CA before The Vice-Chancellor Dyson LJ and Thomas LJ, on appeal from HHJ Humphrey LLoyd QC. sitting as judge arbitrator. 16th June 2005.

LORD JUSTICE DYSON :

Introduction

2. This is an appeal from part of the award dated 21 April 2004 of HH Judge Humphrey Lloyd QC sitting as judge arbitrator in accordance with section 93 of the Arbitration Act 1996. Leave to appeal was given by Clarke LJ on the grounds that the issues raised were of general public importance. They concern the question of when a cause of action arises in respect of claims for interim and, more importantly in this case, final payment under construction contracts. This must always be a question of construction. But the essential payment terms of the standard forms of contract have many features in common, including provisions for payment on certificates, usually issued by an engineer or architect. The contract in the present case incorporated the ICE Standard Form (6th edition), with amendments which are immaterial to the issues that arise on this appeal. These issues are of considerable significance to those who are engaged in the construction industry.

3. Henry Boot Construction Limited ("Boot") was employed by Alstom Combined Cycles Limited ("Alstom") as contractor for the main civil works for the construction of a power station at Connah's Quay, North Wales ("the Works"). The contract, which was under hand, was made in 1994.

4. Boot started work on 11 April 1994 and achieved substantial completion of the Works on 28 May 1996. The defects correction certificate was issued on 15 August 2000. Boot submitted its final account in stages, the final part being submitted on 29 June 2001. The total sum claimed in the final account was £102.08 million. The Engineer issued the final certificate on 9 October 2002 in the sum of £44.43 million.

5. On 1 March 2003, Alstom served a notice of dispute pursuant to clause 66(2) of the conditions of contract, challenging the valuation in the final certificate and raising the issue that the claim was barred by the Limitation Act 1980. On 3 March 2003, Boot served two notices of dispute, the first of which related to Alstom's refusal to pay the sum certified as due under the final certificate.

6. On 23 May 2003, the Engineer gave his decision in relation to all three notices. In response to Alstom's notice, he decided that the value of the final account was £44.38 million (thereby reducing the amount certified by £43,000). He made no decision on the limitation issue raised by Alstom. In relation to Boot's first notice, he decided that a sum of at least £2.9 million became overdue for payment to Boot on 8 December 2002.

7. This arbitration was commenced on 27 May 2003. Alstom sought a review of the Engineer's decision not to decide whether Boot's claims were statute-barred. Alstom also contended that Boot's claims were statute-barred at the date of the final certificate, so that, contrary to the decision of the Engineer, no sum was due to Boot. The limitation defence was tried as a preliminary issue. The judge arbitrator decided that all or almost all the claims were statute-barred, because the relevant causes of action had arisen when the work was done or when the events on which the claims were based had occurred, ie more than 6 years before the date when the arbitration proceedings were started.

Summary of issues

8. (i) Did Boot's contractual right to receive payments for the value of work done and materials supplied arise upon the work being done and materials being supplied, or only upon the issue of a certificate?

   (ii) If it only arose upon the issue of a certificate, did it arise once and for all as soon as Boot was entitled to have the sum certified in an interim certificate, or did Boot have a continuing right to have the sum certified in subsequent certificates, and in particular in the final certificate, so that (where the sum was not certified) each failure to certify in accordance with the contract gave rise to a new cause of action?

   (iii) To what extent are Boot's claims for interest pursuant to clause 60(7) of the conditions of contract statute-barred?

   (iv) Was the Engineer obliged only to certify sums in respect of claims which he considered not to be statute-barred?

Summary of Boot's claims

9. Boot's claims pursuant to the contract (as distinct from its claims for damages for breach of the contract) were for: admeasure valuation pursuant to clause 56(1) and (2); valuation of Provisional Sums pursuant to clause 58(1)(a) and 52; valuation of Dayworks pursuant to clause 56(4) and 52; valuation of variations pursuant to clause 51 and 52(1) and (2); corrections of errors or omissions in the Bills of Quantities under clause 55(2);extra cost incurred as a result of the late information pursuant to clause 7(4); extra cost incurred as a result of unforeseen conditions under clause 12; extra cost incurred as a result of Engineer's instructions under clause 5 and 13(3); interest pursuant to clause 60(7) on payments which it is claimed should have certified by the Engineer; extra cost incurred in the circumstances referred to in clause 14(8); extra cost as a result of providing facilities to other contractors (clause 31(2)); extra cost as a result of suspension of work (clause 40(1)); extra cost as a result of failure to give possession (clause 42(3)); and cost of acceleration measures (clause 46(3)).

The conclusions of the judge arbitrator

10. In paras 83-91, the judge arbitrator explained why in his opinion the cause of action in relation to interim payments accrued when the work was done, and was not dependent on the issue of certificates. This he described as his *"preliminary ground"* for holding that *"subject to one or two possible exceptions"* and subject to the estoppel issue, Boot's claims were all statute-barred. At para 85, he drew attention to the language of the clauses. Thus, clause 60(2) required the Engineer to form an opinion as to what *"is due to the Contractor"*, and saw significance in the fact that reference was to what *"is due"* rather than what *"will be due"* (after the certificate had been issued and the time for payment had arrived). He made other linguistic points on the wording of clause 52(4)(c)-(f) which he said was consistent only with the certificate *"substantiating the existing right or obligation."* He placed particular emphasis on clause 52(4)(f) which referred to the contractor being *"entitled to have included in any interim payment certified by the Engineer pursuant to clause 60 such amount in respect of any claim as the Engineer may consider due to the Contractor provided that the Contractor shall have supplied sufficient particulars to enable the Engineer to determine the amount due"*, but *"if such particulars are insufficient to substantiate the whole of the claim the Contractor shall be entitled to payment in respect of such part of the claim as the particulars may substantiate to the satisfaction of the Engineer."* The judge arbitrator said that this *"is language which presupposes the existence of a right, as it is directed to its quantification after appropriate proof of amount."*

11. He then reviewed a number of authorities which he said support this interpretation. To the extent that I think it necessary to do so, I shall refer to these later in this judgment. The judge arbitrator considered that the House of Lords decision in ***Beaufort Developments Limited v Gilbert-Ash Limited*** [1999] AC 266 was of particular importance as showing that a certificate *"is a convenient way of establishing the rights and duties at that stage"*. It followed that *"a certificate does not of itself necessarily create any right or obligation; it is merely a recognition of them, as perceived by the architect"*.

12. He concluded at para 91 that the certification provisions of the contract were written on the basis that *"the contractor is already entitled to the amounts. The only question is whether the entitlement will be recognised by the Engineer."*

13. Having reached this conclusion, the judge arbitrator addressed the point that, taken to its logical conclusion, it would mean that *"every cubic metre excavated, carted, tipped, spread, poured, lifted, applied etc would make the Employer liable for the applicable rate or price, at least as soon as it was measured for payment under clauses 55-57"*. That would be absurd. Accordingly, he went on to say: *"It is probably safer to base the decision on the alternative ground that the contractor's right to payment in respect of work, materials etc properly done or supplied arises when a certificate is issued or due to be issued. That result is conveniently encapsulated in the proposition that a certificate is a condition precedent to payment, but that is inaccurate or perhaps an overstatement. However it is a proposition that is endorsed by many cases, even if in a number of them, the point was not analysed as it has been by the submissions in this arbitration."*

14. He then rejected the submission that, since certificates are cumulative, contractors gain a new right every time a certificate is issued which undervalues the work or does not include a sum to which the contractor is entitled. At para 93, he continued: *"Once all the ingredients which would justify an*

application or a statement from the contractor are present, the cause of action accrues, perfected, if need be, at the time when the certificate is due. Once the Engineer has failed to issue a certificate for what is due, then time runs against the contractor in respect of the undervaluation or omission—why otherwise is interest payable under clause 60(7)? This is in my judgment fully borne out by the provisions of clause 52(4) and 60 and the authorities to which I have referred."

15. He then turned to the individual claims made by Boot and decided that they were all or almost all statute-barred because the causes of action had arisen earlier than 27 May 1997. Thus, for example, the claim under clause 12 was in respect of a cause of action which arose on the happening of events on which the claim was based, and was therefore statute-barred. The same applied in relation to claims made pursuant to clause 7(4)(a), 13, 14, 31 and 40. As regards the claims for measured work, errors and omissions from the Bills of Quantities, dayworks and provisional sums, Boot's cause of action arose as and when the work was carried out ie before 28 May 1996.

16. Finally, the judge arbitrator decided (para 101) that the Engineer was in error in failing to decide that Boot's claims were statute-barred, and that he had no power to make any decision in favour of Boot (with the exception of the second half of the retention money).

Discussion

The first issue

17. I do not understand it to be disputed that the question that arises under this issue is one of construction.

18. By clause 4 of the Form of Agreement which was incorporated into the contract, Alstom agreed to pay *"to the Contractor in consideration of the performance and completion of the Works the Contract Price at the times and in the manner prescribed by the Contract"*. The Contract Price was defined by clause 1 of the conditions of contract as *"the sum to be ascertained and paid in accordance with the provisions hereinafter contained for the construction and completion of the Works in accordance with the Contract"*. The Contract Price was not fixed at the outset, but was to be ascertained by the Engineer by the application of the contractual provisions in the light of the work that was actually done and the events that occurred during the carrying out of the Works. The times and manner prescribed by the contract for payment were in clause 60 and nowhere else. As Mr Stephen Furst QC pointed out, but for the provisions for payment of interim certificates, Boot would have had no entitlement to be paid as the work progressed at all. Mr Roger ter Haar QC suggested in argument that, in a substantial contract such as this (indeed he suggested in all construction contracts), there would be an implied term that the contractor was entitled to instalment payments. He cited no authority in support of this sweeping submission. It is true that in ***Gilbert-Ash (Northern) Limited v Modern Engineering (Bristol) Limited*** [1974] AC 689, there are dicta to the effect that "a building contract is an entire contract for the sale of goods and work and labour for a lump sum price payable by instalments as the goods are delivered and the work is done": per Lord Diplock at p 717B and see also the dicta of Lord Salmon at p 722G. But since clause 60(2) makes detailed provision for interim payments, these dicta are not relevant to the first issue. Still less are they relevant to the question whether the right to an interim payment in respect of part of the contract work is the same cause of action as the right to final payment in respect of the same part of the contract work. That question (which lies at the heart of this appeal and is the subject of the second issue) must, in my judgment, always be a matter of construction.

19. It is, therefore, to clause 60 that one must look to see what provisions the parties agreed as to the *"times and manner*" of payment. So far as material, clause 60 provides:

"60(1) The Contractor shall submit to the Engineer at monthly intervals a statement (in such form if any as may be prescribed in the Specification) showing

(a) the estimated contract value of the Permanent Works executed up to the end of that month

(b) a list of any goods or materials delivered to the Site for but not yet incorporated in the Permanent Works and their value

(c) a list of any of those goods or materials identified in the Appendix to the Form of Tender which have not yet been delivered to the Site but of which the property has vested in the Employer pursuant to Clause 54 and their value and

(d) the estimated amounts to which the Contractor considers himself entitled in connection with all other matters for which provision is made under the Contract including any Temporary Works or Contractor's Equipment for which separate amounts are included in the Bill of Quantities

unless in the opinion of the Contractor such values and amounts together will not justify the issue of an interim certificate.

Amounts payable in respect of Nominated Sub-contracts are to be listed separately.

Monthly payments

(2) Within 28 days of the date of delivery to the Engineer or Engineer's Representative in accordance with sub-clause (1) of this Clause of the Contractor's monthly statement the Engineer shall certify and the Employer shall pay to the Contractor (after deducting any previous payments on account)

(a) the amount which in the opinion of the Engineer on the basis of the monthly statement is due to the Contractor on account of sub-clauses (1) (a) and (1) (d) of this Clause less a retention as provided in sub-clause (5) of this Clause and

(b) such amounts (if any) as the Engineer may consider proper (but in no case exceeding the percentage of the value stated in the Appendix to the Form of Tender) in respect of sub-clauses (1) (b) and (1) (c) of this Clause.

The amounts certified in respect of Nominated Sub-contracts shall be shown separately in the certificate.

Minimum amount of certificate

(3) Until the whole of the Works has been certified as substantially complete in accordance with Clause 48 the Engineer shall not be bound to issue an interim certificate for a sum less than that stated in the Appendix to the Form of Tender but thereafter he shall be bound to do so and the certification and payment of amounts due to the Contractor shall be in accordance with the time limits contained in this Clause [the sum stated in the Appendix was £100,000]..

Final account

(4) Not later than 3 months after the date of the Defects Correction Certificate the Contractor shall submit to the Engineer a statement of final account and supporting documentation showing in detail the value in accordance with the Contract of the Works executed together with all further sums which the Contractor considers to be due to him under the Contract up to the date of the Defects Correction Certificate.

Within 3 months after receipt of this final account and of all information reasonably required for its verification the Engineer shall issue a certificate stating the amount which in his opinion is finally due under the Contract from the Employer to the Contractor or from the Contractor to the Employer as the case may be up to the date of the Defects Correction Certificate and after giving credit to the Employer for all amounts previously paid by the Employer and for all sums to which the Employer is entitled under the Contract.

Such amount shall subject to Clause 47 be paid to or by the Contractor as the case may require within 60 days of the date of the certificate.

Interest on overdue payments

(7) In the event of

(a) failure by the Engineer to certify or the Employer to make payment in accordance with sub-clauses (2) (4) or (6) of this Clause or

(b) any finding of an arbitrator to such effect

the Employer shall pay to the Contractor interest compounded monthly for each day on which any payment is overdue or which should have been certified and paid at a rate equivalent to 2% per annum above the base lending rate of the bank specified in the Appendix to the Form of Tender. If in an arbitration pursuant to Clause 66 the arbitrator holds that any sum or additional sum should have been certified by a particular date in accordance with the aforementioned sub-clauses but was not so certified this shall be regarded for the purposes of this sub-clause as a failure to certify such sum or additional sum. Such sum or additional sum shall be regarded as overdue for payment 60 days after the date by which the arbitrator holds that the Engineer should have certified the sum or if no such date is identified by the

arbitrator shall be regarded as overdue for payment from the date of the Certificate of Substantial Completion for the whole of the Works.

Correction and withholding of certificates

(8) The Engineer shall have power to omit from any certificate the value of any work done goods or materials supplied or services rendered with which he may for the time being be dissatisfied and for that purpose or for any other reason which to him may seem proper may by any certificate delete correct or modify any sum previously certified by him. Provided that

(a) the Engineer shall not in any interim certificate delete or reduce any sum previously certified in respect of work done goods or materials supplied or services rendered by a Nominated Sub-contractor if the Contractor shall have already paid or be bound to pay that sum to the Nominated Sub-contractor and

(b) if the Engineer in the final certificate shall delete or reduce any sum previously certified in respect of work done goods or materials supplied or services rendered by a Nominated Sub-contractor which sum shall have been already paid by the Contractor to the Nominated Sub-contractor the Employer shall reimburse to the Contractor the amount of any sum overpaid by the Contractor to the Sub-contractor in accordance with the certificates issued under sub-clause (2) of this Clause which the Contractor shall be unable to recover from the Nominated Sub-contractor together with interest thereon at the rate stated in sub-clause (7) of this Clause from 60 days after the date of the final certificate issued under sub-clause (4) of this Clause until the date of such reimbursement.

Payment advice

(10) Where a payment made in accordance with sub-clause (2) of this Clause differs in any respect from the amount certified by the Engineer the Employer shall notify the Contractor forthwith with full details showing how the amount being paid has been calculated."

20. Mr ter Haar submits that Boot's cause of action accrues on the doing of the work, not necessarily brick by brick, but periodically, which, for purposes of the Limitation Act 1980, he says means day by day and in any event at the end of each period for which Boot is first entitled to submit a statement of the value claimed. The Engineer's valuations and certificates under clause 60(2) and (4) are irrelevant to the accrual of the cause of action. They are no more than evidence of the Engineer's opinion of what is due to Boot. The entitlement to payment exists independently of the exercise of that machinery by the Engineer, because in this contract the Engineer does not create rights for the contractor; rather he recognises and assesses or determines what Boot's rights are at any given time.

21. An early authority on which Mr ter Haar relies is ***Coburn v Colledge*** [1897] 1 QB 702. This establishes the proposition that, where A does work for B at B's request on terms that A is entitled to be paid for it, his right to be paid for it (ie his cause of action) arises as soon as the work is done *"unless there is some special term of the agreement to the contrary":* per Lord Esher MR at p 705G. In my view, this decision is not sufficient to vindicate Mr ter Haar's argument for two reasons. First, it begs the question of what is *"the work"* for this purpose: is it the whole of the work which is the subject of the contract, or certain separately identified parts of the work? Secondly, the question arises whether, as Mr Furst submits to be the case, clause 60 is a "*special term of the agreement to the contrary."*

22. Mr ter Haar submits that the judge arbitrator was right to find support in the language of the contract for Alstom's case that interim certificates are not conditions precedent to Boot's right to payment. The reference in clause 60(2)(a) to the amount which in the opinion of the Engineer "is due" indicates that the Engineer is required to certify the amount which he considers already to be due to Boot independently of the certification process. He makes similar points in relation to clause 52(4) which provides for claims for additional payments pursuant to any clause of the conditions other than clause 52(1) and (2) and 56(2). Mr ter Haar places particular reliance on clause 52(4)(f) which provides that:

"(f) The Contractor shall be entitled to have included in any interim payment certified by the Engineer pursuant to Clause 60 such amount in respect of any claim as the Engineer may consider due to the Contractor provided that the Contractor shall have supplied sufficient particulars to enable the Engineer to determine the amount due. If such particulars are insufficient to substantiate the whole of the claim the Contractor shall

be entitled to payment in respect of such part of the claim as the particulars may substantiate to the satisfaction of the Engineer."

23. He submits that clause 52(4) presupposes that Boot is already entitled to additional sums under the relevant clauses of the contract, and it is not consistent with the entitlement to payment only arising upon the issue of a certificate.

Conclusion on the question of construction without reference to previous authority

24. In my judgment, on the true construction of this contract, certificates are a condition precedent to Boot's entitlement to payment under clause 60(2) and (4), and they are not merely evidence of the Engineer's opinion. By "condition precedent" I mean that the right to payment arises when a certificate is issued or ought to be issued, and not earlier. It does not, however, follow from the fact that a certificate is a condition precedent that the absence of a certificate is a bar to the right to payment. This is because the decision of the Engineer in relation to certification is not conclusive of the rights of the parties, unless they have clearly so provided. If the Engineer's decision is not binding, it can be reviewed by an arbitrator (if there is an arbitration clause which permits such a review) or by the court. If the arbitrator or the court decides that the Engineer ought to have issued a certificate which he refused to issue, or to have included a larger sum in a certificate which he did issue, they can, and ordinarily will, hold that the Contractor is entitled to payment as if such certificate had been issued and award or give judgment for the appropriate sum. (see further paras 40-45 below). It is convenient to make such an award or to enter such a monetary judgment in order to avoid the risk of further proceedings in the event that the Employer does not pay. For the reasons that follow, I consider that the right to payment arises when a certificate is issued or ought to be issued, and not when the work is done (although the doing of the work is itself a condition precedent to the right to a certificate).

25. For the purposes of the first issue, I shall concentrate on interim payments. Clause 60(1) requires Boot to submit at monthly intervals a statement showing the estimated value of the Permanent Works executed up to the end of that month as well as the other matters referred to in clause 60(1)(b) to (d). I shall examine clause 60(1) in more detail when I deal with the second issue. Clause 60(2) requires the Engineer within 28 days of the delivery of the monthly statement to certify and Alstom to pay the amount which in the opinion of the Engineer "*on the basis of the monthly statement*" is due on account of subclauses (1)(a) to (d). Thus what the Engineer has to certify and Alstom to pay is not the true final value of the work in fact done and materials in fact supplied etc, but what in the opinion of the Engineer is due on the basis of the monthly statement. If Boot omits an item of work from the statement, even if the work has been done, the Engineer is not obliged to include its value in the certificate. Moreover, the Engineer is required to certify and Alstom to pay within 28 days of the delivery of the statement. It follows that the certificate may be issued at least 28 days after the end of the month to which the statement relates, and, if Boot takes some time to deliver the statement, possibly even later than that. In my view, it is clear that Boot's entitlement to interim payment does not arise until the Engineer issues his certificate. The machinery for interim payment is provided exclusively by clause 60(1) and (2), and it is inconsistent with the proposition that Boot's cause of action in respect of interim payments arises any earlier than the date on which an interim certificate is issued, or (where a certificate is not issued) the date on which a certificate ought to be issued. I do not see how it is possible to construe this contract as meaning that the right to interim payments arises brick by brick, or day by day or is in any other way unrelated to certificates.

26. There are other provisions in the contract which support this conclusion. First, clause 60(3). This provides that, until the Works have been certified as substantially compete, the Engineer is not bound to issue a payment certificate for a sum less than £100,000. It follows that, if Boot's monthly statement were to claim a net amount of, say, £50,000, the Engineer would be entitled to refuse to issue a certificate, and Alstom would not be obliged to make any payment for that month. And yet, on Mr ter Haar's argument, Boot's cause of action in respect of the £50,000 would have accrued. But it is quite clear that it is intended that there should be no right to payment of the £50,000 at that stage. If the position were otherwise, it is difficult to see what purpose is served by clause 60(3) at all. I re-iterate

that the fundamental payment obligation on Alstom is to pay the Contract Price at the times and in the manner prescribed by the contract.

27. Secondly, I refer to clause 60(7). This provides that, in the event of "failure by the Engineer to certify" or the Employer to make payment in accordance with clause 60(2), (4) or (6), Alstom shall pay interest compounded monthly for each day on which any payment is overdue or which should have been certified. It is immaterial for present purposes that it has been decided that the phrase *"failure to certify"* has a restricted meaning: see ***The Secretary of State for Transport v Birse-Farr Joint Venture*** 62 BLR 36. Hobhouse J held that a failure to certify must demonstrate some misapplication or misunderstanding of the contract by the Engineer. The important point is that the contract provides for the payment of interest, not from the date when the work was done, but from when payment was "*overdue"* or should have been certified and paid. A payment is "*overdue"* inter alia if it is not made in accordance with subclauses (2), (4) or (6). If the cause of action accrued at the date when the work was done, one would have expected interest to run from that date. Instead, it runs from the later date when payment is overdue because it has not been made in accordance with clause 60.

28. Thirdly, if certificates do no more than recognise Boot's existing rights and are no more than evidence of Boot's contractual entitlement to payment, then why is it necessary (by clause 66(8)) to give arbitrators the *"full power to open up review and revise any…..certificate or valuation of the Engineer"?* If a certificate is no more than (non-conclusive) evidence as to Boot's entitlement, it would not be necessary to give the arbitrator this power.

29. As regards the points made on the wording of clause 52(4) and 60(2) to which I have referred at para 21 above, I do not consider that the words will bear the weight the judge arbitrator sought to put upon them. In my judgment, the tense used in these clauses does not indicate that the certificate is merely the quantification of a cause of action that has already accrued. The amount certified *is* due because that is the amount assessed as due for payment by the Engineer as a consequence of the issue of his certificate. It is not due for payment at any earlier time. The fact that the certificate relates to work that was done before the issue of the certificate does not mean that the sum certified as due for payment was due before the certificate was issued. This interpretation of the meaning of "due" in clause 60(2) is also consistent with clause 60(7) (see para 26 above). The same arguments arise under clause 52(4)(f). Boot is entitled to have included in any interim payment certified under clause 60 "such amount in respect of any claim as the Engineer may consider due to the Contractor".

Previous authority

30. The conclusion that I have reached thus far is based on my interpretation of the contract untrammelled by previous authority. But this is an area that is not free of authority. As Lord Hoffmann said in ***Beaufort*** at page 274D: *"It is also important to have regard to the course of earlier judicial authority and practice on the construction of similar contracts. The evolution of standard forms is often the result of interaction between the draftsmen and the courts and the efforts of the draftsman cannot be properly understood without reference to the meaning which the judges have given to the language used by his predecessors.*

31. A number of cases were cited to us on standard forms of construction contracts which deal with the question whether a certificate is a condition precedent to the contractor's right to payment. In ***Dunlop and Ranken Limited v Hendall Steel Structures Limited*** [1957] 1 WLR 1102, the issue was whether a debt was owed by main contractors to sub-contractors which could be the subject of a garnishee order. Lord Goddard CJ said at p 1105*: "…until the architect has given a certificate, the builder has no right to receive any sum of money from his employer by what I may call a drawing on account. He must get a certificate from the architect….until the contractor can produce to the building owner a certificate he cannot receive anything."*

32. In ***Lubenham Fidelities and Investments Co Ltd v South Pembrokeshire District Council*** 33 BLR 39, an issue arose as to whether the contractor under a JCT form of building contract was entitled to determine its employment on the grounds that deductions made by the architect in his interim certificates were improper. It was held by the Court of Appeal that the employer was not obliged to pay more than the amount stated on the face of the certificate and that it had properly determined the

contractor's employment under the contracts. In giving the judgment of the court, May LJ said at p 55: *"Whatever be the cause of the under-valuation, the proper remedy available to the contractor is, in our opinion, to request the architect to make the appropriate adjustment in another certificate, or if he declines to do so, to take the dispute to arbitration under clause 35. In default of arbitration or a new certificate the conditions themselves give the contractor no right to sue for a higher sum. In other words, we think that under this form of contract the issue of a certificate is always a condition precedent to the right of the contractor to be paid."*

33. In ***Costain Building & Civil Engineering Limited v Scottish Rugby Union plc*** 69 BLR 80, the Court of Session, Inner House had to decide whether a contractor employed under the ICE conditions of contract was entitled to arrestment of a sum which it claimed had been undercertified. It was held that, since the sum claimed was not a debt due, it could not be the subject of arrestment. For the purposes of founding an arrestment, a debt was due only if it was *"due for payment immediately ex hypothesi of the pursuer's case"* (p 89E). The Lord President (Lord Hope) considered the conditions of the contract in some detail. The contractor's argument was that what was due to it was *"something that can be established independently of the engineer's opinion"*. Lord Hope rejected this argument as being impossible to reconcile with the conditions of the contract. It ignored the detailed provisions by which the contract price was to be ascertained, and proceeded instead upon the view that the contractor was entitled to be paid for the work at rates which could be adjudicated upon by the court, in effect a claim for payment on a *quantum meruit*.

34. In ***Scottish Equitable plc v Miller Construction Limited*** 83 Con LR 183, another decision of the Court of Session, Inner House, differences arose under a JCT form of building contract. Practical completion took place on 6 August 1990 and all the factual events on which the contractor's claim for loss and expense was based had occurred before that date. The latest interim certificate was issued on 18 June 1992, and the arbitration started less than 5 years after that date (5 years is the relevant limitation period under the law of Scotland). The question was whether the claim for loss and expense had been enforceable for a continuous period of 5 years before the arbitration proceedings were started. It was held that the claim for loss and expense was not statute-barred. It seems to have been common ground that there would be no right to payment without a certificate, and ***Lubenham*** and ***Costain*** were cited (p 192). ***Scottish Equitable*** is of more direct relevance to the second issue.

35. Mr ter Haar submits that these authorities can no longer be regarded as good law in the light of ***Beaufort.*** He relies strongly on this decision in support of the proposition that a certificate is not a condition precedent to Boot's right to payment, a right which rises independently of certificates. In that case, the contractor started proceedings in the High Court claiming sums due under interim certificates. The employer denied liability and alleged that it was entitled to set off an amount in excess of the claim. The contractor gave notice of arbitration, and the employer started further proceedings against the contractor and architect claiming damages for negligence and breach of contract. The contractor applied for a stay of proceedings in the employer's action on the grounds that an arbitrator would, but the court would not, have the power to open up, review and revise certificates issued by the architect.

36. The House of Lords refused the stay on the grounds that it was unnecessary: the court's jurisdiction was unlimited. The fact that the power to open up, review and revise certificates was expressly conferred on the arbitrator, but not upon the court, could not be construed as removing the court's unlimited power to determine the rights and obligations of the parties. The issue, therefore, was the extent of the jurisdiction of the court. As Lord Hoffmann put it at p 272C, the question was whether *"an arbitrator appointed to decide a dispute arising under a building contract in the JCT Standard Form has a power to review decisions and certificates of the architect which is not available to a court."* As Lord Hoffmann said at p 273F, *"the critical question is whether, upon the true construction of the contract, such certificates are binding."* The issue was not whether the certificate was a condition precedent to the right to payment in the first place.

37. At p 275H, Lord Hoffmann said: *"….If one considers the practicalities of the construction of a building or other works, it seems to me that parties could reasonably have intended that they should have what might be called a provisional validity. Construction contracts may involve substantial work and expenditure over a*

lengthy period. It is important to have machinery by which the rights and duties of the parties at any given moment can be at least provisionally determined with some precision. This machinery is provided by architect's certificates. If they are not challenged as inconsistent with the contractual terms which the parties have agreed, they will determine such matters as when interim payments are due or completion must take place. This is something which the parties need to know. No doubt in most cases there will be no challenge."

38. As Mr Furst points out, it was not suggested in *Beaufort* (still less did the House hold) that the certification process was irrelevant to the contractor's rights and merely evidence of the true content of those rights. On the contrary, this passage in the speech of Lord Hoffmann suggests that certification was an essential element in determining the parties' rights and obligations even if, due to its provisional status, a certificate could subsequently be challenged. It is a non sequitur to reason that, because interim certificates are not conclusive and may subsequently be reviewed, therefore they are not an essential part of the contractual machinery for payment. To assert that a certificate (a) is a condition precedent to a right of action, and (b) is not conclusive, since it can be reviewed by an arbitrator or court, is not to advance two inconsistent propositions. It is, therefore, not surprising that their lordships did not say anything about the question of what constitutes the cause of action or when it arises. Nor is it surprising that decisions such as ***Dunlop & Ranken, Lubenham*** and ***Costain*** were not mentioned. They were not relevant to the issue that the House of Lords had to decide.

39. Mr ter Haar places particular reliance on the speech of Lord Hope. At p 286C, Lord Hope said that the court does not need the power conferred on the arbitrator to open up, review and revise certificates: the ordinary powers of the court in regard to the examination of the facts and awarding sums found due are all that is required. At p 288G, he drew a distinction between an agreement that machinery be used to implement or give effect to the contract, and an agreement that the parties' rights are to be determined solely by means of that machinery. Machinery for the certification and making of interim payments falls into the first of these categories. An agreement to provide machinery of that kind does not imply any limitation on the ordinary powers of the court. Its purpose is "simply to enable the contract to be worked out upon the agreed terms to achieve the result to which it was directed." Thus, when an architect makes decisions as to the amounts to be paid to the contractor by way of instalment payments towards a final settlement of the sums to which he is entitled under the contract, it is the duty of the architect (or in the event of an arbitration, the arbitrator) to *"give effect to the contract, not to alter or modify it"* (p 290F). If the issue comes before the court, the court is: *"entitled to examine the facts and to form its own opinion upon them in the light of the evidence. The fact that the architect has formed an opinion on the matter will be part of the evidence. But, as it will not be conclusive evidence, the court can disregard his opinion if it does not agree with it."*

40. I do not see any difference of principle between the approach of Lord Hoffmann and that of Lord Hope. For the reasons already given, I do not consider that the decision in *Beaufort* compels the conclusion that certificates are not a condition precedent to the right to payment.

41. Finally, Mr ter Haar submits that ***Lubenham*** was decided per incuriam, because it is inconsistent with three important decisions which were not cited to the court. These are ***Brodie v Corporation of Cardiff*** [1919] AC 337, ***Neale v Richardson*** [1938] 1 All ER 753 and ***Prestige v Brettell*** [1938] 4 All ER 346.

42. In ***Brodie,*** the contract provided that the employer was not to become liable for the payment of any charge for additions, alterations or deviations unless instructions for them were given in writing by the engineer. There was a widely drafted arbitration clause. The arbitrator held that the engineer had improperly refused to give orders in writing for the extras. The employer argued that the absence of such orders was a defence to the contractor's claim to be paid for them. The House of Lords held that the arbitrator had power to award that the items in question should be paid for as extras, despite the absence of any orders in writing by the engineer. Lord Finlay LC said at p 351 that the finding of the arbitrator *"is to take the place of the order in writing which ought to have been given*." It seems to me that this is entirely consistent with what May LJ said in ***Lubenham.*** It was a condition precedent to the right to payment that an order was given, or ought to have been given. ***Brodie*** certainly does not support the proposition that the cause of action in respect of the extra work arose when the work was done.

43. In ***Neale,*** payments were to be by instalments when the architect gave a certificate. In the case of disputes, the architect was to act as arbitrator. A dispute arose and the architect refused to act as arbitrator or to issue a certificate in relation to the final instalment. It was held by the Court of Appeal that the absence of a certificate was no bar to the contractor's right to recover. Slesser LJ said at p 756H that he could not see why in principle the employer should not be entitled to stand upon her contract and say that she had undertaken to pay when, and only when, the architect gave his final certificate. But the arbitration clause compelled a different conclusion. Following ***Brodie,*** he held that an arbitration resulting in an award in favour of the contractor would have enabled him to sue for his payment "*as if a final certificate for that amount had been granted and not wrongfully refused*"(at p 758A). The employer was not permitted to take advantage of the architect's refusal to operate the contract machinery for the resolution of disputes. But it is noteworthy that Slesser LJ did not say that the absence of a final certificate was irrelevant. Rather, in the events that occurred, the contractor was entitled to bring proceedings *as if* a final certificate had been issued and not been honoured.

44. In ***Prestige,*** the architect refused to issue a certificate. The contractor referred the dispute to arbitration. The Court of Appeal applied ***Brodie*** and ***Neale*** and held that the arbitrator had power not only to decide as to the issue of a certificate, but also to make an award of the sum due. Slesser LJ said at p 350A: *"Where an arbitrator having jurisdiction has to decide that something ought to have been done by the architect or engineer which was not done, if the terms of reference are wide enough to enable him to deal with the matter, he may by that decision himself supply the deficiency, and do that which ought to have been done, and produce the result which ought to have been produced…"*

45. At p 350G he said that if the arbitrator came to the conclusion that the certificate ought to have been issued, "*he could act as if it had been granted*." MacKinnon and Greer LJJ agreed. Mr ter Haar places particular reliance on the judgment of Greer LJ, who said at p 354H: *"I cannot read either* ***Brodie v Cardiff Corpn*** *or* ***Neale v Richardson*** *except as expressing the view that, in the opinion of the House of Lords in* ***Brodie****'s case, and in the opinion of this court in* ***Neale v Richardson,*** *an arbitrator to whom a matter is remitted in the form in which it was in this case has the power to dispense with the conditions precedent, and to order that, notwithstanding the non-performance of those conditions precedent, a liability may be established on which money may be ordered to be paid."*

46. It is clear that in ***Prestige*** the Court of Appeal was purporting to apply ***Brodie,*** which for the reasons I have given does not support Mr ter Haar's argument. Moreover, Greer LJ explicitly acknowledged that certificates *were* a condition precedent to payment, but said that the arbitrator and the court had power to dispense with the condition where a certificate ought to have been issued. In my judgment, this approach is inconsistent with the proposition that a certificate is no more than evidence of the Contractor's right to payment accruing when the work is done, rather than when the certificate is, or ought to be, issued.

The claim under clause 46

47. Clause 46(3) of the contract provides:

> *"(3) If the Contractor is requested by the Employer or the Engineer to complete the Works or any Section within a revised time being less than the time or extended time for completion prescribed by Clauses 43 and 44 as appropriate then the Contractor shall submit written proposals to the Engineer stating:-*
>
> *(a) The lump sum based on an estimate of the reasonable extra costs which the Contractor would require to be added to the Contract Price in order substantially to complete and test the Works or any Section by such earlier date as the Employer or the Engineer may have specified, together with details showing the manner of calculation of the lump sum and proposals for the terms of payment thereof.*
>
> *(b) Where applicable, the extent to which any extension of time to which the Contractor has become entitled at the date of the request may be cancelled or reduced such that the date for substantial completion then resulting would become the substantial completion date for the Works or any Section.*
>
> *Notwithstanding that the Employer and the Contractor may not have agreed the amount by which the Contract Price is increased, the Contractor shall nevertheless be obliged to proceed with the Works or Section thereof in order to achieve the earlier date aforesaid, and the Employer shall make a reasonable payment on*

account to the Contractor pending agreement on the lump sum increase to the Contract Price. The cost of preparing the proposals referred to in this sub-clause shall be borne by the Contractor."

48. An issue arose in the arbitration as to whether payment of the extra cost of accelerating the completion of the Works is subject to the certification provisions of clause 60. The judge arbitrator said: *"Clause 60(1)(d) requires the contractor to include in its monthly applications "the estimated amounts to which the Contractor considers himself entitled in connection with all other matters for which provision is made under the Contract." Clause 46 makes such provision."*

49. Mr ter Haar makes the following points. Clause 46 contemplates an agreement between the parties that acceleration measures are to be put into effect. The "*request"* by the Engineer or Alstom is not an "instruction" under clause 51, so that the valuation provisions of clause 52 do not apply. The clause envisages an agreement between the parties as to the price to be paid for the acceleration measures: this is to be a lump sum increase, and there is no provision that, once agreed, payment of the sum is dependent on a certificate by the Engineer. Prior to, or in the absence of agreement of the amount of the increase, Alstom is obliged to make a reasonable payment on account, and this obligation is not dependent on the issue of a certificate by the Engineer.

50. In my judgment, the judge arbitrator was right. The language of clause 60(1)(d) is very wide: *"estimated amounts….in connection with* ***all other matters for which provision is made under the Contract…..****"* (emphasis added). Sums claimed in respect of acceleration measures pursuant to clause 46 are amounts to which Boot considers itself entitled in connection with a matter (acceleration measures) for which provision is made under the Contract (by clause 46). It seems to me that none of Mr ter Haar's points compels a different conclusion.

Conclusion on the first issue

51. In my judgment, there is nothing in the authorities which requires me to modify the conclusion that I expressed earlier that, upon the true construction of the contract, the right to payment arises when a certificate is not paid in accordance with clause 60(2) or (4) as the case may be, or when a certificate to which Boot is entitled under clause 60(2) or (4) is not issued in accordance with the contract.

The second issue

52. Mr ter Haar submits that (whatever the outcome of the first issue), once Boot had a right to an interim payment in respect of an item of work or a claim, the cause of action in respect of that right to payment accrued, and it became statute-barred 6 years thereafter. He says that it is a very strange proposition that the repeated omission of an item or claim gives rise to a fresh cause of action. He makes the point that, if A claims a debt from B and B refuses to pay, and one month later A again claims the same sum and B again refuses to pay, B's refusal on the second occasion does not give rise to a fresh cause of action.

53. Mr ter Haar submits that the proposition that the same cause of action can be renewed or "refreshed" is contrary to principle and authority. He cites ***Wilkinson v Verity*** (1871) LR 6 CP 206. That concerned a claim in detinue against a bailee of goods. At p 209, Willes J said: *"It is a general rule that where there has once been a complete cause of action arising out of contract or tort, the statute [of Limitations] begins to run, and that subsequent circumstances which would but for the prior wrongful act or default have constituted a cause of action are disregarded."*

54. Another authority relied on by Mr ter Haar is ***Reeves v Butcher*** [1891] 2 QB 509. In that case, the plaintiff claimed principal and interest under a 5 year loan agreement. The plaintiff started proceedings to recover the principal and interest within 6 years from the end of the term of 5 years. A limitation defence succeeded. It was held that time began to run from the earliest time at which the plaintiff could have brought her action ie 21 days after the first instalment of interest became due. At p 511, Lindley LJ said: *"…the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought."*

55. But it is important to distinguish between (a) successive claims in respect of the same cause of action and (b) successive claims in respect of different causes of action. In the example of the debt owed by B

to A, there is only one cause of action, namely the right to repayment of the debt. That cause of action arises no later than when B first refuses to pay. It is obvious that the mere refusal of payment on the second occasion does not give rise to a fresh cause of action. Willes J referred to *"a complete cause of action"*, and Lindley LJ to *"the cause of action"* (emphasis added). It is clear that they were not contemplating successive and distinct causes of action.

56. The question that arises in relation to the second issue is whether a claim to have a sum included in a final certificate in respect of work or events for which a sum should have been included in an interim certificate is a fresh cause of action, or merely a repeat of the earlier cause of action. If the causes of action are the same, and the claim for inclusion of the sum in the final certificate is made more than 6 years after the cause of action first arose, then it is statute-barred. In that event a separate question that arises is whether the Engineer is obliged to include in the final certificate a sum in respect of that cause of action even though it is statute-barred. That question is the subject of the third issue.

57. In my view, the cause of action in respect of an Engineer's failure to include a sum in an interim certificate is not the same as the cause of action in respect of the failure to include a sum in the final certificate, even if the two sums happen to be the same. This is because interim certificates are no more than provisional estimates of the sum to which Boot is entitled by way of instalment payments. The Engineer is required to certify the amount which on the basis of Boot's monthly statement in his opinion is due "*on account of clause 60(1)(a) and (d)"*. Clause 60(1)(a) requires the monthly statement to show the *"estimated contract value of the Permanent Works"*. Clause 60(1)(d) requires the statement to show the *"estimated amounts to which the Contractor considers himself entitled in connection with all other matters…."* (ie other claims). The Engineer is, therefore, required to decide, on the basis of estimates, what in his opinion is due as a payment "*on account*". The contract does not state what supporting documentation *if any* Boot must put forward in support of its estimates. Boot is not even obliged to claim the full estimated values or amounts, because the whole of clause 60(1) is subject to the qualification: "*unless in the opinion of the Contractor such values and amounts together will not justify the issue of an interim certificate"*. These words may do no more than reflect the language of clause 60(3). More importantly, the Engineer is not required to carry out a detailed and accurate valuation each month. His obligation is no more than to certify the amount which in his opinion is due *on account of* clause 60(1)(a) and (d). This is of particular relevance in relation to claims for extra expense pursuant to various clauses of the contract, where the calculation of Boot's true entitlement can be very complicated and time-consuming, and where it is often impossible to form an accurate view at the interim stage of the extra expense that will finally be payable.

58. Boot is required to include in its statement a list of any goods or materials delivered to the Site but not yet incorporated in the Permanent Works (clause 60(1)(b)); and a list of any of those goods or materials identified in the Appendix to the Form of Tender not yet delivered to the Site but of which the property has vested in Alstom (clause 60(1)(c)) In relation to these amounts, the Engineer is required to certify such amounts as he may consider "proper". This gives the Engineer a measure of discretion which, of course, he does not have at the final certificate stage, when all the goods and materials will have been incorporated in the Works.

59. The provisional nature of the exercise performed by the Engineer at the interim stage is reinforced by clause 60(8) which provides that he may *"by any certificate delete correct or modify any sum previously certified by him"*.

60. Accordingly, the contractual scheme in relation to interim certificates and payments is that, as the work proceeds, a provisional running account is prepared by the Engineer on the basis of the statement submitted in accordance with clause 60(1). At the final account stage, however, Boot and the Engineer have to perform a very different exercise. Clause 60(4) requires Boot to submit *"a statement of final account and supporting documentation showing in **detail** the value in accordance with the Contract of the Works executed together with all further sums which the Contractor considers to be due to him up to the date of the Defects Correction Certificate"* (emphasis added). It is then provided that within 3 months after receipt of the final account "*and of **all information reasonably required for its verification***" (emphasis added), the Engineer shall issue his final certificate stating the amount which in his opinion is finally

due under the contract from Alstom to Boot or from Boot to Alstom, as the case may be. It will be an integral part of the final certificate that it will contain the Engineer's statement of the Contract Price ascertained by him after considering the final account, its detailed supporting documentation and all information reasonably required by him for its verification.

61. In my view, the nature of the exercise required by the contract to be performed by Boot and the Engineer at the interim stage is so different from that required at the final account stage that it cannot be said that a failure by the Engineer to perform his obligations in accordance with clause 60(2) can start time running in relation to a cause of action based on the failure by the Engineer to perform his obligations in accordance with clause 60(4). It seems to me that the submissions of Mr ter Haar fail to take account of the fundamental differences between what the Engineer is required to do at the interim stage and what he is required to do at the final stage. The position would be otherwise if this were, say, a contract for a fixed sum of £1 million whose only payment provision was that the price was to be paid by 10 equal monthly instalments of £100,000. In such a case, the right to claim the first instalment would accrue at the end of the first month, and the right to sue for that instalment would become statute-barred 6 years after the end of the first month. This is because the right to payment of £100,000 at the end of the first month would be the cause of action in respect of the work done in that month. The right to payment of £100,000 for that work would be unaffected by any other provisions of the contract. It would not be reviewed or recalculated at the end of the contract. But this kind of contractual arrangement is quite different from that provided by the contract in this case, where there is a single Contract Price and one set of elaborate provisions for dealing with instalment payments on account and a very different set of elaborate provisions for ascertaining the Contract Price finally payable in the light of the work actually done and the events that occur during the carrying of the Works.

62. This analysis is consistent with what has been said on a number of occasions about the difference between interim and final certificates. In ***Birse-Farr*** (p53), Hobhouse J said: *"Certification may be a complex exercise involving an exercise of judgment and an investigation and assessment of potentially complex and voluminous material. An assessment by an engineer of the appropriate interim payment may have a margin of error either way. It may be subsequently established that it was too generous to the contractor just as it may subsequently be established that the contractor was entitled to more. Further the sum certified may be made up from a large number of constituent figures, some of which may likewise be assessed favourably to one party or the other. It may be that a contractor can say under a certain heading he did not have certified as high a figure as can later be seen to be appropriate but that under another heading he has to accept that the figure certified can be shown to have been an over-certification. At the interim stage it cannot always be a wholly exact exercise. It must include an element of assessment or judgment. Its purpose is not to produce a final determination of the remuneration to which the contractor is entitled but is to provide a fair system of monthly progress payments to be made to the contractor. The strict twenty-eight day period in sub-clause (2) can be contrasted with the three months allowed in sub-clause (3) "**after receipt of this final account and of all further information reasonably required for its verification**"*

63. I have already referred to the passage in the speech of Lord Hoffmann in *Beaufort* where (p 276B) he spoke of the *"provisional validity*" of interim certificates, and the fact that they are machinery by which the rights and duties of the parties can be "at least provisionally determined with some precision".

64. Finally, I refer to what Lord Prosser said at para [29] in ***Scottish Equitable***:

"[29] The question which underlies the submissions advanced on behalf of the appellants is nevertheless perhaps this: if the claimants could have challenged earlier certificates, more than five years before they eventually initiated the arbitration, and moreover could have done so on the same basis as formed the basis of that eventual challenge, may it not be said that they really should have made that challenge at those earlier dates, and that having failed to do so their rights have prescribed? There is a certain attraction in that broad approach (although it is not perhaps quite the same as the argument presented by the appellants). But it is important to appreciate that the prescription of one right cannot prevent a claimant from continuing to assert another right. Since each interim certificate supersedes its predecessor, and effectively constitutes a revaluation of the whole work carried out, any failure in relation to one interim certificate (in terms of

prescription or otherwise) will apparently leave unaffected the right of a claimant (and indeed a building owner) to challenge the valuation of the whole works executed, in the next or any subsequent certificate. Moreover, cl 41 provides not only a right, in arbitration proceedings, to challenge previous certificates in ways which were not available when those certificates were issued. A previous certificate can apparently be challenged in the arbitration, notwithstanding that the challenge might have been, and was not, advanced when that earlier certificate was issued. In our opinion, a challenge at the earlier stage, and a challenge at the stage of arbitration, can be distinguished. Even if the challenge is upon the same basis, a challenge when a certificate is issued would relate to the amount which ought to be paid at that stage and could properly be seen as part of the enforcement of a different contractual right. A subsequent challenge in arbitration, even upon the same factual basis, may be very different, relating either to the content of a much later interim certificate, or to a final certificate. The whole structure of the contract appears to us to allow such subsequent challenges, notwithstanding that a challenge on the same basis could have been made much earlier, for more limited or different purposes. The availability of arbitration or even litigation for those earlier purposes, even if regarded as the assertion of an enforceable right, does not result, by the elapse of a prescriptive period, in the loss of a separate right to challenge any subsequent certificate."

65. It is true that, as Mr ter Haar submits, ***Scottish Equitable*** was a case where the question was when an obligation became "enforceable" for the purposes of section 6 of the Prescription and Limitation (Scotland) Act 1973. But in my view, this does not affect the analysis in para [29] of Lord Prosser's judgment. It is not necessary on this appeal to decide whether the failure to include a sum in successive interim certificates gives rise to successive causes of action, but if it were necessary to do so, I would adopt the analysis of Lord Prosser on this point. But for the reasons that I have given I consider that there is no doubt that the failure to include a sum in an interim certificate gives rise to a different cause of action from the failure to include a sum in a final certificate (even if it happens to be the same sum).

66. Mr ter Haar submits on policy grounds that such a resolution of the second issue will have serious implications for the construction industry and is incompatible with the need for finality, a need which is recognised by the Limitation Acts. He points to the facts of this case. Work started on 11 April 1994. The defects correction certificate was issued on 15 August 2000. Boot's final account was submitted on 29 June 2001 and the final certificate was issued on 9 October 2002. A final certificate dispute could involve a claim in respect of work carried out or events which occurred in April 1994. If this appeal is allowed, such a dispute would not be statute barred until 6 years after the date when the final certificate was issued, or ought to have been issued. By that time, relevant documents may well have been destroyed, witnesses may have died or disappeared and so on.

67. But these potential consequences do not cause me to doubt the correctness of the conclusion that I have reached. Large construction contracts of this kind are often executed as deeds, thereby attracting a 12 year limitation period. Practical problems of the type described by Mr ter Haar are not unusual in such contracts. Their significance should not, however, be overstated. Issues of pure measurement should not usually cause difficulty. One would expect contemporaneous measurement records to be kept. The more troublesome area is likely to be claims made under the clauses of the contract which permit such claims to be made: clause 12 is but one example. The draftsman of the contract recognised the problem of claims and made special provision to reduce, if not avoid, the difficulty. Thus, the Contractor is required to give notices, and may be instructed by the Engineer to keep contemporary records and permit the Engineer inspect such records. The Contractor is required to give full and detailed particulars of the amount claimed. Clause 52(4)(e) provides:

"*(e) If the Contractor fails to comply with any of the provisions of this Clause in respect of any claim which he shall seek to make then the Contractor shall be entitled to payment in respect thereof only to the extent that the Engineer has not been prevented from or substantially prejudiced by such failure in investigating the said claim or the Employer has not been prevented from or prejudiced in pursuing his own claim as a result of such failure.*"

The third issue
The submissions

68. Boot claims in excess of £13 million compound interest pursuant to clause 60(7). The claim is made on the basis that there was a failure on the part of the Engineer to certify sums in interim certificates pursuant to clause 60(2), and that Boot is therefore entitled to interest on the sums which should have been certified from the dates on which such sums were "*overdue*" ie 60 days after they should have been certified.

69. The judge arbitrator held (para 98) that the cause of action for interest accrued when the certificate that is successfully impeached was issued, or, if no certificate was issued, when it should have been issued. Accordingly, any claim for interest is statute-barred in so far as it is based on amounts that should have been, but were not, certified before 27 May 1997.

70. Mr ter Haar seeks to uphold this conclusion. First, he submits that the right to interest pursuant to clause 60(7) does not depend on certification. Interest is payable whether or not it is certified. Clause 60(7) simply provides for payment of interest in the event of failure to issue interim certificates in accordance with clause 60(2).

71. Secondly, Mr ter Haar submits that, if the failure to certify which triggers a claim for interest is a failure to certify £x in month 1, then for limitation purposes, there is only one cause of action for interest from month 1, and that is based on the failure to certify £x in month 1 and it arises in month 1. What happens subsequently if Boot includes its claim for interest on £x in succeeding applications and each month the Engineer fails to include £x (and interest thereon) in the later certificate is that there is simply a succession of applications for the payment of interest, all based on the failure to certify £x in month 1. Once more than 6 years elapses from the date when interest should have been paid in respect of the failure to certify £x in month 1 (ie 60 days after the date when £x should have been certified), the claim for interest in respect of the failure to certify £x in month 1 becomes statute-barred.

72. Mr Furst submits that the right to interest is dependent on the issue of a certificate in the same way as the right to payment of the principal sums due under the contract. In this respect, the treatment of claims under clause 60(7) is no different from the treatment of claims made under clause 46(3) as to which I refer to paras 46-49 above. The cause of action for interest based on the failure to certify £x in month 1 accrues at the time when £x is overdue for payment. A claim can be made in month 2 for interest which includes interest on £x from the date when £x was overdue for payment, and that is a fresh cause of action for interest from month 1. And the same applies in relation to succeeding claims until the date of the defects correction certificate (15 August 2000).

73. Moreover, Mr Furst submits that, if and to the extent that the Engineer did not include in his final certificate dated 9 October 2002 all the interest properly claimable pursuant to clause 60(7) (including interest based on the failure to certify £x in month 1), a fresh cause of action accrued on that date. A claim under clause 60(7) is not in principle different from any other claim to payment under a certificate. For the reasons which I have accepted at paras 55-58 above, a cause of action in respect of an Engineer's failure to include a sum in an interim certificate is not the same as the cause of action in respect of the failure to include a sum in the final certificate. By parity of reasoning, Mr Furst submits that a cause of action in respect of the Engineer's failure to include interest in an interim certificate is not the same as a cause of action in respect of the failure to include interest in a final certificate. It follows, therefore, that the claims for interest under clause 60(7), even if statute-barred in so far as they are made in respect of a failure to include interest in interim certificates, is not statute-barred in so far as they are made in respect of a failure to include interest in the final certificate.

My conclusion

74. It seems to me to be inescapable that certificates are the contractual mechanism for certification and payment of interest. That follows from the language of clause 60(1)(d) to which I have already referred. But I do not consider that this disposes of the third issue.

75. It is, I think, helpful to start by considering what the position would be if the claim for interest under clause 60(7) were advanced on the basis of a failure to pay the sum of £x certified as due for payment in month 1. In my view, it is clear that the claim for payment of £x pursuant to clause 60(2) would become statute-barred 6 years after the cause of action arose, ie 6 years from the date when £x was due

for payment under the certificate: it would appear from clause 60(2) that a sum certified is payable forthwith upon the issue of an interim certificate. Similarly, a claim for interest for that non-payment of £x would also be statute-barred 6 years from the date when £x was due for payment. The general principle that, once an action for the principal sum is barred, an action for arrears of interest will also be barred would apply: see ***Elder v Northcott*** [1930] 2 Ch 422. The fact that the claim for interest is brought in arbitration proceedings would make no difference. Section 13(1) of the Arbitration Act 1996 provides: "The Limitation Acts apply to arbitral proceedings as they apply to legal proceedings."

76. Is the limitation position different in a case where the claim under clause 60(7) is for interest on £x which is overdue for payment because it was not certified in month 1 (rather than because it was certified but not paid in that month)? It would be surprising if the position were different, and no reason has been suggested as to why it should have been intended by the draftsman of these conditions of contract that there should be such a difference. In each case, Boot's complaint is that £x should have been paid in month 1 and its claim is for interest on £x for that non-payment at that time.

77. In my judgment, once £x is overdue for payment in month 1, the cause of action is complete in respect of that overdue payment, whether the overdue payment results from a failure to pay £x when it has been certified, or from the Engineer's failure to certify £x. The fact that, where it has not been certified, £x can be certified in later certificates does not affect the position. The right to payment of £x and interest when £x is overdue for payment accrues when Boot is first entitled to those payments. The right to have £x included in successive certificates probably gives rise to successive causes of action (see para 64 above). This is because each successive interim certificate revalues the whole of the work carried out, and any failure in relation to one interim certificate will leave unaffected Boot's right to challenge the valuation of the whole of the work executed in later certificates. Likewise, the right to have included in a final certificate a sum which happens to be £x for work for which £x was claimed at the interim certificate stage gives rise to a distinct cause of action (see paras 55-66 above). But the claim to interest on £x from the date when the arbitrator holds that £x should first have been included in an interim certificate, even if repeated in later applications for interest when it is capitalised and recalculated, does not become a different cause of action when it is so repeated. On the other hand, a claim to interest on £x from a later date, on the footing that £x should have been included in a later certificate as part of the monthly revaluation of the work, would, if upheld by the arbitrator, give rise to a different cause of action accruing at that later date.

78. I would, therefore, hold that the right to claim interest on a sum which should have been certified becomes statute-barred 6 years after that right accrued. If the arbitrator does not identify a date when £x should have certified, then £x is regarded as overdue for payment from the date of the Certificate of Substantial Completion of the Works: see clause 60(7).

79. I should add for completeness that we heard argument as to whether the Engineer is obliged to certify sums in respect of claims even if he considers them to be statute-barred: this is the subject of the fourth issue. But in my judgment, this issue does not arise here. For the reasons that I have already given, the cause of action in respect of interest based on the failure to certify £x in month 1 arises in month 1. The arbitrator cannot grant relief in respect of that failure if the cause of action arose outside the limitation period.

80. We have not been provided with sufficient material to enable us to work out how much of the claim under clause 60(7) is statute-barred. But I have endeavoured to explain how the limitation issue in relation to the claim under this sub-clause should be applied.

The fourth issue

81. In view of the conclusion that I reached on the second issue, the fourth issue does not arise

Overall conclusion

82. For the reasons that I have given, I would allow the appeal, save to the extent that Alstom has been successful on the third issue. Counsel should agree a form of order to give effect to this judgment.

Leave to appeal to the House of Lords

83. Under section 69(8) of the Arbitration Act 1996 ("the 1996 Act") as modified by paragraph 2 of schedule 2 to the Act in relation to judge arbitrators, no leave may be given to appeal to the House of Lords unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the House of Lords. Leave to appeal can only be given by the court which heard the first appeal from the judge arbitrator: see ***Henry Boot Construction Limited v Malmaison Hotel Limited*** [2001] QB 388.

84. It is clear, therefore, that this court cannot give leave to appeal unless the appeal would raise a question of general importance. I am in no doubt that this necessary condition is satisfied: see para 1 of this judgment. Mr ter Haar concedes, rightly in my view, that this is not a sufficient condition for leave to appeal to be given. But he submits that the only other condition that needs to be satisfied is that the proposed appeal is arguable. He contends that this condition is amply met in the present case.

85. In my judgment, in deciding whether to give leave to appeal, the correct approach is to apply paragraph 4.5 of the House of Lords Practice Directions Applicable to Civil Appeals, which includes: *"Leave is granted to petitions which raise an arguable point of law of general importance which ought to be considered by the House at that time, bearing in mind that the case will have already been the subject of judicial decision."*

The words "*which ought to be considered by the House*" are important. They give the House a broad discretion. I would refuse leave to appeal in this case. The principal question that arises on this appeal is whether the cause of action in respect of the Engineer's failure to include a sum in an interim certificate is the same as the cause of action in respect of the failure to include a sum in the final certificate (the second issue). In my judgment, the answer to this question is plain, although I would not go so far as to characterise Mr ter Haar's submissions on this issue as unarguable. It is sufficiently plain that I would hold on that account alone that the point is not one which ought to be considered by the House of Lords. In my view, the clause 60(7) issue (on which Alstom has achieved a large measure of success) does not raise an issue of general importance sufficient to justify giving leave to appeal. In reaching my conclusion, I also bear in mind that this is an appeal from an arbitrator's award. In the ***Malmaison*** case at page 396D, Waller LJ said: *"I also reject Mr Black's submissions that once matters are in court the philosophy applicable to arbitrations somehow has no further application. Parties who have agreed to have their disputes arbitrated should have finality as speedily as possible and with as little expense as possible: see generally section 1(a) of the Arbitration Act 1996. Limitation on the rights of appeal is consistent with that philosophy and one tribunal dealing with the question is also consistent with that philosophy."*

86. It seems to me that, in deciding whether the questions *ought* to be considered by the House of Lords, this is a relevant factor.

87. In the event that we refused leave to appeal to the House of Lords on the substantive issues that arise, we were asked by Mr ter Haar to grant leave to appeal against that refusal of leave. Section 69(6) of the 1996 Act, as modified by paragraph 2 of Schedule 2 provides that "the leave of the [Court of Appeal] is required for any appeal from a decision of the [Court of Appeal] under this section to grant or refuse leave to appeal". In my judgment, this power should be exercised very sparingly, particularly in relation to the grant of leave to appeal to the House of Lords, and only where there is real doubt as to the criteria to be applied for the grant of leave to appeal. As I understood it, it was common ground that the relevant criteria are contained in paragraph 4.5 of the House of Lords Practice Direction. It is true that there was an issue as to whether the statement of Waller LJ cited at para 84 above is correct. But I do not consider that this is a sufficient reason for giving leave to appeal against the refusal of leave to appeal. The fact that this is an appeal against an award of an arbitrator is no more than a relevant factor. I would, therefore, refuse leave to appeal against the refusal to grant leave to appeal.

Costs

88. Mr ter Haar accepts that Boot is entitled to the costs of the appeal up to the close of the hearing on 13 April 2005. But further costs were incurred in relation to the clause 60(7) issue. I did not deal with this issue in the first draft of my judgment. This was because the clause 60(7) claim was not included by Mr Furst in his skeleton argument of the list of relevant claims; and, although the issues were

discussed by both sides to some extent in their lengthy skeleton arguments, no oral argument was directed to the issue at all: it was simply not mentioned. In the result, the parties were requested to submit further skeleton arguments dealing with the point, and an oral hearing took place on 16 June to deal with it (as well as the question of leave to appeal). Since Alstom has only been partially successful on the clause 60(7) issue, and bearing in mind that both parties were responsible for failing to draw the attention of the court to the issue, I think that there should be no order in relation to the costs attributable to the clause 60(7) issue incurred since 13 April 2005.

89. Boot has submitted a bill of costs in the breathtaking sum of almost £350,000. They ask for a payment on account of costs of two thirds of this sum. This was a two day appeal on issues of pure law which had been canvassed in considerable detail before the arbitrator. I take full account of the fact that the case raises important issues and that the claim is very large: Boot's claim is quantified at approximately £60 million. But it is a matter of grave concern that costs of this magnitude have been incurred by Boot on this appeal. The incurring of costs on this scale does not appear to be consistent with the proportionate resolution of disputes. We were not told what costs have been incurred by Alstom, but it is reasonable to infer from the silence on the part of Alstom's legal representatives that its costs are also likely to be very substantial. We were told that they did not have time to prepare a bill. I find this somewhat surprising in these days of computerised billing: Alstom's solicitors must have some idea of their costs for the appeal.

90. Of course, Boot is free to agree to pay its legal representatives what it wishes. It may well be that Boot insisted that they left no stone unturned in their preparation for the appeal. But Boot is only entitled to a payment on account of costs which were reasonably and proportionately incurred and which were proportionate and reasonable in amount: CPR 44.5(1). I accept that it is not for this court to conduct a detailed assessment of costs. But bearing in mind that the appeal raised pure questions of law which had been considered in great detail before the judge arbitrator, I think that it is unlikely that the costs judge will assess Boot's costs at anything like the level claimed. The solicitors claim total profit costs of £177,631 excluding VAT. This is a massive sum for an appeal such as this. Counsel's fees are claimed at almost £150,000 excluding VAT: this too is a huge sum.

91. Mr ter Haar submits that £150,000 would be a reasonable payment on account. In my view, this is, if anything, generous. But in view of the position taken by Alstom, I would order that sum to be paid on account of Boot's costs.

Lord Justice Thomas:

92. I agree.

The Vice-Chancellor:

92. I also agree.

Mr Stephen Furst QC and Mr Tim Lord (instructed by Messrs Davies Arnold Cooper) for the Appellant
Mr Roger Ter Haar QC and Mr Alastair Walton (instructed by Messrs Lovells) for the Respondent