company and/or Managing Contractor from any and all liens and claims for which Company and/or Managing Contractor might be or become liable; and

d) Contractor has delivered to Managing Contractor assignments to Company and/or Managing Contractor from Contractor (and from each assignee, if any, to whom Contractor with Managing Contractor approval assigned any part of the Contract and whose assignment is in effect at the time of final payment under the Contract) of any refunds, rebates, credits, or other amounts, including any interest thereon, accruing to or received by Contractor to the extent that said items are properly allowable as costs for which Contractor has been reimbursed by Company; and

e) Contractor has delivered releases to Managing Contractor discharging Company and/or Managing Contractor from all liabilities, obligations, and claims arising out of or under the Contract; and

f) Managing Contractor has issued to Contractor a notice of Acceptance of the Work."

Article 34.2 provided the actual mechanism for the final payment as follows:

"Upon Acceptance of the Work the retention monies due to Contractor shall be paid provided that Contractor shall have furnished Managing Contractor with a Release Certificate."

19. In paragraph 50 of his judgment the judge correctly summarised the key ingredients relating to the administrative completion of the Contract as follows:

i) a Notice of Acceptance of the Work, issued by the Managing Contractor to the Contractor;

ii) a Release Certificate issued by the Contractor to the Managing Contractor;

iii) agreement by the Managing Contractor that all the Contractor's work had been fully performed and that all claims were satisfied upon the making of the final payment;

iv) payment of the retention monies to the Contractor.

The judge added that if and to the extent that the Contractor was not happy with the proposed final payment, it would not issue a Release Certificate (save perhaps in a form unacceptable to the Managing Contractor) and the retention monies would continue to be held by McCormick.

20. Like the judge, I would accept Mr Nissen's submission that there is nothing in those Articles about reviewing previous payments, or the making or renewing or formalisation of claims for additional monies by the Contractor.

The judge rejected a submission by counsel then appearing on behalf of Birse that at that stage, but not before, the Contractor had an implied right to seek all sums that it said were due under the Contract. The judge held, and I agree, that there is nothing in the words of Article 39 or Article 34.2 (both of which are quoted above) which supports that contention.

21. Finally I should refer to Article 34.1, which played an important part in the argument below and, indeed, in this appeal. It provided:

"Unless otherwise provided in this Contract, Company shall pay to Contractor, for performance of the Work, partial payments as the Work progresses as follows:

At the end of each calendar month, or other periodic 'close-out' date specified by Managing Contractor, Contractor shall submit to Managing Contractor progress payment work sheets to demonstrate the work performed by Contractor. Progress payment shall be based on the work agreed between Contractor and Managing Contractor to have been completed in accordance with the measured progress in the various parts of the Work. After agreement between Contractor and Managing Contractor, Contractor shall submit an invoice based on the progress payment worksheets. Agreement as to the measurement and quantities of work performed shall be made by certification of the invoice by Contractor. In the case of disagreement, Managing Contractor's estimate of the value of all work performed hereunder shall be conclusive and Contractor waives any and all entitlement to interest in the event of progress or monies being disagreed by Managing Contractor that are subsequently found to have been due and payable. Company shall pay Contractor ninety-five percent (95 per cent) of the work certified and agreed by Managing Contractor less the aggregate of all payments previously made to Contractor."

The Appeal

22. The case now advanced on behalf of Birse is much narrower than that advanced before the judge. Preliminary Issue 1 asked whether Birse's claims pleaded in paragraphs 9.1 to 9.4 of the amended particulars of claim were time barred. Paragraph 9.1 simply alleged the facts and matters assumed in paragraphs (a) and (b) of the formulated issue. Paragraph 9.2 alleged that Birse was entitled to be paid pursuant to Article 14. However that claim failed and, as I understand it, Birse does not seek to advance it now. We are thus concerned only with the case pleaded in paragraph 9.3 of the amended particulars of claim, which alleges that the 29 events were outwith the responsibility of Birse and resulted in additional time being spent on the work site in order to perform the Work and/or an increase in the Site Establishment resources to perform the Work. Birse's case is that it is entitled to an amendment of the Lump Sum for Site Establishment using the rates in Attachment 14.2 to which I have already referred. Paragraph 9.4 simply identifies the 29 events and the claim advanced in respect of each.

23. Before the judge Birse submitted that the answer to Preliminary Issue 1 was that its claims were not time barred on the basis that it had only one cause of action in respect of disputed claims but that it did not accrue until final payment under Article 39.1 because that was the first occasion on which the Managing Contractor's decision on the claims, namely to value them at nil, was not to be regarded as temporarily conclusive under Article 34.1.

24. The argument, as summarised in paragraph 58 of the judgment, was that any and each of Birse's claims for Changes or for additional Site Establishment costs which were disputed by Fluor would be the subject of a "conclusive" estimate of its value whilst the works themselves were being performed, and could not, during the currency of the contract, be pursued, even if Birse disputed that estimate. It was submitted on behalf of Birse that the conclusive nature of Fluor's decision would survive up to completion of the works when, following the provision of a Notice of Acceptance of work under Article 39, Birse would finally be able to mount a challenge to Fluor's hitherto conclusive decision, by refusing to accept or put forward a Release Certificate which did not encompass the entirety of their claims, including those rejected at an earlier stage by Fluor. It was submitted that in this way Birse's cause of action in respect of either Changes or additional Site Establishment costs did not accrue until the Final Payment Certification and Release Procedure set out under Article 39, and in particular, until the commencement of that process by Fluor's issue of the Notice of Acceptance of the Work. Only then, it was submitted, did Birse have a right to payment to disputed Changes and/or additional Site Establishment costs. Any attempt to commence litigation or arbitration before that date would have been met with the unassailable contention from McCormick that the cause of action could not have accrued until after the issue of the Notice of Acceptance of the Work. For these reasons, it was argued that Birse had no right to be paid its additional Site Establishment costs until September 1997, and that its claim under the contract in these proceedings was not therefore statute barred.

25. The key dates relied upon by Mr Darling on behalf of Birse, as I understand it, were 9 July 1997 when Birse informed Fluor that it had completed all the outstanding work and, more importantly, 3 September 1997 when Fluor issued a qualified Notice of Acceptance of Work, both of which were after 23 May 1997 and thus within the limitation period.

26. The judge rejected the submissions based on Article 34.1 for a number of reasons which he set out in paragraphs 61 to 76 of his judgment. I refer to only two. The first is that Article 34.1 had no application because it only applied "unless otherwise provided in this Contract" whereas the judge held that there was already a mechanism for the payment of the Lump Sum Contract Price. There were Contract Amendment mechanisms, with a right to invoice and be paid for Changes and additional Site Establishment costs, and there was a procedure in Article 17.0 to follow in the event that any claims for Changes and/or additional Site Establishment costs were disputed.

27. The second of the reasons given by the judge to which I wish to refer is his conclusion (in paragraph 69 of his judgment) that there was nothing in Article 34.1 that referred to or related back to claims under Article 17 (or to claims under Article 14 or Article 8.3). Nor is there anything which purported to make the Article 17 claims the subject of a "conclusive" decision by Fluor under article 34.1.

28. It is not necessary for me to set out the judge's reasons in any more detail here because Birse now accepts that the judge was correct to reject the argument based on Article 34.1 This is an important concession because, as I see it, it follows that, if Birse is to succeed in this appeal it must show that is has a cause of action which accrued after 23 May 1997 other than that based upon Article 34.1. As I understand the argument, the only such cause of action now suggested on behalf of Birse depends upon the construction of Article 39.

29. The submission is that Article 39 provides for a review of the position and, as Mr Darling put it in the course of the argument, a wrapping up of previous issues. However, I have already expressed my view that the judge was correct to reject this argument. There is, so far as I can see, nothing in Article 39 to support the submission that Birse was entitled to a review of the claims at the stage of final payment.

30. In my opinion that conclusion resolves both the appeal and the applications for permission to appeal against Birse. There are now five grounds or proposed grounds of appeal, which I take in turn. They are set out in paragraph 7(i), (ii), (iii), (v) and (vi) of section 7 of the appellant's notice, paragraph 7(iv) having been abandoned.

Ground 1

31. Paragraph 7(i) asserts that the judge erred in concluding that Birse's cause of action accrued once and for all on only one occasion and that he ought to have held that a fresh cause of action accrued on each occasion that the Contract gave Birse the right to seek payment, either expressly or impliedly of the amount sought. As Mr Nissen observes, the problem with this argument is that no such submission was made to the judge.

32. As indicated above, the submission made to the judge was that Preliminary Issue 1 should be decided in the negative on the basis of the true construction of Articles 34.1 and 39 of the Contract. Before the judge Birse's case on Preliminary Issue 1 was that that it had only one cause of action in respect of disputed claims and that this did not accrue until final payment under Article 39, since that was the first occasion on which Fluor's decision on the claims, namely to value them at nil, was not to be regarded as temporarily conclusive under Article 34.1. Birse now accepts that that submission cannot be maintained. It was the ground advanced in paragraph 7(iv) and now abandoned.

33. Ironically, Preliminary Issues 2 and 3 (which are quoted above) were concerned with the question whether there was another cause of action available to Birse in respect of Site Establishment costs. The judge held that there was but that Birse's claims based upon it were statute barred. I agree with Mr Nissen that the answer to the question whether a fresh cause of action accrued on each occasion that the Contract gave Birse a right to seek payment does not help Birse to obtain a negative answer to Preliminary Issue 1 unless it can show that such a cause of action accrued after 23 July 1997, which, for the reasons already given, it cannot. However, the various grounds of appeal are to my mind closely related. I therefore turn to ground 2.

Ground 2

34. Paragraph 7(ii), which is I think the ground upon which permission was granted, asserts that the judge was wrong in his construction of Articles 14 and 17. It is said that he ought not to have held that an express or implied refusal of an estimate under Article 17 gave rise to any cause of action and/or that the fact that there was a dispute between the parties as to the contents of a notice gave Birse a cause of action. It is said that he confused a dispute with a cause of action.

35. I agree with Mr Nissen that the problem with this argument is that, even if it is correct, it does not by itself produce a negative answer to Preliminary Issue 1. On the other hand, I can see that, if Birse had no cause of action on the basis suggested by the judge, it would follow that it had some other cause of action and the absence of a cause of action found by the judge might afford a ground for holding that its cause of action must have accrued after 23 July 1997. It is in any event appropriate to address the question since it was the basis upon which Chadwick LJ granted permission to appeal.

36. The judge summarised his contractual analysis in respect of Changes and claims in paragraphs 52 to 56 of his judgment as follows:

> *"52. The Articles of the Contract set out above reveal a contractual regime, which, although a little convoluted, was relatively simple and easy to operate. The emphasis at all times was upon agreement between Contractor and Managing Contractor and consequential amendments to the Contract itself to reflect such agreement. The articles were not always willing to embrace even the possibility of disagreement between the parties, so the provisions dealing with the situation when Changes or claims were not agreed are relatively brief. However, it seems clear to me that Article 17 of the Part III document expressly anticipated that formal claims for Changes or additional Site Establishment costs would be made by Birse when their agreement was not possible.*
>
> *53. Prima facie, therefore, Birse's cause of action in respect of each of their individual claims (whether for Changes or for additional Site Establishment costs) accrued once the relevant event triggering the claim had occurred; the two steps within the overall 10-day period in Article 17.0 had been taken by Birse; and Fluor had either rejected the claim or had, at the very least, failed promptly to respond to it. As I have said, given the short period in which Birse had to make its claim (10 days from the happening of the relevant event), it seems to me that Fluor would*

have itself to respond to such claim promptly, and inactivity on its part beyond a relatively short response period would be deemed a denial of the claim made.

54. The prima facie position outlined above would have this additional attraction: that the cause of action – the right to payment – would accrue, if not precisely when the work was done, then certainly within a relatively short period of the relevant event that triggered that right. To that extent, therefore, it seems to me that such a position is broadly consistent with the principles in Coburn v College [1897] 1 QB 702 and Reeves v Butcher [1891] 2 QB 509, above.

55. In the present case, it is agreed that each of the 29 events which give rise to Birse's claim in these proceedings had occurred by 14 November 1996, which was also the date of Birse's formal claim for additional site establishment costs under the contract. As previously noted, it appears that, although the notice of acceptance of work was not provided until September 1997, the works carried out between November 1996 and September 1997 were of a snagging/completion nature and are not – and have never been – the subject of any of Birse's claims.

56 Accordingly, on this prima facie analysis, Birse's causes of action under the contract in respect of each of the 29 events would have accrued in late November/December 1996. Such claims would, therefore, be statute-barred. … Accordingly, the key question then becomes: Is there some reason why this prima facie analysis is incorrect? Is there anything else in the contract which provided that a cause of action was not complete until the happening of some later event, after November/December 1996, which would mean that Birse's cause of action was not, in fact, statute-barred? I consider that point in paragraphs 57–76 below."

37. As already indicated, the judge answered that question in the negative, in my opinion correctly. In this connection I refer to three particular points which have particularly struck me to which I have not referred above. The first is that in paragraph 72 the judge said that another way of putting the same point was to ask the question: what is there in this contract that would have prevented Birse from commencing litigation or arbitration in respect of a disputed change or claim for additional Site Establishment costs before the issue of the Notice of Acceptance of Work? His answer was nothing. I agree. The second is his conclusion at the end of paragraph 74 that there was nothing that Birse could have done about disputed claims after the issue of the Notice of Acceptance of the Work which they could not have done before such a Notice was issued. Again, I agree.

38. The third point is a more general commercial consideration which he expressed thus in paragraph 76: *"The contract required Birse to act promptly on the happening of any event which might give rise to a claim. It would be wholly inconsistent with those provisions to argue that, on the one hand, Birse had to notify Fluor almost immediately of any event which might conceivably give rise to a claim, but on the other to say that such a claim – if disputed – was not actionable until months or years later, when a notice of acceptance of the work was eventually issued by Fluor."*

I agree.

39. Finally, I would not accept the submission that the judge has confused Birse's cause of action with a dispute. In this regard I would accept Mr Nissen's submission as follows. Article 17 is entitled CLAIMS. It provides both for the giving of a notice and for the making of a claim. I agree with Mr Nissen that the judge fully appreciated the distinction, since he said in paragraph 42 that "the Managing Contractor also had a relatively short time to accept or reject the detailed claim that had been made". Mr Nissen correctly recognises that Article 17 is a procedural provision and does not create a substantive right to recover money. He is also right to submit that Article 17 regulates when the claim must be made. The judge concluded that Birse's cause of action arose when McCormick rejected a claim or failed to respond to it within a reasonable time: see paragraphs 106 and 111 of the judgment. A dispute no doubt also arose at that time. It seems to me to be sensible to conclude that Birse's cause of action accrued when the dispute arose or, if that were wrong, before the dispute arose.

40. The judge expressed his conclusions on the facts, albeit in connection with Preliminary Issue 3, in paragraph 111 as follows:

"In summary on this issue, therefore, I find that the 14 November 1996 claim was, in effect, Birse's formal claim for additional monies for Site Establishment and was the only claim which survived the settlement of 15 November 1997. I find that the claim document of April 1997 was simply a revision of that original claim. I find that there was no separate or different cause of action accruing to Birse simply because it chose to recast and resubmit its claim in April 1997 or because there was no formal response by Fluor to that recast claim until August 1997. In my judgment, it is simply contrary to common sense to suggest that there was a new duty and a new breach every time Birse put in a recast claim. The obligation fairly and properly to assess and/or estimate and/or agree was an inherent part of the contract, and any breach occurred when Fluor failed to respond to the claim (whether fairly or at all). To the extent that this breach gave rise to a separate cause of action, I consider that that cause of action arose at the same time as the cause of action under the contract itself. In this case, I consider that the date of accrual of each cause of action was in late November/December 1996, and was probably on or about 9 December 1996."

41. Birse does not quarrel with any of those findings of fact or with the judge's answers to the questions raised by Preliminary Issues 2 and 3. The judge was also in my opinion right to hold that the accrual of each cause of action was in late November/December 1996. In all the circumstances I would refuse the renewed application for permission to appeal on ground 1 and dismiss the appeal on ground 2.

Grounds 3 to 5

42. These grounds, which are set out in section 7(iii), (v) and (vi) of the appellant's notice, all raise in one way or another the argument that Article 39 required a review of the position at the stage of "Final Payment and Release". I have already indicated my view that there is nothing in Article 39 to support such a submission. Chadwick LJ refused permission to appeal on these grounds and I would refuse the renewed application for permission to appeal on them.

CONCLUSION

43. In all the circumstances I would dismiss the appeal on the ground on which permission was granted and refuse the renewed application for permission to appeal on the other grounds. In my opinion the judge answered the question posed by Preliminary Issue 1 correctly.

44. I would add by way of postscript that I have considered the judgment in ***Henry Boot Construction Ltd v Alstom Combined Cycles Ltd*** [2005] EWCA Civ 814, which was handed down on 4 June 2005, after the argument in this appeal. The parties agree that the decision in that case has no bearing on the issues in this appeal. I also agree. I can see nothing in it which affects any of the conclusions which I have reached. It was concerned with entirely different problems under an entirely different contract.

Lord Justice Carnwath

45. I agree.

Mr Justice Patten

46. I also agree.

Paul Darling QC (instructed by Osborne Clarke) for the Claimant/Appellant
Alexander Nissen (instructed by Baker & McKenzie) for the Defendant/Respondent