

JUDGMENT : HIS HONOUR JUDGE PETER COULSON Q.C. TCC. 28th January 2005

[1] INTRODUCTION

1. By a Claim Form issued on 16 October 2003, the Claimant, S & W Process Engineering Ltd (hereinafter referred to as "S&W") sought to recover the sum of £361,146.06 from the Defendant, Cauldron Foods Ltd (hereinafter referred to as "Cauldron") under the terms of a Contract between the parties pursuant to which S&W supplied and installed plant and machinery at Cauldron's premises at Portishead in Bristol. The claim was amended in May 2004 and increased to £583,990.29. The claim is defended and, in addition, there is a counterclaim in respect of defects and other matters which is presently calculated in the sum of £498,037.
2. This claim was commenced in the Boston County Court and was not transferred to this Court until the summer of 2004. When the matter came before me by way of a Case Management Conference on 11 October 2004, I ordered that various pleaded issues between the parties as to the nature and effect of the Contract, and an alleged variation to its terms, should be dealt with by way of Preliminary Issues. Between the CMC on 11 October and the trial of those Issues on 6 and 7 December 2004, the parties were able to agree certain matters and the real nature of the disputes between them became much clearer. In particular, it is now apparent that the principal contractual issue between the parties is the extent, if at all, to which the Contract as originally agreed and/or as operated in practice provided a regime by which the costs incurred and then claimed for by S&W could be limited or controlled by Cauldron.
3. Since the Preliminary Issues are concerned with the Contract between the parties, and its operation in practice, it is appropriate for me to set out the background to the Contract (Section 2 below); the Contract documents and the express terms to be derived therefrom (Section 3 below); the extent to which the Contract was varied by agreement in practice (Section 4 below); and certain later events in the story (Section 5 below). I then go on to answer each of the outstanding Preliminary Issues between the parties (Sections 6-10 below).

[2] BACKGROUND TO THE CONTRACT

4. Cauldron produce organic processed food. Their original site at Portishead in Bristol comprised Units 1 and 2. In 2001 they acquired a third Unit and they wanted to move all their high risk operations to that Unit, leaving the lower risk operations in Units 1 and 2. Amongst other things, it was thought that this would improve their insurance position. Accordingly, the work which Cauldron wanted to have carried out at their premises was the creation of a new Unit 3 to which they could transfer the bulk of their production, and then certain refurbishment works to Units 1 and 2, in particular to increase the volume of the tofu plant.
5. In September 2001, S&W provided their first (Phase 1) Feasibility Study to Cauldron in respect of the proposed redevelopment work. This Study said that "the complexity of this project is not to be underestimated" and indicated a total budget cost figure of £5,863,222.
6. In November 2001, S&W produced their second (Phase 2) Feasibility Study. The bulk of the work in producing this document was carried out by Mr Jason Musk, S&W's head of engineering and the project manager responsible for this Contract. In Section 3 of this Feasibility Study, under the heading 'Invitation to Bid Packages' S&W proposed: *"In order to estimate the target or ceiling price of the overall Project, it is intended to prepare an unambiguous specification and tender document for specific and key areas of the re-development project"*.
Section 5 of the same document introduced the possibility of 'Partnering Concepts', pursuant to which a target price would be indicated and any savings against that price would be shared by the parties and any overspend against that price would be funded by S&W.
7. There was an additional document that formed part of the second Feasibility Study entitled 'Project Management Agreement'. This document was also drafted by Mr Musk. Section 3 of the document was expressly concerned with Cost Control. Mr Musk agreed in cross-examination that, throughout, the control of costs was an important consideration for S&W. It clearly was important for Cauldron, as Mr. Musk also accepted. At this stage, according to this document the proposed contract form was the MF/1 (Rev 3) 1988 Edition.
8. At the first project Review Meeting which took place sometime in January/February 2002, there was a discussion about the flooring contractor, with Cauldron making the point that this contractor's prices tended to rise throughout the duration of any project. The minute of the meeting noted S & W's response: *"S & W confirmed that the orders would be placed on a fixed price basis with all variations carefully managed and approved prior to any financial commitment. Subsequently, and on the above terms, the ITB Package will be issued."*
9. In March 2002, S&W produced the third and final Feasibility Study for Cauldron. The Introduction began: *"Following completion of Phases 1 and II of the pre-live phase Feasibility Studies, the following report will detail the transition from "Orders of Costs" through the analysis of competitive tenders towards presenting the optimum costs pertaining to the successful redevelopment of Cauldron Foods' facilities at Bristol.*
For the purposes of presenting realistic and accurate costs, it has been subsequently agreed that specific areas providing "uncertainties" or risk areas to the project budget should be accompanied by a contingency factor. Typically, the level of contingency applied would be 5% unless specifically stated otherwise. All areas including contingency have been highlighted on the attached report"
10. The Summary of the Project Budget was put at £4,395,614. There was a detailed analysis of the Project Budget at Section 3 of the Feasibility Study demonstrating that the proposed works had been broken down into 56

separate elements. The Budget Cost was there stated to be £4,630,113.99. The total "Selling Costs" figure set out in the same document, was put a little below that in the sum of £4,599,108.81.

[3] THE CONTRACT

11. As long ago as the 11th of November 2003, S&W provided Further Information in respect of their case as to the formation of the Contract. It is a case with which Cauldron have agreed. The case is that the Contract was evidenced by the following documents, namely an e mail from Cauldron and a letter from S&W both dated 8.4.02; a letter from Cauldron dated 10.4.02; a purchase order from Cauldron dated 10.4.02; a letter from S&W dated 12.6.02; a letter from Cauldron dated 13.6.02; and a letter from S&W dated 21.6.02. I deal briefly below with each of those 7 documents in turn.
12. The email from Cauldron to Mr Musk at S&W of 8.4.02 confirmed that the Cauldron board had approved the project to a value of £6,606k. The email gave confirmation that the project could be commenced to the value of the phase 1 (or long lead-in) items in the sum of £1,103k.
13. S&W's letter of the same date in response identified various figures for the works. The letter went on:
"Commercial Arrangements – Phase 1(a)
Commercial Tracking: Open Book (Target Price)
In order to identify all project costings under the 'Open Book' framework, we would propose to use the following unique reference numbers against the areas detailed. Subsequent phases of the project (following official notification) will also be managed on this basis. The main invoice reference number will be utilised on all financial correspondence between both parties (invoices etc).
Main Invoice reference number 87508(accounts use only)
Builders Works 87509
Fryer System 87510
Tofu Filter Press 87511
Sausage Cooking Machine 87512
Mezzanines and structural steel works 87513
Preliminaries 87514
Temporary Dry Goods Store 87515
Against the previously listed reference numbers, monthly interim statements of account will be produced detailing all expenditure, forecasts to complete and accruals. All under spends will be transferred to the Project Account and overspends (if applicable) justified (in writing) prior to any financial commitment. Final invoices will be amended to suit the actual costs incurred.
All payments unless specifically described otherwise are to be made within 28 days of the date of submission of the invoice".
14. On 10.4.02 Cauldron sent S&W a Purchase Order for the phase 1 works in the total sum of £1,102,706.80.
15. It would appear that, on or about 12 June 2002, Cauldron confirmed to S&W their instruction to carry out the remaining works in phase 1(b) of the project in the total amount of £3,496,402 plus VAT. Accordingly, on 12 June 2002, Mr Musk of S&W wrote to Mr Roberts of Cauldron as follows:
"Thank you for now confirming your instructions to proceed with phases 1(a) and (b) of the Expansion Project. We look forward to receiving written confirmation of phase 1(b) work shortly.
For reference the Target Order Values for both phases are as follows:
Phase 1(a) £1,102,706.80 plus VAT
Phase 1(b) £3,496,402.01 plus VAT
We would propose to introduce a system to track the procurement phases of the project in line with the Datum Point Budget as issued within Feasibility Study III. Such a system would incorporate the production of Authorisation for Capital Expenditure Certificates. Where estimated costs consist mainly of labour services, we would propose to issue interim evaluations and forecasts to complete (as reported on the monthly financial report).
As explained during our meeting, this will effectively enable the overall project of circa £4.6 million to be managed as approximately 56 significantly smaller value contracts, hence reducing the financial risks through individual and detailed costs analysis.
In summary, all requests for Capital Purchases within the previously pre-defined Project Budget would be authorised by yourselves by signing an Authorisation for Capital Expenditure Form. An example of the format of this form is attached for reference and review.
The forms will be sequentially numbered to record all proprietary plant and services purchases and any overspends or under spends to the budget. Any significant variance to the budget will be discussed prior with rationales provided.
The forum for presenting the Authorisation for Capital Expenditure Certificates will be the main weekly Project Review Meeting on site at Cauldron Foods.
In addition, the monthly financial reports tracking the costs of the project against the Target costs will now include a reference to the Authorisation for Capital Expenditure Certificate.
Any variances to the Project scope and from the Datum Point Budget will be fully discussed in the weekly Project Review Meetings and agreements minuted for future reference".

16. The two Target Order Values for phases 1(a) and 1(b) respectively quoted in the early part of the letter added up to £4,599,108.81, which was, of course, the 'Selling Costs' figure set out in the analysis of the Project Budget in Feasibility Study III (paragraphs 9 and 10 above) . That same document is also referred to in this letter as the "Datum Point Budget."
17. Cauldron acknowledged receipt of that letter the following day, 13 June 2002. The letter concluded: "As outlined in your letter dated 12 June 2002 all capital purchases within the above defined project budget will be authorised by Cauldron Foods by the signing of an appropriate Capital Expenditure Form".
18. The final letter said to be a document evidencing the contract between the parties was a letter from S&W dated 21 June 2002. This letter stated that whilst the costs were as per the Target Figures identified within the Datum Point Budget, the actual costs would be £56,494.64 higher as a result of the introduction of two new items of work. Thus the Forecasted Project Cashflow was now expressly stated to be £4,655,603.45, (being £4,599,108.81 plus £56,444.64). The letter went on: "Any increases to the scope of supply or potential overspends to the Target Costs would be fully discussed prior to any financial commitment and again be authorised through the Authorisation for Capital Expenditure System. Similarly underspends or scope reductions ie savings to Project Budget would be declared and funds accrued".
19. Importantly, the letter went on to identify a schedule of payment, which took what was called a "total invoice value" of £4,615,756.94 and identified various dates between April 2002 and March 2003 for the payment of the specified lump sums that made up that total value figure. In other words, this was a proper instalment contract of the type referred to in (and highly recommended by) Hudson's Building and Engineering Contracts 11th edition, at paragraph 4-023. This was not a contract where the amount of the monthly or periodic payments had to be individually assessed: on the contrary, the interim payments were pre-set and pre-fixed at the very outset of the Contract. This only served to highlight the importance of the total of the two Target Order Values which was, in approximate terms, the sum to be paid in instalments to S & W during the course of the Contract.

[4] VARIATION TO THE CONTRACT

20. On a project of this kind, the costs can increase in one of two ways, either as a result of changes to or increases in the scope of supply, or by way of expenditure of sums that were higher than the relevant Target Cost figure for a particular element of the Contract work. The documents set out above broadly envisaged a 3 stage process in respect of both changes to or increases in scope on the one hand and potential overspends on the other. This is outlined below and set out in greater detail in paragraph 32 of this Judgment. Stage 1 would involve discussion of the increase or overspend at the weekly Project Review Meetings and oral agreement being reached as to the cost of the increase in scope or the amount of the overspend. At Stage 2, an Authorisation for Capital Expenditure ("ACE") Certificate would be completed by S&W and approved by Cauldron. That would confirm in specific and unequivocal terms the discussion and agreement previously minuted. At Stage 3, the agreement/ authorisation would be recorded in the monthly interim statements of account, which were referred to by the parties as the Cost Reports, provided to Cauldron by S & W.
21. It appears that, in the early stages of the project, this system was operated. However, after a while, the procedure involving the ACE Certificate (Stage 2 above) fell into disuse. It appears that they were not regarded by either party as particularly useful or important, given the detailed minutes of the weekly meetings and the provision by S&W of the monthly Cost Reports.
22. Accordingly, the 3 stage process referred to in paragraph 20 above was reduced, by the agreement of the parties, to a two stage process and the written ACE Certificates were no longer used. It does not appear that there were any other significant variations to the contract regime.

[5] LATER EVENTS

23. It appears that, from the point of view of both parties, the project went well. Cost Reports were produced by Mr.Musk and agreed by Mr.Roberts of Cauldron. Mr.Musk emphatically agreed in cross-examination that once a particular Cost Report had been agreed, it could be taken as an 'accurate statement of the financial commitment that Cauldron had agreed to'. By the end of March 2003, Unit 3 had been completed and the work on Units 1 and 2 was well advanced. Furthermore, at that time, S&W's proposed Final Account figure was £4,754,361.54, which was only slightly more than the total Target Order Value, as increased by the letter of 21 June 2002 (paragraph 18 above).
24. The figure of £4,754,361.54 can be found in an email produced by Jason Musk on 28 March 2003. He was summarising the position at this point because his involvement on the project was coming to an end and others would have to close out the Contract. Mr Musk's analysis in March was entirely consistent with Cost Report no 8, produced by S&W on 28 April 2003, into which he had had some input. There, S&W put their forecast figure for completion at £4,742,395.65.
25. After that, things began to go wrong. Cost Reports 9 and 10 were produced by S & W which showed considerably higher figures. In September 2003, various S & W invoices were provided which included many items that had not been invoiced before and took the estimated completion cost to almost £5 million. A further raft of S & W invoices were produced in February 2004, and they formed the basis of the amendment which increased the net claim in these proceedings to £583,990.27. It is the invoices of September 2003 and February 2004, that they say were unheralded in Cost Reports 1-8, to which Cauldron take particular exception in these proceedings.

[6] PRELIMINARY ISSUE 1.1/FORMATION OF CONTRACT

26. Preliminary Issue 1.1 asks: "How is the contract formed and, in particular, was it made orally and/or is it contained in or evidenced by writing?"
27. The parties are agreed that the Contract was evidenced in writing. The written documents evidencing the Contract are those set out in Section 3 above, at paragraphs 11-19 inclusive. That Contract has to be considered against its factual background pursuant to the well-known dictum of Lord Hoffmann in *Investors Compensation Scheme Ltd v- West Bromwich Building Society* [1998] 1 WLR 896 at page 913. In my judgment, the relevant background is essentially that set out in paragraphs 4-10 above, by reference to the three important Feasibility Studies provided by S & W to Cauldron.

[7] PRELIMINARY ISSUE 1.2/EXPRESS AND IMPLIED TERMS

28. Preliminary Issue 1.2 asks: "What were the express and/or implied terms of the Contract?"

The express terms can only arise from the documents set out in Section 3 above; the implied terms are said to arise as a matter of law. I deal with each category of terms below.

Express Terms

29. As a result of the helpful submissions of both counsel at the opening and the closing of the trial, it became apparent that the key dispute between the parties was the relevance of the Target Cost/Value figures and the existence or otherwise of a system within the Contract for controlling expenditure. It was unfortunate that this essential difference had not properly emerged from the pleadings before the hearing; this was largely because paragraph 5 of Cauldron's amended defence and counterclaim (which was not drafted by Mr. Stansfield) did not address the contents of the letters referred to at Section 3 above, and because paragraph 5B of that same document muddled together the terms of the original contract and the later variation to its operation in practice. However, I am entirely satisfied that, by the end of the trial on the Preliminary Issues, each side knew full well what the other side were saying about the Contract terms and were able to deal in detail with the other side's contentions.
30. Essentially, Mr Lofthouse, on behalf of S&W, submitted that this was a cost-plus, open book Contract and that the references in the Contract documents to Target Costs or Target Order Values did not amount to any sort of contractual obligation or entitlement; at best, he said, they were a free-standing statement of aspiration. On the basis of the Contract documents set out above and for the reasons set out below, I am unable to accept that submission.
31. It seems to me clear that, from the outset, Cauldron were anxious to ensure that the costs were controlled. S&W readily accepted this and, in their three Feasibility Studies, put forward a number of alternative ways in which this might be achieved. The eventual agreement between the parties that costs would be tightly controlled was set out, in my judgment, in clear terms in the letters from S&W of 8.4.02, 12.6.02 and 21.6.02. The relevant passages are cited in Section 3 above. It seems to me that on the basis of those letters, there was a clear agreement between the parties that, as a starting point, the cost of the project to Cauldron would be the total of the two Target Order Values for each phase which, when added together came to £4,599,108.81. This was the Datum Point Budget. Any increase to that sum could only arise in circumstances where there was a change to or increase in the scope of the work or where a particular Target Cost figure was shown to be too low. In either of those circumstances, a clear procedure, by which the total Target Order Values/ Datum Point Budget might be increased, was set out in the Contract.
32. Stage 1 of this procedure would involve the identification of the change to or increase in the scope of supply or the potential overspend on an item already within the Target Costs: see the paragraph which says just that in the S&W letter of 21 June 2002. Any such increase or overspend was then to be "fully discussed prior to any financial commitment": see the letter of 21 June 02. The discussion would take place at the weekly Project Review Meetings and, if an agreement was reached as to any changes to or increases in scope or any overspend on an existing item within the Target Costs, that agreement would be "minuted for future reference": see the relevant paragraph in the letter of 12 June 02. Only once such an agreement had been reached would an Authorisation for Capital Expenditure Certificate be issued. That would "again" authorise the additional expenditure: see the relevant paragraph in the letter of 21.6.02. Presumably the word "again" was used because such authorisation would already have been provided at the weekly meeting when the agreement had first been reached. Finally, the third stage of this process would be the production by S&W of the monthly interim statements of account (referred to by the parties as the Cost Reports) which would detail all expenditure, forecasts to complete and accruals: see the letter of 8.4.02.
33. This procedure was the way in which the parties agreed that any changes to or increases in scope or overspends on items within the Target Costs would be "justified in writing prior to any financial commitment" (see the letter of 8 April 2002) and/or to ensure that "any significant variance to the budget would be discussed prior with rationales provided" (see the letter of 12 June 2002). The same point was made in the letter of 21 June 2002 with a specific promise by S & W that any such increases or overspends would be fully discussed "prior to any financial commitment". That indeed is the common theme that runs throughout all these important Contract documents: that authorisation would be obtained before any work was done or expenditure incurred which would give rise to an increase in the total Target Order Value/Datum Point Budget figure of £4,599,108.81.

34. Although my findings, set out above, as to the existence of a contractual regime for controlling costs and the significance within that regime of the Target Order Values/Costs are based foursquare upon the letters which both sides agree formed the basis of their Contract, it is perhaps worth noting that they appear to chime precisely with the views of their author, Mr.Musk. He agreed in cross-examination that it was always his intention that any overspend against the Target Costs would be justified in writing prior to the expenditure being incurred. He also said that, if anyone wanted to know what the additional expense was (if any) on any given item, they could identify it immediately by looking at the latest Cost Report.
35. Accordingly, for these reasons, I conclude that the following were express terms of the original Contract between the parties:
- (a) S&W would carry out and procure the work on an open book cost plus basis, subject to the other terms of the Contract.
 - (b) The base cost of the work to Cauldron would be £4,599,108.81, being the total of the Target Order Values (as set out in the Datum Point Budget issued within Feasibility Study III), subject to the other conditions of the Contract.
 - (c) Any proposed changes to or increases in the scope of supply or potential overspends on items within the Target Order Values would be discussed at the weekly Project Review Meetings with agreements as to changes/increases in scope and/or any additional expenditure being minuted for future reference.
 - (d) Any such agreed changes to or increases in scope of supply or agreed overspends on items within the Target Order Values would then be the subject of an Authorisation for Capital Expenditure Certificate.
 - (e) Any such agreed changes to or increases in scope of supply or potential overspends on items within the Target Order Values would be recorded in the monthly interim statements ("Cost Reports") produced by S&W.
 - (f) The project would be managed as 56 small value contracts in order to reduce the financial risks through individual and detailed cost analysis.
 - (g) Invoices were to be raised by S&W on the basis expressly set out in the letter of 21 June 2002 and would be paid within 28 days of the submission of those invoices.

Variation to the Express Terms of the Contract

36. It will be seen that the agreed variation to the contract procedure as set out in paragraphs 20-22 above was, in truth, a relatively minor matter. The parties effectively agreed to dispense with the term of the contract referred to at paragraph 35(d) above; they stopped using the Authorisation for Capital Expenditure System. Beyond that, there was no change to the contractual regime. This makes practical common-sense too, given that, on the basis of the letter of 21 June 2002, Cauldron would make their financial commitment to any changes to or increases in scope or overspends on items within the Target Order Values when they agreed to the same at the weekly meetings. It was that oral discussion and agreement which was required "prior to any financial commitment": the Authorisation for Capital Expenditure System was merely a method of confirming "again" that authorisation. Since that authorisation was also reflected in the later Cost Reports, it is perhaps unsurprising that the parties agreed to do away with the written ACE System. It was essentially duplicatory.

Implied Terms

37. Cauldron alleged that there were the following implied terms of the Contract:
- (a) The goods supplied would be of satisfactory quality.
 - (b) If goods were selected by S&W for a particular purpose then those goods would be fit for that purpose.
 - (c) S&W would carry out the works with reasonable skill and care.
 - (d) S&W would perform its professional duties with the skill and care of a project manager experienced in construction projects.
38. There can be no dispute that the goods supplied by S&W had to be of satisfactory quality: see *Gloucestershire County Council -v- Richardson* [1969] A.C. 480, HL. Further, it seems to me that if goods were selected by S&W for a particular purpose then they also impliedly warranted that such goods would be fit for that purpose: see *Gloucestershire County Council -v- Richardson, Young and Marten -v- McManus Childs* [1969] 1 A.C. 454; and *Rotherham MBC -v- Frank Haslam Milan* 78 BLR 1.
39. As to the general terms relating to the performance of S & W 's work, it seems to me that, unless the express terms of the Contract contradicted or cut across the general obligation to carry out that work with reasonable skill and care, set out at paragraph 37(c) above, then such an obligation would be implied into any contract of this type. I therefore find that there was an implied term that S & W's work identified in the Contract letters would be carried out with reasonable skill and care. For reasons which are not wholly clear, Cauldron contend that there was an additional implied term that S&W would perform its professional duties with the skill and care of a project manager experienced in construction projects. This appears to be an attempt to differentiate between S&W's contracting role and their project management role. Whilst I of course accept that, on the basis of the Contract documents, S&W had a project management role, I do not understand why the fulfilment of that role should somehow be hived off and separated from their other contractual obligations set out in the letters. S&W's Contract was as set out in Section 3 above. I have found that they owed an implied obligation to perform their work pursuant to that Contract exercising reasonable skill and care. I can see no basis and no room for the further implied term alleged by Cauldron (and noted at paragraph 37d) above) and I therefore reject it.

[8] PRELIMINARY ISSUE 2/TARGET ORDER VALUES

40. Preliminary Issue 2 asked: "What is the relevance and effect "if any" of the Target Order Values referred to in the letter of 12 June 2002?"
41. I have dealt with this under Preliminary Issue 1.2 above. Those Target Order Values, totalling £4,599,108.81, formed the base figure for the cost of the project to be paid by Cauldron to S & W. Any increases to that figure could only be achieved by following the procedure set out under Preliminary Issue 1.2 above. As reflected in the letter of 21.6.02, the base figure was increased by agreement at a very early stage to £4,655,603.45. Thereafter, any increases above that new figure could only arise from authorised changes to or increases in scope or potential overspends, as previously explained.
42. I should note that, on this point, Mr Loffhouse contended that the only relevance of the Target Order Values was to allow the costs of the project to be "tracked" against the Target Cost, purely for monitoring or budgeting purposes. That was another way of saying that the Target Order Values existed to allow the actual costs of the project to be (passively) monitored by both parties, but were irrelevant for any positive purpose, in particular an attempt actually to control such expenditure in the way described in such detail in the Contract letters. For the reasons which I have previously outlined, I reject that contention. It seems to me that it flies in the face, not only of the clear words of the S&W letters that are at the heart of the Contract, but also the contents of Feasibility Studies II and III, the latter, of course, being a document expressly referred to in the S&W Contract letter of 12 June 2002.

[9] PRELIMINARY ISSUES 3 AND 4/AUTHORISATION OF WORK AND EXPENDITURE

43. Preliminary Issue 3 asked: "Was the existence of a signed Authorisation for Capital Expenditure Form a condition precedent to the Claimant's right to be paid?"

The parties have agreed that the answer to this question is No. I consider that the parties are right for two separate reasons. First, I do not think, taking the relevant letters as a whole, that the completion of an ACE Certificate was a condition precedent to payment even prior to the variation to the Contract in practice. That can be tested in this way. As set out above, the financial commitment to any change to or increase in the scope of supply or overspends on items within the Target Order Values would be made by Cauldron at the weekly meetings. If, say, at such a meeting Cauldron agreed to an increase in the scope of supply and were told that that increase would cost £10,000, to which they also agreed, and those agreements were minuted and typed up, then the absence of an ACE Certificate, even before the Contract was varied, would be of no account. In my example the financial commitment by Cauldron was triggered by their oral agreement to both the increase in scope and its attendant cost. That commitment would be minuted and would be binding on the sides. In any event, since they were the party responsible for approving an ACE Certificate, Cauldron could hardly rely on the absence of such an approved certificate as a defence to a claim for the £10,000. Accordingly, I find that the relevant authorisation of work and costs came –as it was always going to- at the weekly meetings. In addition, of course, that position was merely underlined when the use of the ACE Certificate was scrapped by agreement.

44. Preliminary Issue 4 asked: "If the answer to Issue 3 is no, by what means was work/expenditure under the contract to be authorised?"

The answer is as set out above. Additional work and additional expenditure were to be authorised by an express oral agreement, minuted by S&W, and reached at the weekly Project Review meetings.

45. During the hearing, both parties touched on the possibility that, on occasion, the authorisation might have come after the work was done and/or that in some instances the financial implications were not always minuted. There was some evidence from Mr. Watson of S & W on this point. It seems to me that the kinds of dispute which might arise in such situations lie outside the strict remit of these Preliminary Issues. I have set out the basis of the Contract between the parties and the clear procedure which the parties agreed. It will be for S&W to demonstrate, for each item of additional work or overspend, either that they complied with the procedure which I have set out or, if they did not, how and why their claim remains a good one in fact and/or in law.
46. Having said that, I ought to record my preliminary view that, on the evidence I heard and the documents to which I was referred, S & W's position in cases of non-compliance may not be straightforward. Mr. Watson, the man at S & W who effectively took over from Mr. Musk, explained in his evidence in chief that, as an example, item CA 43a) –Unit 3 lockers and ancillary equipment- was identified as a change in Cost Report 6 but that information as to its cost was not provided until the invoice of 11.9.03. He said that the invoice referred back to various minutes of meetings to demonstrate the basis of the claim. He concluded this part of his evidence in chief by saying that S & W had "kept these costs saved up" and that they had been "put in at the end of the Contract".
47. A number of points arise from this example. First, Mr. Watson's explanation that costs had been "saved up" by S & W strikes me as being quite contrary to the contractual procedure described above. Secondly, there is a figure of £15,708 in Costs Reports 6, 7 and 8 against this item and it is marked 'final account' which, according to Mr. Musk (see below), meant that, as far as S & W were concerned, the item had been "closed off" in that figure. Yet a claim in excess of this figure is now being made by S & W. Thirdly, there is nothing on the face of the invoice of 11.9.03 which made any express reference whatsoever to item CA43a). Fourthly, the minutes of the meetings, referred to in the invoice, appear to fall some way short of being a clear authorisation from Cauldron that a particular sum would be expended on this item. Thus, whilst it would seem clear from the documents that Cauldron have accepted item CA43 a) as a variation, together with an additional cost of £15,708, there is nothing in the

documents that I was shown to indicate that S & W have a clear-cut claim on item CA 43a) for any sums over and above that figure.

48. One final point arises out of this analysis under Preliminary Issue 4. Mr Stansfield, on behalf of Cauldron, contends that I should find that, in all instances where S & W used the expression "final account" within the Costs Reports in respect of any one of the 56 items, it demonstrated that the parties did not envisage that any further costs would be incurred in relation to that particular item. I understand why Mr Stansfield makes that point because that is how Mr Musk, in cross-examination, explained the expression "final account". He said that the effect of this expression was that, for S&W's internal purposes, the cost of an item marked "final account" in the report had been "closed off" and further purchase orders could not be raised against that item.
49. Accordingly, I accept that the use of the expression "final account" demonstrates that when the relevant person at S & W used those words on the Cost Report he or she did not envisage any further costs being incurred or claimed in relation to that item. However, that would not necessarily rule out a claim at a later date by S&W for further costs in relation to any given item: they would obviously have to explain why the expression "final account" was used in respect of the costs of an item of work which had not, in fact, been completed or where the cost figure had important components missing, but I would not want at this stage to pre-judge whether such contentions would or would not be successful. I therefore reach no final conclusion on that point.

[10] PRELIMINARY ISSUE 7/QUANTUM MERUIT

50. I am sure that Counsel will forgive me if I say that their submissions on this last point were rather skeletal. Mr Lofthouse contended that, whilst a claim in quantum meruit could only be sustained in principle for work which was not required to be done under the Contract, he said that that might still give rise to a potential claim by S & W if, for instance it was established that S&W incurred expenditure on work without Cauldron's authorisation. In response, Mr Stansfield submitted that no quantum meruit of any sort could arise for work carried out in relation to the supply, delivery, installation and commissioning of the production facility at Cauldron's premises at Portishead, because that was all work covered by the Contract. Since the existence or otherwise of a potential alternative claim by S & W might be relevant to the forthcoming discussions between the parties, it is appropriate for me to set out briefly the preliminary conclusions which I have reached on this topic.
51. It is trite law that a claim on a quantum meruit cannot arise if there is an existing contract between the parties to pay an agreed sum: see, for instance, *The Olanda* [1919] 2 KB 728 and *Gilbert and Partners -v- Knight* [1968] 2 ALL ER 248. However, where there is a contract for specified work but the contractor does work outside the contract at the employer's request, the contractor may be entitled to be paid a reasonable sum for the work outside the contract on the basis of an implied contract: see *Thorne -v- London Corp* (1876) 1 Ap. Cas. 120 and *Parkinson and Co -v- Commissioners of Works* [1949] 2 KB 632. However, this will always turn on what is meant in any particular instance by "outside the Contract". Such a claim would, in any event, be subject to the general principle that "no action can be brought for restitution while an inconsistent contractual promise subsists between the parties in relation to the subject-matter of the claim..... if there is a valid and enforceable agreement governing the Claimant's right to payment, there is neither occasion nor legal justification for the law to superimpose or impute an obligation or promise to pay a reasonable remuneration": Mason P, Court of Appeal of New South Wales in *Trimis -v- Mina* (2000) 2T.C.L.R. 346; see also *Mowlem -v- Stena* [2004] EWHC 2206 at paragraph 40, where His Honour Judge Richard Seymour Q.C. expressly held that this accurately stated the relevant principle of law.
52. Applying those principles to the present case it seems to me that S&W could not make a claim for quantum meruit in respect of the items that were incorporated within the original Contract work scope. Prima facie, any item of work within the original Contract work scope would be reimbursable at the Target Cost figure unless a potential overspend in respect of that item had been identified and agreed in accordance with the Contract procedure as set out in detail above.
53. That leaves what the Contract letter of 21 June 2002 calls "increases to the scope of supply" and what in the building industry are more commonly called variations. It seems to me that, prima facie S&W would not be able to make an alternative claim for a quantum meruit in respect of an item of allegedly varied or additional work if they had already failed to demonstrate, under the Contract, that that item of varied or additional work had been instructed and/or requested and/or authorised by Cauldron. In other words, if the claim under the Contract for that item of allegedly varied or additional work failed because the necessary instruction/request/authorisation could not be proved, then it seems to me that, at least prima facie, such an omission would also be fatal to any alternative claim for a quantum meruit. Even leaving aside the difficulty created by the existence of the Contract itself, S & W's alternative claim would have to demonstrate that, in some way, Cauldron freely accepted services in circumstances where they should have known that S & W would expect to be paid for them, and that might be difficult where the item of extra work in dispute was not clearly requested/instructed/authorised at the weekly meetings or by reference to the Monthly Reports.
54. The last remaining possibility for a quantum meruit claim would be the situation where S&W could show that an increase in the scope of supply had been authorised by Cauldron as a matter of principle (because, for instance, there was a clear minute to that effect), but where the amount of expenditure had never been agreed or expressly authorised by Cauldron. In those circumstances, it would depend on the facts as to whether a claim was allowable under the Contract, given that a situation where work was done before the expenditure was known or agreed would, prima facie, comprise a breach by S & W of the procedure identified above. However, as previously noted, I could see that there may be circumstances in which such a claim might be sustained, although,

that would depend each time on the facts and the potential arguments put forward by S&W. Of course, in that situation, if the claim under the Contract was successful, then an alternative quantum meruit claim would be irrelevant. If, on the other hand, the claim under the Contract failed, then it is again a little difficult to see how the principles of quantum meruit could be applicable to the alternative claim. However, since such an alternative claim might also turn on the facts, it would not be appropriate for me to dismiss outright such a possibility at this stage.

55. Accordingly, it seems to me that, prima facie, S&W would not be able to make claims on a quantum meruit basis in respect of potential overspends to the Target Cost figures in relation to work that was always part of the Contract work scope. In principle, those would either be legitimate claims under the Contract, or they would fail. In addition, and again on a prima facie basis, it does not seem to me that S&W could easily utilise a quantum meruit claim to seek to recover monies in respect of alleged increases in the scope of supply where such works could not be shown to have been instructed/requested/authorised by Cauldron. Accordingly, quantum meruit may well only be relevant in situations where additional or varied work had expressly been instructed/requested/authorised by Cauldron but where the actual expenditure had not been agreed or authorised. Even there, for the reasons stated, I think it much more likely than not that S&W's primary route, if it were available, would be by reference to the terms of the Contract itself, and not by way of quantum meruit. Accordingly, for these reasons, my preliminary conclusion is that it is unlikely, although not impossible, that an alternative claim for a quantum meruit could succeed in any of the circumstances that may arise in this case.

[11] SUMMARY

56. I have answered the Preliminary Issues on the basis of the documents and the evidence at the trial of Mr.Musk and Mr.Watson of S & W . The answers are set out above. On the principal question as to whether the Target Costs were a simple aspiration, or an essential component in a mechanism by which their expenditure could be properly controlled by Cauldron, I have reached the firm conclusion that the answer is the latter.

Mr Simon Lofthouse (instructed by Shadbolt and Co for the Claimant)

Mr Piers Stansfield (instructed by Osborne Clarke for the Defendant)