CA on appeal from TCC, Salford District Registry, (HHJ Gilliland QC) before May LJ; Jacob LJ; Lloyd LJ. 18th November 2005

Lord Justice May:

Introduction

1. This is an appeal, with the hesitant permission of Clarke LJ, by the claimants, Shawton Engineering Limited, against the decision and order of HH Judge Gilliland QC, sitting in the Technology and Construction Court in the Salford District Registry, on 28th February 2005. The judge dismissed Shawton's claim for damages against the defendants, DGP International Limited. DGP had a claim against their insurers, Limit (No. 3) Limited, in the event that Shawton's claim against them had succeeded. The judge held contingently that this claim would have failed. DGP seek to appeal that finding, if Shawton's appeal against them succeeds.

2. The central issues raised by Shawton's appeal concern the circumstances in which a contracting party may lawfully terminate the contract for delay in performance by the other party when that party's obligation is to complete their work within a reasonable time.

The contracts

3. British Nuclear Fuels Limited had a contract with Kvaerner Construction Limited to construct premises and process plant at Sellafield for handling nuclear waste. Kvaerner subcontracted this work to a joint venture, including themselves, called KAT Nuclear. KAT were effectively the main contractors. KAT placed subcontract orders with Shawton for the design and manufacture of a number of packages. Shawton subcontracted the design work of 5 of these packages to DGP.

4. The first order was placed on 30th June 1999. It had a reference 2Q/S469. It related to the water top up system. DGP's price for the design work was £10,253.

5. The second order was placed on 6th July 1999. It had a reference 2Q/S468. It related to mechanical outcell equipment and hatches. The agreed price was £96,994.

6. The other three orders were placed on 12th October 1999. 2Q/S511 related to the glove box assembly. The price was £38,790.53. 2Q/S512 related to the box operations cell. The price was £60,530. 2Q/514 related to the waste treatment cell. The price was £30,345.07. The total price for all five packages was about £237,000. They were all lump sum fixed price contracts.

7. DGP were to produce a fit for purpose robust design. The design work was to follow design proposal drawings (DPDs) produced by KAT. Together with specifications, these DPDs showed what KAT was proposing. DGP were to produce detailed manufacturing drawings using the DPDs. When DGP quoted for their work, they thought, wrongly as the judge held, that it would be possible to produce their manufacturing drawings directly from the DPDs without developing them further.

8. The drawings produced by DGP were to be reviewed by KAT before manufacture started. If KAT required alterations, they might give rise to a claim for variation. A comment by KAT might however draw attention to an error. There was what was referred to as a "*one iteration clause*". The judge held that the import of the clause was to guard or protect DGP from preferential engineering. It did not relieve them from the obligation to get their design right. Nor did it oblige KAT or Shawton to note all errors at the first submission.

9. As I have said, there was an issue as to the extent to which DGP were obliged to develop the designs shown on the DPDs. The judge decided this issue against DGP and there is no appeal against this finding. It no doubt goes to explain why DGP's prices, as will appear, were so low. The judge's finding (paragraph 45 of his judgment) was that, on the true construction of the contracts, DGP undertook not merely the obligation to carry out the detailed design of the equipment, but also any necessary design development work required to produce a robust fit for purpose design.

10. As to time, the contract for each package originally had a fixed completion date: 7th December 1999 for S468; 15th September 1999 for S469; 1st February 2000 for S511; 7th December 1999 for S512; and 21st December 1999 for S514. These were the dates by which DGP's drawings should have achieved A status. The experts had agreed that DGP needed to submit their drawings for review some 5 weeks earlier than the contractual date for achieving A status. DGP also undertook to produce as built drawings for which the dates would have been somewhat later.

11. In the event, there were variations. There was no contractual mechanism for extending time on account of the variations. The parties agreed and the judge accepted that the effect in law of the variations was that DGP became obliged to complete their work within a reasonable time.

12. DGP had not completed their work on any of the packages by 26th March 2001, on which date Shawton terminated or purported to terminate the contracts. They claim in these proceedings the cost of having another design contractor, RWE Nukem, complete the design work. Shawton claimed £856,607 plus VAT under this head – more than three times DGP's original contract price. They also claimed £933,927 for alleged delay and disruption suffered by themselves.

13. Shawton say that DGP were in such breach of their obligation to complete as to entitle Shawton to determine the contracts. They further say that they had by then made time of the essence and that DGP's failure to complete by stated dates entitled them to determine the contracts. DGP say that they were not in breach, because on the facts

a reasonable time had not expired. They also say that, whether they were in breach or not, time was not of the essence on 26th March 2001 when Shawton purported to determine.

The judge's judgment

14. The judge considered the details of contract S468 in paragraphs 47-53 of his judgment. The latest original completion date was 7th December 1999. The first drawings were submitted at the end of July 1999, but generally dates were not met. Only 23 out of a total of 144 drawings had been issued by DGP by 2nd November 1999. Further programmes including "close out" programmes dated 23rd November 2000 and 16th March 2001 were subsequently issued showing end dates of 12th December 2000 and 9th March 2001 respectively. Generally the dates in these programmes were not met. When the contract was terminated on 26th March 2001, the agreed expert evidence was that 124 out of 144 drawings had achieved A status, and DGP had completed about 50% of the associated documents.

15. For contract S469, the drawings should have achieved A status by 15th September 1999. No drawings had been submitted for review by 11th August, the date 5 weeks earlier. When the contract was terminated on 26th March 2001, DGP had completed 26 out of 28 drawings and about 25% of the associated documents.

16. The position with contract S511 was similar. The original completion date was 1st February 2000. There were subsequent "close out" programmes issued on 23rd November 2000 and 3rd March 2001. When the contract was terminated on 26th March 2001, DGP had completed 10 out of 47 drawings and about 10% of the associated documents.

17. The original completion date for contract S512 was 7th December 1999. DGP did not submit its first drawing until 27th January 2000. When the contract was terminated on 26th March 2001, they had completed 10 out of a total of 80 drawings and about 10% of the associated documents.

18. The original completion date for contract S514 was 21st December 1999. When the contract was determined on 26th March 2001, DGP had completed 4 out of 63 drawings and about 10% of the associated documents.

19. By 26th March 2001, Shawton had manufactured a substantial quantity of the items for contracts S468 and S469 and some had been delivered to KAT. Some other items were in various stages of manufacture. DGP had produced no as built drawings.

20. It is accepted that there was a significant amount of variations. It is further accepted that, because there was no contractual mechanism for awarding extensions of time, DGP's obligation became to complete within a reasonable time. The judge said (paragraph 63) that the issue here was whether DGP were in repudiatory breach of this obligation when Shawton terminated the contracts on 26th March 2001.

21. As to what was a reasonable time, the judge said at paragraph 65 of his judgment: *"In the present case extra work was ordered by Shawton. It is also perfectly clear that Shawton was prepared to and did give DGP substantially more time in which to complete the work. It accepted a series of revised programmes from DGP for the production of drawings. Among these were what have been referred to as the close out programmes issued on 22nd November 2000 showing completion dates for S511, S512 and S514 in March, February and April respectively. Further Mr Platt and Mr Shaw in January 2001 also entered into an agreement extending time until the end of March 2001 and agreeing that Shawton should pay for variations claimed by DGP."*

22. Experts for each party considered the variations. They agreed for contract S468 that 14 out of 19 claims for variations were valid. They agreed that one was not valid and disagreed about the remaining 4. They agreed that there was one valid claim for contract S469. They agreed that 3 claims were valid for contract S511 and disagreed about one claim. They agreed that one claim was valid for contract S512; and that there were 5 valid claims for contract S514 and 2 more were partially valid.

23. The experts each assessed the time by which additional works would have extended the original contract periods.

24. The judge considered the variations which were in dispute, finding that each of them was not a valid variation. DGP had thus established as variations only those accepted by Mr Ardron, Shawton's expert. The total value of the accepted variations was £44,811.

25. Variations were instructed on contract S468 both before and after the original completion date. On the other 4 contracts, the variations were all instructed after the original completion dates.

26. Shawton passed on DGP's claims for additional payments to KAT. Significantly KAT were themselves having difficulties, and by December 2000 were not pressing Shawton to deliver the items on time. There was apparently no operational need for the deliveries. The judge accepted evidence to this effect (paragraph 70), saying that it was entirely consistent with the absence of any serious complaint from KAT before the dismissal of DGP, apart from some short lived pressure at the beginning of November 2000.

27. The judge considered two specific allegations of failure by DGP. One concerned the layering of drawings and the other was a question of style. DGP did not comply with BNFL's layering convention, but the judge held that this did not contribute to any delay. As to the style, DGP delineated dimensions with ticks, conventionally used for civil engineering drawings, not arrows, conventionally used for mechanical engineering drawings. When this was discussed, neither DGP nor Shawton agreed to change existing drawings. There was much discussion of this topic. It was clear to the judge (paragraph 88) that the question of ticks and arrows did not contribute to any material delay.

28. The judge held (paragraph 90) that it was for Shawton to prove on the balance of probabilities that DGP failed to complete their work within a reasonable time. He held that there was no satisfactory evidence to establish what would have been a reasonable time in all the circumstances of the case. Shawton led no expert evidence as to what would have been a reasonable time. It apparently took RWEN at least 11 months to complete what they did, and Mr Ardron had no reason to believe that it would not have taken them that or a longer time if they had started when DGP started. He had not analysed whether this would have been reasonable. The time depended on the resources put into the work. He had not considered what resources a reasonable engineer could be expected to devote to the project.

29. The judge rejected (paragraph 92) a submission that a reasonable time should be ascertained by reference to the original contract periods as extended only by the agreed periods for variations. He said at paragraph 92 *"The question of what is a reasonable time within which to complete particular work is in my judgment an objective question and is not dependent upon the actual time within which a person may have agreed to carry out the work. The reason why the periods may be different is clear. The parties may have over or under estimated what time the work would actually require. In the present case it is clear that DGP seriously underestimated both the number of drawings which would be required and how long the work would take. Its quotations were made I am satisfied on the incorrect basis that only detailing of the DPDs would be required. I also consider that the time which has to be ascertained is the time it would reasonably take to complete the whole of the work."*

He considered that the approach contended for on behalf of Shawton was understandable and might be correct for a contract with express provisions for an extension of time; but not where time had become at large. He referred to the judgment of Denning LJ in ***Rickards v Oppenheim*** [1950] 1 KB 616 at 623, 624. In that case, it was held that originally time had been of the essence, but that had been waived. The judge quoted the passage from the judgment of Denning LJ at 623 as follows: *"If the defendant, as he did, led the plaintiff to believe that he would not insist on the stipulation as to time and that if they carried out the work, he would accept it, and they did it, he could not afterwards set up the stipulation as to time against them. Whether it be called waiver or forbearance on his part or an agreed variation or substituted performance does not matter. It is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations. He made in effect a promise not to insist upon his strict legal rights. That promise was intended to be acted upon and was in fact acted upon. He cannot afterwards go back on it."*

30. The judge then quoted from Denning LJ's judgment at page 624 to the effect that the purchaser was able to give a notice making time of the essence, by stipulating what in all the circumstances would then be a reasonable time for completion. *"It would be most unreasonable if the defendant having been lenient and waived the initial expressed time, should, by so doing, have prevented himself from ever thereafter insisting on reasonably quick delivery. In my judgment, he was entitled to give a reasonable notice making time of the essence of the matter."*

Denning LJ went on to say that the reasonableness of the notice must be judged at the time at which it is given.

31. The judge then cited further from ***Rickards v Oppenheim***, and said at paragraph 98 of his judgment: *"These passages are in my judgment inconsistent with the view that a reasonable time is to be measured by the original contractual period as extended by the time it might require to carry out the variations. The approach in these passages is that when a person ordering the work continues to seek performance of the contract after the agreed delivery date has passed, reasonable notice must be given if the contract is to be subsequently terminated for delay. Reasonable notice in these circumstances is clearly different from the originally agreed period although the original period is a factor which may be taken into account when deciding what is a reasonable period or a reasonable notice. It is however not the only factor. Likewise it is clear that the time it actually takes to carry out the work is not determinative. It was submitted that the fact that the experts had agreed what was an appropriate extension of time together with the originally agreed period was a fair indication of what should be regarded as a reasonable time for completion of the work, but that is in effect to treat the originally agreed period as being a reasonable period, notwithstanding that that period was agreed to under a misapprehension by DGP of what was involved. It should also be borne in mind that Shawton itself contracted with KAT on the same basis. KAT however never seems to have suggested that Shawton was in breach of contract in not completing all its works by the original dates."*

32. There is, I think, some confusion here. ***Rickards v Oppenheim*** was not a case where there were variations, but where the purchaser had waived the original completion date. The question was whether he had succeeded in giving a notice making time of the essence again. That turned on whether in all the circumstances the new time stipulated in the notice was reasonable judged at the time it was given. In the present case, there were originally fixed dates for completion, but it is correctly agreed that variations had rendered those dates inoperable. Instead, the obligation was to complete within a reasonable time. That obligation did not depend on Shawton giving any notice. But such an obligation was not a condition such that breach of it would automatically entitle Shawton to determine the contracts. Shawton could only in law legitimately determine the contracts for delay if either

(a) they gave reasonable notice making time of the essence; or

(b) DGP's failure to complete within a reasonable time was a fundamental breach such that the gravity of the breach had the effect of depriving Shawton of substantially the whole benefit which it was the intention of the parties that they should obtain from the contracts.

Where time is not of the essence and where the party said to be in breach by delay is nevertheless making an effort to perform the contract, it is intrinsically difficult for the other party to establish a fundamental breach in this sense. So here, I think, where on any view DGP were performing at least in part.

33. The judge also referred to ***Hick v Raymond & Reid*** [1893] AC 22 for the propositions that (a) what is a reasonable time is judged by the actual circumstances which cause delay; and (b) that these do not nevertheless extend to circumstances caused by the contracting party who is in delay. The judge accepted that DGP could not rely on their own failure to carry out the work properly. But it was for Shawton to prove that DGP were in breach of the obligation to complete within a reasonable time. That involved Shawton establishing what a reasonable time would be disregarding delays caused by DGP's failures. There had been no attempt to do this.

34. Most of the variations were instructed long after the original completion dates. The judge rejected the submission that new reasonable completion dates should be fixed with reference to the original dates plus reasonable periods for the variations. He said at paragraph 101 of his judgment: *"Shawton by instructing a variation has in my judgment indicated that it will accept performance of the whole contract as varied within a reasonable time from the giving of the instruction and the consequence is that Shawton cannot in my judgment continue to hold DGP to its previous time obligations."*

35. The judge said that the valid variations were significant additions or alterations. Overall the total work increased by 18.8%. The increases on each of the contracts were 25.2%, 22%, 16.3%, 8% and 21% respectively. The experts had attributed comparatively short periods of extra time for the variations, but that was by reference to the original contract periods. There was no satisfactory evidence enabling the court to find with confidence what would have been a reasonable time for DGP to complete its work, including the variations ordered at the time at which they were. The original contractual periods were not a sound guide. RWEN took at least 11 months, and possibly 17 months, to complete the contracts.

36. It is implicit in the judge's findings that he thought it right to disregard, or at least not to regard as determinative, the time specified in the original contracts. He had already held that the work content was much greater than DGP had anticipated. He said at paragraph 104 that a reasonable time is an objective concept which must be ascertained by reference to the actual work required and not on the basis of any misapprehension by DGP of what was involved. The fact that on occasions DGP produced incomplete or poor quality drawings was not a guide to the reasonable time needed to produce competent drawings. There was no evidence of the resources reasonably needed for a competent job. These matters had not been considered by the experts.

37. The judge held (paragraph 108) that by instructing extra work after the agreed or extended completion dates, Shawton in effect started time running afresh. DGP became entitled to a reasonable time judged objectively for carrying out the remainder of its work. I think it is questionable whether the judge was correct here, at least without qualification. The important point however is that Shawton could not lawfully determine the contracts without giving notice making time of the essence. The giving of variation instructions after the stipulated date for completion or after the expiry of a reasonable time could have the effect that time was no longer of the essence or of confirming that fact.

38. The judge did not overlook the fact that DGP took much longer to perform than they had originally agreed and that at the date of termination they had only completed 48% of the drawings to A status. But Shawton had not established that DGP were in breach of their obligation to produce the drawings within a reasonable time (paragraph 109).

39. By October 2000, DGP were being asked to explain the reason for the delay. They were claiming additional payment for variations and for immediate release of funds. There was some dispute as to which variations properly entitled DGP to payment. KAT had allowed an extension of the delivery programme. I am not clear what this extension was, but it should in principle be relevant to what was a reasonable time for DGP to produce their drawings.

40. By letter dated 7th November 2000, Shawton said that they must insist that within 7 days DGP provide them with an acceptable timetable for completion of all contract works covering their job numbers 468, 511, 512 and 514. They then stated: *"We regret that in the event that you do not agree to carry out your contractual obligations we will place the matter in the hands of our solicitors with the view to considering options which may [include] determining the contract and obtaining completion by an alternative supplier. In the event this proves necessary we shall seek redress for all additional costs incurred, both in the process and resulting from engaging a third party to complete the works originally contracted to you."*

On the following day, Shawton wrote to KAT seeking to persuade them to release further money for DGP.

41. On the same day, 8th November 2000, DGP wrote to Shawton saying that DGP would "honour our contractual obligations and complete the scope of the work, a programme of which will follow very shortly." They were however expecting a further significant payment to help their cash flow. At the time, so the judge held, Shawton and DGP were presenting a united front to KAT in seeking extra payment for DGP.

42. By letter dated 23rd November 2000, DGP sent Shawton completion dates for the 5 contracts "as requested". The dates given were for S468, but excluding variation order 6, 12th December 2000; for S511, 23rd January 2001; for S514, 26th February 2001; for S512 (part), 15th February 2001 and for S512 (part), 16th January 2001. VO 6 was a valid modification affecting S468, S512(part) and S514. Dates for the other two contracts were promised for 27th November 2000. They were sent on 1st December 2000. These together with those previously sent were the first set of close out programmes.

43. Shawton say that the letter of 7th November 2000 taken with DGP's letters of 23rd November and 1st December, was a notice to complete making time of the essence, and that the dates subsequently provided by DGP were dates of completion for that purpose.

44. It is, in my view, questionable whether the letter of 7th November 2000 is expressed sufficiently clearly to make time of the essence. Mr Platt of DGP, when pressed in cross-examination, in effect accepted that it did. The judge said at paragraph 122: *"In principle it is in my judgment open to a party to a contract when the other party is in breach of its time obligations to ask the party in breach to state when he will complete the contract and if he makes clear that the contract will be liable to be terminated if the party in breach fails to adhere to the time by which he states he will complete the contract, then that is in law capable of making time of the essence in respect of the time which is given by the contract breaker. Mr Platt's evidence in cross-examination does show in my judgment that DGP must have realised when it provided the completion dates for the four specified contracts on 23rd November and provided the first set of close out programmes that it was at risk of being dismissed from the contracts if it did not adhere to those dates and programmes."*

The judge said, however, that the difficulty was that a party seeking to make time of the essence had to show that the other party was in breach at the time of the notice. This was not in dispute. The judge referred to ***Behzadi v Shaftsbury Hotels*** [1992] Ch. 1 at 12. Shawton had not shown this for 7th November 2000 and the submission that time became of the essence failed for that reason. The judge said at paragraph 125:

"It is difficult to see how Shawton can really have thought that DGP was in breach of its obligation to complete the work within a reasonable time because it was actively pursuing in conjunction with DGP a claim that it was entitled to an additional payment from KAT because of all the extra work which DGP had said it had had to do because of the poor quality of the DPDs. Mr Walker's letter to KAT dated 8 November to which I have already referred clearly seeks additional payment on the basis that there had been significant variations. All that actually occurred in my judgment is that KAT were now asking Shawton for the work to be completed as soon as possible. Mr Walker's letter dated 7 November to DGP significantly in my view does not assert that DGP was already in breach of its obligations and it is difficult to see how Mr Walker could have done so when he states explicitly that KAT had allowed Shawton an extension of time. Any extension of time allowed by KAT to Shawton would in principle allow time for both design and manufacturing and Shawton could hardly say that if KAT had allowed it extra time DGP should not also be allowed extra time for the design element when their respective obligations would appear to have been the same, namely to complete the work within a reasonable time as a result of the variations which had occurred."

45. Shawton received DGP's programmes in early December 2000 and did not object to them. They pursued DGP's claims with KAT, but without success. In a fax of 5th December 2000, Mr Walker said that he had gathered from conversations from people at KAT that the whole box encapsulation plant might be subject to delays. The judge reckoned that some of the urgency which KAT had expressed in November was going out of the project.

46. During December 2000, DGP continued to claim additional payments. The judge was satisfied that they thought they were entitled to payment, although in some respects the judge had held that they were not. DGP believed that Shawton had cash flow difficulties.

47. On 21st December 2000, Mr Shaw wrote to Mr Platt proposing a compromise basis on which the works would be allowed to proceed. The proposal was that both parties' positions would be fully reserved and that the proposed terms were strictly without prejudice to the present contentions of the parties. The terms suggested were:

i) that Shawton's quantity surveyor would, with DGP's full support, prepare a full claim to KAT for all the design/development changes for which DGP were claiming.

ii) that DGP would provide Shawton with a detailed programme to complete all the works as soon as possible.

iii) that there would be immediate stage payment terms over the period of DGP's programme.

The letter stated that, if this was not agreed, Shawton would have no alternative but to instruct solicitors to take steps to protect their position which might include taking action by way of issuing formal proceedings against DGP to recover all their additional costs or damages.

48. Mr Platt replied on 2nd January 2001 in a letter marked without prejudice. He said that DGP were willing to deliver the outstanding works to the programme outlined in their letter of 1st December 2000 given the instruction to proceed. DGP could not accept that this did not represent an admission of liability. They understood that this would not change the current position and meant that DGP would still be working at risk. As to the proposed terms, Mr Platt said that DGP were willing to support Shawton's quantity surveyors to prepare a claim to KAT; that a detailed programme was issued on 23rd November and 1st December; and that DGP would issue stage payments in relation to the programme already issued. In view of the enormous cash flow DGP had carried on the projects over the past 12 months, and as an indication of Shawton's willingness to resolve the situation, they would appreciate immediate payment of all outstanding invoices, of which they gave details.

49. There was a meeting between Mr Shaw and Mr Platt on 8th January 2001. Mr Shaw wrote on that date saying:

"Further to our meeting today at your office, I confirm as agreed that both companies will proceed with the KAT contract on the basis of our letter dated 21st December 2000.

As discussed, I will personally be involved in preparing a claim for both parties in an attempt to recover monies from KAT to recover costs incurred by us.

Please find enclosed a cheque for £20,782.27 for payment as agreed today."

50. The judge held that there was an agreement reached between Mr Shaw and Mr Platt on 8th January 2001. Mr Shaw accepted in his evidence that he had eventually agreed to pay unconditionally and that he took all the risk out of it for DGP. The judge held that Mr Shaw agreed to pay DGP the money they were seeking for variations. There was a payment of £20,782.27 on 8th January and 3 subsequent payments in January 2001. The judge said that, although the letter of 21st December 2000 had asked DGP to provide a detailed programme to complete as soon as possible, Mr Shaw was perfectly clear that the agreement was that DGP would *try* to complete by the end of March. The judge noted that Mr Shaw had also said this in an earlier abortive trial of the action before HH Judge MacKay. Details of the evidence on which the judge made these findings are in paragraph 138 of his judgment.

51. The judge held in paragraph 139: *"Having seen and heard Mr Shaw give this evidence, and although in many respects I consider that he was an unsatisfactory witness, I am satisfied and find that what he agreed with Mr Platt was that DGP would try to complete the drawings by the end of March and by the end of March was meant 31 March. Mr Platt did not say that DGP would supply all the drawings by the end of March and that is consistent with later programmes being submitted showing later dates."*

    We were told that no complaint was made about the dates in these later programmes.

52. The judge held that time had not been made of the essence when Shawton determined the contracts on 26th March 2001. Even if there had been a valid notice on 7th November 2000, that was superseded by what was agreed as a compromise on 8th January 2001. DGP proceeded and there was nothing to indicate they were not doing their best. 91 drawings were released between 8th January and 26th March 2001. Shawton clearly terminated the contracts prematurely. The claim to terminate the contracts for delay failed.

53. There was a separate claim, not dependent on termination for delay in the delivery of drawings. But there was a series of waivers by the instruction of variations and no reservation of any right to claim for pre-existing delay. The letter of 7th November 2000 did not show that there had been no waiver of original delivery dates. Shawton had not established that DGP had failed to produce its drawings within a reasonable time. If there were such breaches, Shawton waived them by instructing variations.

54. The judge then considered whether Shawton were entitled to terminate the contracts for reasons other than delay. He rejected submissions that Shawton could rely here on alleged breaches relating to layering drawings and using ticks rather than arrows. These matters are not relied on in this appeal. He rejected a contention based on DGP's failure to complete drawings and calculations for the same reasons that he had rejected the claim based on delay. It had not been established when the work should have been completed and it had not been proved that DGP were in breach when the contract was terminated. There had, said the judge, been a failure to adhere to the original agreed completion dates. But time was consistently extended both by reason of the instruction of variations and of Shawton's conduct in allowing additional time in circumstances where the proper inference was that Shawton had agreed to accept delivery later than had been originally agreed.

55. The judge considered at some length (paragraphs 151 to 153) Shawton's contention that drawing errors by DGP and their failure historically to correct errors contributed to Shawton's entitlement to determine the contracts for fundamental breach. There had been much analysis of drawings in particular by Mr Wilson, DGP's expert. The judge's general conclusion was that DGP's drawings were not initially drawn as carefully as they should have been, but that DGP did ultimately deal with the comments that were made. In general, the A status drawings ultimately produced by DGP were robust fit for purpose drawings. There were exceptions, but there was no evidence to suggest that wholesale redesign was needed. In so far as this may have contributed to delay, the judge had no material to enable him to quantify it.

56. In submitting as a ground of appeal that the judge was wrong to reject Shawton's contentions here, Mr Thomas QC accepted that the errors were historical and that most of them had been rectified by 26th March 2001. I am quite unpersuaded that the judge's findings here were wrong. Historical errors which had been corrected were not a powerful or, I think, any contribution to a case that DGP were in repudiatory breach on 26th March 2001.

57. There was an allegation that DGP were in negligent breach of a duty to use the skill and care to be expected of reasonably competent consulting engineers. No particulars were given and little emerged in evidence that was not encompassed by the delay claim. DGP had misunderstood the extent of the work required of them, but had not insisted on performing only what they had mistakenly believed to be the scope of their work. There was a case that DGP had not provided adequate resources, but there was no satisfactory evidence to show that this was so. The judge considered, correctly in my view, that this went to the delay claim rather than to a separate case of negligence. He also said that the question of resources was bound up with the question of what was a reasonable time, as to which there was no satisfactory evidence.

58. The termination letter gave five reasons for terminating the contracts. The first complained of the quality of initial drawings. The judge regarded this as really a delay claim, which ignored previous extensions of time. There was nothing, in the judge's judgment, to justify the view that the standard of performance by DGP was such as to demonstrate that they would not be able to produce fit for purpose drawings. The most that Shawton could properly say was that they had not received as many drawings as they had hoped. But DGP had not undertaken that all the drawings would be available by the end of March.

59. The second reason given was that DGP had not altered their drawings to show arrows instead of ticks. That is an insubstantial matter no longer relied on. The next reason was that Shawton had been unable to comply with KAT's

programme because of DGP's failures. Of this the judge said in paragraph 162 of his judgment: *"It is correct that DGP did not keep to the programmes it submitted but there is a singular lack of evidence that KAT had been pressing Shawton for the completion of the work before KAT began pressing in October 2000 for the work to be completed. In the event that urgency does not seem to have lasted for long as doubts about the box encapsulation project were being mentioned by Mr Clarke and Mr Ley at the end of November. Mr Walker's evidence was that KAT were not pressing (day 5 p.104). At no time until after DGP had been dismissed did KAT threaten to terminate Shawton's contract and that was only because Shawton had failed to engage another contractor to replace DGP."*

The next reason was that DGP had allocated insufficient resources. That was part of the delay claim.

60. The judge considered that the various reasons were not additional reasons justifying the dismissal of DGP. I agree with this part of the judge's decision. Shawton attempted to resurrect some of these reasons on this appeal – in particular the errors in the drawings – but the judge was, in my view, correct to reject this part of the case for the reasons he gave. Shawton had to justify the termination on the ground of delay.

61. The judge held that Shawton were not entitled to determine the contracts on 26th March 2001. His essential reasoning was (1) that Shawton had not then made time of the essence and (2) that they had not shown that DGP were in repudiatory breach of the contracts. The true complaint was, not that DGP could not produce satisfactory drawings, but that they were too slow in producing satisfactory drawings. The judge summarised his conclusions in paragraph 169 as follows: *"Even if I were wrong in finding that DGP had not been proved to be in breach of its obligation to complete the drawing work within a reasonable time, Shawton would not in my judgment have been entitled to terminate the contract on 26th March 2001 on the grounds of delay. Although the contract had been delayed, any delay up to 26th March was not such as to deprive Shawton of substantially the whole benefit to which it was entitled under the contract. "*

62. The judge gave reasons in paragraphs 176 to 181 of his judgment for questioning the credibility of things said or written by Mr Shaw. The judge was satisfied: *"… that little credence may be put upon what is said in letters written by him or under his name on behalf of Shawton and that he is prepared to write things which he knows to be untrue or in whose truth he has no genuine belief if he thinks it is to be to the advantage of Shawton. His oral evidence likewise must be approached with caution when he is seeking to advance Shawton's interests. The letter of termination dated 26th March 2001 is in a similar category in my judgment. … I have no doubt but that he had considerable input into that letter and he certainly approved its content. It is not correct in my view as stated in the first paragraph that DGP's "continual and repeated failures" had placed Shawton "in severe difficulties" with KAT. Up to November 2000 KAT had extended time for Shawton's work including the design element and indeed there is some evidence in the correspondence that Shawton may also have been at fault itself on the manufacturing side. There is however no evidence to show that KAT were pressing during the first three months of 2001 or that Shawton was being criticised for any delays which were then occurring."*

As an explanation for the termination letter, the judge said: *"Shawton on his own admission had cash flow problems at this time and KAT on 1 March 2001 had rejected the claim for additional payment which Mr English had prepared. The effect of what had been agreed with DGP on 8 January was to commit Shawton to make further payments to DGP and I consider that the probability is that Mr Shaw had come to regret what he had agreed and wished to find a way in which he could avoid Shawton having to make any further payments to DGP."*

63. The judge's conclusion was that Shawton was not entitled to dismiss DGP on 26th March 2001 and in doing so Shawton was itself in repudiatory breach of contract.

64. The judge proceeded to consider quantum, lest he were wrong in this finding. There is a contingent appeal against one of his findings, which only arises if the main appeal succeeds. Likewise, the judge contingently rejected DGP's claim for indemnity against the insurers, Limit. DGP seek contingently to appeal this finding. This again only arises if Shawton's main appeal succeeds.

Grounds of Appeal

65. Mr Thomas accepted, correctly in my view, that the main appeal on delay would fail, if Shawton were unable to reverse the judge's finding that they had not established that DGP were in breach of contract for delay on 7th November 2000. He would have further to satisfy us (1) that the letter of 7th November 2000 together with DGP's replies made time of the essence; and (2) that the judge's findings of fact as to what was agreed on 8th January 2001 were either wrong or should be interpreted as findings which did not supplant the antecedent fact that time had become of the essence.

66. Mr Thomas had seven main submissions. He submits, first, that the judge should have followed *Hick* on the question whether DGP were in breach of contract for delay on 7th November 2000. Second, if he had done so correctly, he would have found that DGP were in substantial culpable delay. Third, the judge could not then have found that the notice of 7th November 2000 was premature. Fourth, the judge should have found that the letter of 7th November 2000 and DGP's responses of 23rd November and 1st December evidenced a mutual understanding that a failure to meet the dates which DGP proposed would be repudiatory. Fifth, the agreement of 8th January 2001 did no more than extend the time for completion to 31st March 2001, but maintained the position that for that extended date time was of the essence. Sixth, if this were wrong, the judge should have found that by 26th March 2001 DGP's accumulation of breaches were repudiatory. Seventh (which only arises if the other points succeed), the judge was wrong as to quantum.

67. Mr Thomas' point about *Hick* is briefly as follows. The principle is that stated by Lord Watson at page 32 (quoted by the judge at paragraph 99 of his judgment): *"... the condition of a reasonable time has been frequently interpreted; and has invariably been held to mean that the party upon whom it is incumbent duly fulfils his obligation, notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control and he has neither acted negligibly nor unreasonably."*

    Mr Thomas says that the only causes not within DGP's control advanced by them as explaining delay were the variations. Legitimate variations were assessed by the experts as adding only modestly to the original contract periods. The most extended completion date to be derived from this exercise would be 5th May 2000. A notional extension for variations should be added to the original completion dates, as exemplified by analogy with *Amalgamated Building Contractors v Waltham Holy Cross UDC* [1952] 2 All ER 452, a case about a contract with express provision for extension of time in which it was held that extensions of time could be made retrospectively. All other causes of delay in the present case were within DGP's control. It follows that DGP were in substantial breach on 7th November 2000.

68. The judge rejected the case that DGP were in culpable delay on 7th November 2000 on four grounds:
    (a) Shawton had not established what in all the circumstances a reasonable time was;
    (b) assessing a reasonable time means having regard to all the circumstances. One such circumstance was that the true work content which DGP undertook was far greater than they had anticipated;
    (c) there were variations instructed after the original completion dates. DGP became entitled to a reasonable time from the giving of the instructions for the whole remaining work;
    (d) Shawton by their conduct made it clear that they were prepared to and did give DGP substantially more time than had been originally stipulated, and the proper inference was that they had agreed to accept delivery at substantially later dates than had originally been agreed.

69. I am not convinced that the judge was entirely correct in what he said about DPG's misapprehension of the work content, nor about the effect of Shawton instructing variations after the original completion dates. What is a reasonable time has to be judged as at the time when the question arises in the light of all relevant circumstances. One such circumstance was that DGP had originally agreed fixed time periods, although they did so upon a misapprehension as to the work content. It was a relevant factor that Shawton originally had the contractual benefit of these time periods, and that fact was not to be entirely ignored simply because DGP's obligation became to complete within a reasonable time. Equally, the true work content was a relevant circumstance. If these two factors had been the only relevant circumstances, judging what was a reasonable time may have presented something of a conundrum, since the two factors worked in opposite directions. But they were not the only relevant circumstances. The mere instructing of a (perhaps quite modest) variation after the original date for completion would not by itself necessarily mean that a reasonable time had to be assessed afresh by reference only to the variation and whatever work happened to remain at the date of the variation instruction – which is what the judge appears to say in the final sentences of paragraphs 101 and 108 of his judgment. Mr Thomas may well be right that a modest variation instruction given after an original completion date has passed could, depending on all the circumstances, result in an obligation to complete within a reasonable time whose assessment would produce a date which was in the past. But I accept Mr Friedman QC's submission that the question is a composite one. The circumstances in the present case included that the variations were significant in scope and, importantly, that, throughout most of the year 2000, Shawton were not insisting on, nor particularly concerned about, early completion of DGP's drawing work.

70. The judge said (paragraph 65) that it was perfectly clear that Shawton was prepared to give and did give DGP substantially more time in which to complete the work. They accepted a series of revised programmes from DGP for the production of drawings. He characterised Shawton's conduct (paragraph 150) as allowing additional time in circumstances in which the proper inference was that Shawton had agreed to accept delivery later than had originally been agreed. The inferential reason for this was that Shawton were not themselves being pressed by KAT for delivery of their work. Why in detail this was so is not apparent. But we were told that KAT's own project was eventually mothballed. Mr Friedman referred to other passages in the judgment:
    - Paragraph 118 – "*They were presenting a united front to KAT and Shawton was asserting positively that DGP was entitled to extra payment. Shawton did not in my view regard DGP as in breach of contract at this time ...*"
    - Paragraph 125, which I have quoted earlier in this judgment.
    - Paragraph 176 – *"Shawton I am satisfied in 2000 accepted this explanation and joined with DGP in pursuing claims for additional payment for itself based on the same claims that DGP were making."*

71. Mr Thomas was unable to show us any evidence or correspondence earlier than 7th November 2000 to show that Shawton were complaining of delay by DGP. Letters from DGP of 19th May and 2nd October 2000, to which Mr Thomas did refer, contain explanations by DGP relevant to their own progress. But he showed us nothing to the effect that Shawton rejected their explanations. There was nothing to gainsay the judge's findings to the effect that up to November 2000 Shawton were simply not insisting on early completion by DGP. The original completion dates, and, indeed, the original completion periods had ceased to be of any relevance. Shawton were, in the language of Denning LJ in ***Rickards v Oppenheim***, not insisting on the stipulations as to time, nor were they insisting on any times or periods for completion. This circumstance, in my view, overlaid to extinction any question of calculating time periods by reference to the original dates for completion and the work content of variations. In the strange circumstances of this case, a reasonable time for completion was literally at large, in the

sense of being undefined, until Shawton took steps, as they did, on 7th November 2000 to start negotiating for its better definition.

72. The judge was, in my judgment, accordingly right to hold that Shawton had not established what was a reasonable time for completion. He was right to hold that DGP were not in breach for delay on 7th November 2000. He was right to hold, as he implicitly did, that on 7th November 2000 the reasonable time for completion was to be assessed afresh, mainly with reference to the outstanding work content including variations. That was not solely or mainly because Shawton had issued variation instructions, but because, until 7th November 2000, Shawton had not insisted on completion by any particular date or within any particular period.

73. Since DGP were not in breach for delay on 7th November 2000, Shawton were not then able to give notice making time of the essence. Mr Thomas accepts this, if DGP were not in breach for delay. Shawton's appeal accordingly fails in so far as they contend that time was of the essence on 26th March 2001.

74. I can take subsequent matters which depend on or assert that time was of the essence more briefly. First, I am not convinced that the letter of 7th November 2000, with DGP's replies of 23rd November and 1st December, was a notice capable of making time of the essence, even if DGP were then in breach. It is a matter of construing the documents. The judge was, I think, wrong to take into account Mr Platt's understanding, given in cross-examination but unexpressed at the time. The letter of 7th November does not clearly articulate an intention to determine if whatever dates DGP might give were not met, but rather an intention to take legal advice on that subject. DGP's letters in reply contain qualifications.

75. In my judgment, the judge's findings as to what Mr Shaw and Mr Platt agreed on 8th January 2001 are impervious to appeal. They are findings of fact by a judge of the Technology and Construction Court in a complicated technical case, such that this court would not interfere unless he were plainly wrong. In my view, reference to the transcripts of Mr Shaw's cross-examination in this trial and in the previous abortive trial show that the judge was plainly right. The agreement was that DGP would *try* to complete by the end of March. There was no agreement to supply all the drawings by the end of March. The judge was correct to find that this agreement did not make time of the essence. The very concept of trying to complete is inimical to time being of the essence. From 8th January 2001, time was not of the essence, even if it had been following the letter of 7th November 2000. I would reject Mr Thomas' unenthusiastic submission that the agreement of 8th January 2001, even with the content as found by the judge, did no more than extend the completion date to 31st March, but retaining completion by that extended date as a condition.

76. I have already considered and rejected the alternative submission that, even if time was not of the essence, DGP were in repudiatory breach of contract on 26th March 2001, such that Shawton were entitled to accept the repudiation by determining the contracts. The judge was right to hold that the main case here was the delay claim. There were other allegations, some of them insubstantial, but the main significant consequence of them was delay. I accept that, even if time is not of the essence, it is theoretically possible for a party to show that another party's delay is so profound as to be repudiatory. But what has to be shown is, not mere breach, but a breach of such gravity as to deprive the other party of substantially the whole benefit which it was the intention of the parties that they should obtain from the contract. Mr Thomas accepted that the judge correctly articulated the law – see paragraphs 165 and 169, 4th sentence. Otherwise, he made factual findings which are not, in my view, amenable to appeal. These included that DGP provided Shawton with 374 drawings from which they were able to manufacture and had manufactured a significant proportion of the equipment comprised in S468 and S469. DGP's obligation after 8th January 2001 was to try to complete by 31st March 2001. The judge held that it had not been established that DGP did not do its best to produce the majority of the drawings by 31st March 2001. Between 8th January and 26th March 2001, a total of some 91 different drawings were released to Shawton. There is, in my judgment, no proper basis for reviewing, let alone reversing, these and other findings of fact. The judge was entitled to hold that DGP were not in repudiatory breach on 26th March 2001.

77. For these reasons I would dismiss this appeal.

Jacob LJ: I agree.

Lloyd LJ: I also agree.

David Thomas QC & Adam Constable (instructed by Hill Dickinson) for the Appellant
David Friedman QC & Andrew Singer (instructed by Messrs George Davis) for the Respondent
Jeremy Stuart-Smith QC & Graeme McPherson (instructed by Messrs Mayer Brown Row & Maw LLP) for LIMIT (No. 3) LIMITED