JUDGMENT : Mr. Justice Jackson: 28th July 2006

This judgment is in eight parts, namely Part 1, Introduction; Part 2, The Facts; Part 3, The Present Proceedings; Part 4, The Effect of Addendum No. 1; Part 5, The Termination Issue; Part 6, RWE's Claim for Over-Payment; Part 7, RWE's Claim for the Costs of Completion; Part 8, Conclusion.

Part 1. Introduction

1. This is an application for summary judgment and/or interim payment made by a main contractor against the guarantor of an insolvent sub-contractor. The main contractor, which is Claimant in the present action, is a company incorporated in Germany called RWE-Industrie-Loesungen GMBH. I shall refer to this company as "RWE". In some of the documents it is referred to as "RWE-IN". The guarantor, which is Defendant in the present action, is a company incorporated in Germany called Thyssen Schachtbau GMBH. I shall refer to this company as "Thyssen".

2. In April 2003 Thyssen had a subsidiary company incorporated in England and Wales called Thyssen (Great Britain) Ltd. Thyssen (Great Britain) Ltd. owned all the shares of a construction company called Thyssen Construction Ltd. Thyssen Construction Ltd. changes its name to Butterley Construction Ltd. on 20th November 2003. For simplicity I shall refer to this company at all stages (both before and after the name change) as "Butterley". In September 2003 Thyssen sold its interest in Thyssen (Great Britain) Ltd. to the Meade Corporation, to whom I shall refer as "Meade". Thus, from September 2003 onwards Meade was the ultimate parent company of Butterley. Butterley is the sub-contractor whose insolvency has given rise to the present litigation. Butterley fell into financial difficulties in late 2004. Butterley went into administration on 2nd December 2004. Butterley went into liquidation on 7th November 2005.

3. The present litigation concerns works which were carried out at a power station. Fluegas Desulphurisation is a process which reduces the sulphur dioxide content of gases which are emitted. The common abbreviation for this process is "FGD", which I shall adopt.

4. After these introductory remarks it is now time to turn to the facts.

Part 2. The Facts

5. Cottam Power Ltd., which is a subsidiary of London Electricity, operates Cottam Power Station in Nottinghamshire. This power station comprises four coal-fired electricity generating units. These electricity generating units are referred to as Unit 1, Unit 2, Unit 3 and Unit 4. For environmental reasons it has become necessary to reduce the level of sulphur dioxide which Cottam Power Station discharges into the atmosphere. In early 2003 Cottam Power Ltd. entered into a main contract with RWE for the installation of FGD plant at Units 2 and 3. This FGD plant would use the limestone/gypsum process. The main contract included provisions whereby the works might be extended to include the installation of FGD plant at Units 1 and 4. These provisions were subsequently implemented, so that RWE became the main contractor for installing FGD plant at all electricity generating units within Cottam Power Station.

6. On 17th April 2003 RWE entered into a sub-contract with Butterley. Butterley as sub-contractor agreed to carry out the civil works ancillary to the FGD plant which was to be installed at Units 2 and 3. These civil works included the foundations and steel work for certain key structures and buildings. The estimated price stated in the sub-contract was £9,745,364.20. However, this did not constitute a contract sum. The remuneration payable to Butterley was to be determined by (a) measuring the actual works carried out, and (b) applying the rates set out in the Bills of Quantity which were attached to the sub-contract as Annex 1. Annex 2 to the sub-contract comprised the technical specifications for all elements of the works. Annex 4(a) comprised the programme for execution of the works. Annex 4(b) divided the civil works into 11 subsections and provided a milestone date for the completion of each subsection. The liquidated damages provisions of the contract were linked to these 11 milestones. Annex 5 set out the scope of the works and contained a description of the individual elements. Annex 8 set out rates and prices to be applied for the evaluation of day works and variations. Annex 11 contained relevant extracts from the main contract. For present purposes it is not necessary for me to go through the other Annexes to the sub-contract.

7. The Contract Conditions which were incorporated into the sub-contract included the following:

> *"31.1. RWE-IN may by Variation Order to the Contractor at any time before the Works are taken over by the Client, instruct the Contractor to alter, amend, omit, add to or otherwise vary any part of the Works or the manner in which they are to be done …*
>
> *33.1. Payment to the Contractor of elements of the Contract Price shall be made pursuant to the provisions of this Clause and shall be calculated in accordance with the rate(s) and price(s) set out in Annexes 1 and 8 and any amendments thereto as may have been made pursuant to the Contract. Where no price or rate is specified RWE-IN shall determine the price or rate applicable thereto which shall be a fair and reasonable price or rate having regard to any prices or rates that may be specified in the Contract for similar plant, work or services.*
>
> *The prices and rates set out in Annexes 1 and 8 and any such prices and rates applied pursuant to Clauses 31 and 34, whether in the Annexes or otherwise, shall except where expressly stated to the contrary be fully inclusive rates covering costs, risk and liability of the Contractor assumed under or arising out of the Contract including but without prejudice to the generality of the foregoing, management and administration, all personnel related costs and payments, taxes, site overhead, accommodation and facilities and any matter necessarily*

incidental thereto for the purposes of the Contract, but excluding overhead and profit which shall be paid in addition pursuant to Annexes 1 and 8.

The quantities set out in Annex 1 are approximate and subject to re-measure. Any increase or decrease in such quantities shall not alter the Contractor's obligation to carry out the Works in accordance with his obligations set out in the Contract. No error in description in or omission from any items in Annexes 1 and 8 shall vitiate the Contract or release the Contractor from any of his obligations or liabilities thereunder. For the avoidance of doubt any increase or decrease in terms of the foregoing shall not cause revaluation of the rates and prices set out in Annexes 1 and 8.

33.2. Applications for payment shall be addressed to RWE-IN.

Applications shall be made on a calendar monthly in arrears basis commencing one calendar month after the date of the Contract Agreement and as set out in Annex 9. All measurements, calculations and other information concerning or supporting an application reasonably required by RWE-IN to verify, assess or value an application (or any previous applications) shall be provided by the Contractor. The Parties shall co-operate with each other in terms of any joint site attendances to carry out and agree any specific re-measure or other valuation to facilitate agreement on an application.

Applications shall include any work done pursuant to a Variation Order, subject to any specific payment terms relating to that Variation Order. The provisions of this Clause 33.2 shall be without prejudice to the obligations of the Contractor pursuant to Clauses 31 and 34.

No later than one calendar month after the completion of each Sub-Section, the Contractor shall carry out a re-measure of the Works comprising that Sub-Section in accordance with the provisions of Annexes 1 and 8. The parties shall in good faith endeavour to reach agreement on the re-measure and its value within two calendar months after the Contractor has delivered full particulars of the re-measure to RWE-IN. The Contractor shall be entitled to make an application for payment relating to the re-measure at the end of the two calendar month period. Where the re-measure indicates a sum payable by the Contractor to RWE-IN, that sum shall become payable by the Contractor within 30 days of the end of the said two calendar month period. In the event of failure to agree within the two month period, the sums paid to the Contractor for that Sub-Section by way of advance payments pursuant to Annexes 1, 8 and 9 shall until otherwise established be considered to be the valuation for that Sub-Section but without prejudice to the right of either party to refer the disputed re-measure and/or its value to adjudication or arbitration pursuant to Clause 50.

33.3. Within 21 days after receiving an application for payment which the Contractor was entitled to make pursuant to Clause 33.2, RWE-IN shall issue a Certificate of Payment to the Contractor showing the amount due in accordance with the Contract, the basis on which that amount was calculated, whether by way of reference to the application or otherwise, and any amounts not being certified, whether in the application or otherwise together with the grounds for not certifying any such amount. Where there is more than one ground, the Certificate shall state each ground and the amount attributable to it. …

45.1. If the Contractor is not executing the Works in accordance with the Contract or is neglecting to perform his obligations thereunder so as seriously to affect the carrying out of the Works, RWE-IN may give notice to the Contractor requiring him to make good such failure or neglect within 7 days or such period as shall be reasonable in the circumstances.

45.2. If the Contractor:

(a) has failed to comply within a reasonable time with a notice under Sub- Clause 45.1, or

(b) assigns the Contract or subcontracts the whole of the Works without RWE-IN's written consent, or

(c) becomes bankrupt or insolvent, has a receiving order made against him or compounds with his creditors, or carries on business under a receiver, administrator, trustee or manager for the benefit of his creditors or goes into liquidation.

(d) is in breach of his obligations under the Contract in respect of his obligations under Clauses 14.2, 15.1 and 19.1 in such a manner as to cause RWE-IN fundamentally to lose all trust in the Contractor's ability to perform the Contract to completion.

(e) commits an act, or any Subcontractor commits an act proscribed by Clause 56.

(f) is in default under Sub-Clause 28.5 and RWE-IN exercises its rights under Sub-Clause 28.7 paragraph (c),

RWE-IN may, after having given 7 days notice to the Contractor, terminate the Contract and expel the Contractor from the Site, save that in the case of paragraphs (c) and (e) no prior notice shall be given.

Any such expulsion and termination shall be without prejudice to any other rights or powers of RWE-IN or the Contractor under the Contract.

RWE-IN may upon such termination complete the Works itself or by any other contractor.

RWE-IN or such other contractor may use for such completion any Contractor's Equipment which is on the Site and RWE-IN shall pay or allow the Contractor a fair price for such use. Otherwise the Contractor will be granted a reasonable period to remove the Contractor's Equipment from the Site.

45.3. RWE-IN shall, as soon as possible after such termination, assess the value of the Works and all sums then due to the Contractor as at the date of termination in accordance with Clause 33.

45.4. RWE-IN shall not be liable to make any further payments to the Contractor until the Works have been completed. When the Works are so complete, RWE-IN shall be entitled to recover from the Contractor the

extra costs, if any, of completing the Works after allowing for any sum due to the Contractor under Sub-Clause 45.3 and Sub-Clause 45.2. If there is no such extra cost RWE-IN shall pay any balance due to the Contractor."

8. At the same time as entering into the subcontract RWE and Butterley also signed a Side Letter dated 17th April 2003. The Side Letter provided as follows:

"RWE-IN subcontract with Thyssen dated 17th April 2003 for the Civils Works relating to the FGD Project at Cottam Power Station

RWE-IN option for further Works

RWE-IN shall be entitled at any time up to and including 17th November 2003 to notify the Contractor in writing that it requires the Contractor to carry out further Works under the Contract relating to the second FGD Unit.

The execution of this requirement is subject to the parties first agreeing the precise scope of such further Works, the related Programme and any other consequential amendments or additions to the Contract. Where these further Works and the related Programme are agreed as substantially the same as for the original Works under the Contract, the rates contained in the Contract shall be used for these further Works. An escalation factor, which may be based on a fixed percentage, is to be agreed between the parties for any such further Works.

It is agreed between the parties that, subject to the above, the further Works will be Taken Over in Sub-Sections in the same manner applicable to the original Works under the Contract and that liquidated damages will apply to each Sub-Section at rates and an overall limit to be agreed between the parties.

Nothing in this letter shall oblige RWE-IN to exercise the options set out above with the Contractor or at all. RWE-IN shall be at liberty to award the further Works to a third party, whether by way of competitive tendering or otherwise and the Contractor shall have no form of claim against RWE-IN arising out of or under this letter or the Contract in relation to the subject matter of this letter."

The phrase "the second FDG Unit" which occurs in the first paragraph of the Side Letter is a reference to Units 1 and 4.

9. RWE required a parent company guarantee before it was willing to enter into the subcontract with Butterley. Accordingly, on 15th April 2003 Thyssen, which was then the ultimate holding company of Butterley, entered into a deed of guarantee in favour of RWE. This deed included the following provisions:

"Whereas:

(1) The Guarantors have a controlling interest in Thyssen Construction Limited whose Registered Office is at Langthwaite Grange Industrial Estate, South Kirby, Pontefract, West Yorkshire, WF9 3AP (hereinafter called 'the Company')

(2) The Guarantors have agreed with RWE-IN that in the event of RWE-IN placing a contract with the Company for the Civils Works relating to the Fluegas Desulphurisation Project at Cottam Power Station, Nottinghamshire, England (hereinafter called 'the Contract') the Guarantors will guarantee the due performance of the Contract with the Company in the manner hereinafter appearing.

Now this Deed witnesseth as follows:

1. The Guarantors hereby unconditionally and irrevocably guarantee to and covenant with RWE-IN that in the event of RWE-IN entering into the Contract with the Company as aforesaid the Company will well and truly perform and observe all the obligations, terms, provisions, conditions and stipulations mentioned or described in the Contract or to be implied therefrom on their part to be so performed and observed according to the true purport intent and meaning hereof and if for any reason whatsoever and in any way the Company shall fail to perform the same then the Guarantor shall upon receipt of a notice in writing from RWE-IN take over from the Company and shall forthwith perform and observe or subject to the prior agreement of RWE-IN cause to be performed and observed such obligations, terms, provisions, conditions and stipulations as aforesaid so far as to the extent the Company was liable to perform and observe them and shall to the same extent be responsible to RWE-IN as principal and not merely as surety for the Company for the payment by them of all sums of money, losses, damages, costs, charges and expenses that may become due or payable to RWE-IN by reason of or in consequence of the acts or defaults of the Company in the performance or observance of the contract. Provided that under no circumstances whatsoever shall the liability of the Guarantors to RWE-IN hereunder exceed the Contract Price. …

4. The obligations of the Guarantors hereunder are primary and not by way of surety only and the Guarantors shall not be entitled as against RWE-IN to any right of set off or counterclaim whatsoever and howsoever arising. …

6. The Guarantors shall not in any way be released or discharged or otherwise absolved of liability hereunder by reason of any of the following (whether or not the Guarantors have notice thereof):

(a) any alteration amendment or variation in the terms of the Contract.

(b) any indulgence forgiveness or forbearance shown by RWE-IN towards the Company whether as to payment or time for payment or any arrangement entered into or composition accepted by RWE-IN or otherwise modifying (by operation of law or otherwise) the rights and remedies of RWE-IN under the Contract or hereunder with regard to payment or time for payment or otherwise changing the obligations of either party under the Contract.

(c) any action lawfully taken by RWE-IN to determine the Contract. …

(f) the liquidation or dissolution or insolvency of any of the parties referred to herein or any receivership administration moratorium composition of creditors claims or other analogous event affecting such parties or any of their property or assets."

10. Butterley duly proceeded with the execution of the subcontract works at Units 2 and 3. Butterley made monthly applications for payment. There are issues between the parties as to whether Butterley complied with its obligations under Clause 33.2 of the Conditions, but those issues are not for consideration today.

11. On 2nd September 2003 Thyssen sold its shares in Thyssen (Great Britain) Ltd. to Meade. Thyssen (Great Britain) Ltd. is and was the parent company of Butterley. Thus, ownership and control of Butterley passed from Thyssen to Meade. Nevertheless, the guarantee which Thyssen had given to RWE-IN remained effective.

12. In and after October 2003 discussions proceeded between Butterley and RWE-IN concerning the possibility of Butterley undertaking civil works ancillary to the FGD plant which was to be installed at Units 1 and 4. Butterley provided proposed Bills of Quantities for those works, setting out appropriate rates and prices. Ultimately these discussions resulted in an agreement which was recorded in a document entitled "Addendum No. 1". Addendum Number 1 was undated, but it appears to have been signed on behalf of RWE-IN and Butterley at the end of March or beginning of April 2004. Addendum No. 1 provides as follows:

"In accordance with the 'Side Letter' to the 'Contract Agreement' dated 17th April 2003, RWE-IN will entrust the Contractor with the execution of the CIVIL WORKS for the Option 1 and 4 of FGD Project in Cottam as per letter BCL-RWE04.533 dated March 23, 2004 and facsimile dated 29.04.2004 with attached Bill of Quantity. This Addendum No. 1 is based on the principle understanding achieved on 29.03.2004:

1. The estimated CONTRACT PRICE of £1,749,387.72 as per Bill of Quantity dated 25.02.2004 and

2. Contractor's renunciation of prolongation costs as per item 6 and 7 of Contractor's letter BCL-RWE04.533.

This Addendum No. 1 to Contract Agreement shall supersede the Letter of Intent entered into between the parties and dated 30th March 2004 for the commencement of certain of the Works by the Contractor. Notwithstanding the date of the Contract, all rights and obligations of the parties relating to or arising out of the Letter of Intent shall be exclusively governed by the Contract and this Addendum No. 1.

With the exception of the following annexes the Conditions of Contract and Appendices 1 - 3 and Annexes 1 - 14, concluded between both parties on 17.04.2003, remain unaltered:

Annex 1 - Bill of Quantities will be revised by the Bill of Quantities which were attached to Contractor's fax dated 29.03.2004

Annex 4a - Schedule/Programme of Civil Works The actual Programme for Option 1 and 4 is Doc. No. 11807-GE-0000-MT02-011-AA dated 30.04.04.

Annex 4b - Subsection Milestones as attached hereto in Annex 4b

Annex 6 - Relevant Data for Civil Works Subcontract

Annex 9 - Payment Schedule revised Payment Schedule as per Annex 9 attached hereto.

For accounting reason the invoicing for the Main Contract and this Addendum No. 1 needs to be separated. Contractor therefore will issue the respective invoices for this Addendum No. 1 in accordance with the Conditions of Contract separately from the invoices for the Main Contract."

13. Five documents were annexed to Addendum No. 1. These were Annex 1 which comprised Bills of Quantities for Units 1 and 4, Annex 4a which comprised the Programme for the works in relation to Units 1 and 4, Annex 4b setting out the milestones, Annex 6 setting out relevant data and Annex 9 setting out the Payment Schedule.

14. The contractual arrangements for Units 1 and 4 differed in a number of respects from the contractual arrangements for Units 2 and 3. The payment structure for Units 1 and 4 was different. In relation to Units 1 and 4 Butterley did not undertake the structural steel work and associated design works. Furthermore, in relation to Units 1 and 4 Butterley agreed to accept a 1% discount on payments for measured works.

15. Following the execution of Addendum No. 1 Butterley proceeded in parallel with its works at Units 1, 2, 3 and 4. There was much debate between the parties concerning the measurement of Butterley's works and what sums should be paid in respect of interim applications. For present purposes it is not necessary for me to trace the course of events on site during 2004. Suffice it to say that by late 2004 Butterley was in serious financial difficulties. It had fallen into arrears in the payment of sums due to its sub-contractors and suppliers. On 22nd November 2004 RWE sent the following letter to Butterley:

"During recent weeks it is noted and recorded that BCL are failing in their obligation to diligently and actively progress their contracted Scope of Works to schedule completions.

Continued and ongoing slippages are advised in BCL generated schedules, whereby works are moving backwards in every revision. Unacceptable delays are noted as examples only and in no way all inclusive.

<u>Units 2 & 3</u>

Off Loading facility and Electrical Building.

Electrical Building

Remedial works (piling) trestle T13.

<u>Units 1 & 4</u>

Pumphouse foundations

Intake Pumphouse

It is clearly evident that BCL are now unable to fund the project which impacts upon essential material deliveries i.e. concrete in particular and performance of sub-contractors with outstanding accounts unpaid. Obviously RWE must look at the overall project completions and the liquidated damages/penalties associated with failure to meet schedule completions. As we see no immediate improvement in BCL financial situation or the drive to achieve due completions RWE have no alternative but to give BCL notice of default pursuant to Clause 45 of the Conditions of Contract. This notice gives BCL 7 days to remedy such failures to perform per Clause 45.1 and thereafter Clause 45.2 will be evoked."

16. On the 23rd November 2004 RWE sent a further letter to Butterley expressing concern about Butterley's lack of progress and Butterley's failure to pay subcontractors and suppliers. RWE stated that it could not pay Butterley's current invoice until matters were put right. On the 23rd November 2004 RWE also sent a tele-fax to Thyssen outlining Butterley's defaults and intimating a possible claim on the parent company guarantee. On 26th November 2004 Butterley sent a letter to RWE denying that it was in default in any of the respects alleged.

17. On 1st December 2004 RWE wrote the following letter to Butterley:

"Reference is made to our letter RWE.5-BCL.04.283 dated 22nd November 2004 and your letter reference above dated 26th November 2004.

Contrary to the statements of intent given in your above referenced letter BCL have failed to comply with our notice given in the letter dated 22nd November 2004.

In the past couple of days RWE-IN have been confronted with constant signs of insolvency of BCL and are therefore forced to invoke Clause 45.2 of the Subcontract with immediate effect."

It appears from the transmission slip that this letter was sent to Butterley by fax on the morning of 2nd December at 9.25 a.m.

18. On the same day a copy of this letter was handed to Mr. Mayes, who was Butterley's General Manager. Mr. Mayes faxed or showed RWE's letter to his colleagues. Mr. Mayes describes the events on the site that day as follows in paragraph 58 of his witness statement: *"I considered that the above letter was notification by RWE that the Contract had come to an end. I believed that the notice was invalid as RWE had no right to end the contract. This was consistent with the letter which I sent on 26 November 2006. Work stopped as the day progressed and as word of the letter eventually got around. The majority of the subcontractors were already negotiating with RWE to continue with their works and to be engaged directly by RWE. It was clear from the letter that RWE did not intend to continue with the Contract. Further indication of this was RWE's conduct in refusing payment and in having commenced direct negotiation with Butterley's sub-contactors to continue with their works on the project. Other Butterley employees left shortly after we received the letter on the 2nd of December. I confirmed my resignation on the telephone with Charles Coward and left the site on or about 4 December 2004. Charles Coward did not give any clear instruction to stop work. It was not a matter of deciding to stop work as the subcontractors took it upon themselves to get clarification from RWE and stop work themselves."*

19. Butterley's financial difficulties were coming to a head at the same time as these events. On 1st December 2004 the Board of Butterley resolved that joint administrators should be appointed pursuant to the Insolvency Act 1986. On the same day Butterley filed at the Birmingham District Registry a notice of intention to appoint administrators. That notice included a statement from Mr. Morrison, the Chairman of Butterley, in the following terms: *"The Company is or is likely to become unable to pay its debts."*

On 2nd December 2004 Mr. Nigel Price and Mr. Roderick Butcher were appointed as Joint Administrators of Butterley.

20. On 14th December 2004 RWE sent the following letter to Butterley:

"Reference is made to our letter RWE.5-BCL.04.291 dated 1st December 2004 and to a letter from Butterley Construction Limited, which was undated, and without a reference number, addressed to Mr. Arnd Pannenbecker received in Duisburg on 9th December 2004. The letter clearly indicates that Butterley Construction Limited is in Administration under Joint Administrators seemingly appointed on 2nd December 2004. …

In the circumstances RWE-IN feels entitled to rely on the above letter from Butterley Construction Limited, a copy of which is attached, as evidence that Butterley Construction Limited was placed in administration on 2nd December 2004. RWE-IN would be obliged to receive the required notice, as our re-measurement indicates an overpayment by RWE-In to Butterley Construction.

This letter is being sent as formal notification to Butterley Construction Limited of the termination by RWE-IN of the Contract entitled 'RWE Industrie-Loesungen GmbH and Thyssen Construction Limited, Contract Conditions relating to the Civil Works for the Flue Gas Desulphurisation Project at Cottam Power Station, Nottinghamshire, England' entered into by those named parties by way of a contract agreement dated 17.04.2003, pursuant to Clause 45.2(c) of the Contract Conditions. …

As can be seen from the above provisions, this notice of termination takes immediate effect and RWE-IN reserves its rights under the Contract accordingly and will proceed in accordance with the provisions of Clause 45.3 and 45.4 of the Contract Conditions.

All rights of access by Butterley Construction Limited, by their sub-contractors or anyone acting on their behalf are hereby withdrawn and all such personnel must forthwith leave the Site. Any access must be arranged reasonably in advance by written application to the RWE-In Site Office."

21. Fortunately, most of Butterley's works had been completed by the time that Butterley went into administration. RWE engaged other sub-contractors to carry out the remainder of the works.

22. RWE maintains that it has suffered losses under two heads:

(i) RWE has over-paid Butterley for work done;

(ii) RWE has incurred additional costs in completing those works which Butterley left unfinished.

RWE maintains that Thyssen is liable under the guarantee dated 15th April 2003 to reimburse RWE in respect of both of those heads of loss. Thyssen denies that it has any such liability. Accordingly, in order to assert its claim RWE commenced the present proceedings.

Part 3. The Present Proceedings

23. By a claim form issued on 25th November 2005 in the Technology and Construction Court RWE-IN claimed against Thyssen a declaration that Thyssen was liable to indemnify RWE-IN against:

"(a) any overpayment which RWE-IN is entitled to recover from Butterley Construction Limited ('Butterley') pursuant to sub-clause 45.3 of the conditions of a contract dated 17 April 2003 ('the Conditions') or as money had and received or as damages for breach of sub-clause 33.2 of the Conditions and/or of an oral agreement made on 4 October 2004; and/or

(b) Any sum or sums which RWE-IN is entitled to recover from Butterley pursuant to sub-clause 45.4 of the Conditions and or as damages for breach of sub-clause 8.1 of the Conditions."

RWE also claimed payment of the sums due under both heads. The amount of over-payment is pleaded as £492,786.40. The amount of the extra costs incurred in completing the works is pleaded as £1,677,471.73. In its Particulars of Claim RWE identified the relevant provisions of the guarantee and the Sub-Contract. RWE also recited the history of events on site as well as the history of events since the termination of the Sub-Contract.

24. On 10th February 2006 Thyssen served its Defence. In that Defence Thyssen took two principal points. First, Thyssen maintained that Addendum No. 1 was a separate contract and therefore not covered by the guarantee. Secondly, Thyssen asserted that RWE had not terminated the Sub-Contract under clause 45, but on the contrary had repudiated the Sub-Contract by its letter dated 1st December 2004, which repudiation had been accepted. Thyssen denied that it had any liability under the guarantee for RWE's losses. Thyssen did not admit the amount of the alleged over-payment. Thyssen disputed the extra costs which RWE claimed to have incurred in completing the works.

25. RWE took the view that Thyssen's Defence had no real prospect of success. Accordingly, on 9th May 2006 RWE issued an application for summary judgment and/or interim payment. The claim for summary judgment seeks both declarations as to RWE's liability in principle and also payment of the specific sums which RWE maintains are due.

26. RWE's application for summary judgment has been listed for hearing on Tuesday and Wednesday of this week. Mr. Tom Leech represents RWE. Miss Chantal-Aimee Doerries represents Thyssen. Both counsel have lodged detailed and lengthy skeleton arguments. In addition the oral argument has lasted for two full days. I am grateful to both counsel for the excellence of their oral and written submissions. Upon reviewing the pleadings I note that both counsel have advanced certain arguments which go somewhat beyond their pleaded cases. In my view neither party has been prejudiced by those departures. Accordingly, I propose to deal with the substantive issues which have been argued on both sides.

27. I must now turn to the issues in dispute.

Part 4. The Effect of Addendum No. 1

28. Miss Doerries advances two alternative arguments concerning the effect of Addendum No. 1. First, she submits that this is such a substantial variation of the Sub-Contract that it falls outside the scope of Clause 6(a) of the Guarantee. Accordingly, Thyssen is discharged from all liability under the Guarantee. In the alternative, Miss Doerries argues that Addendum No. 1 constitutes a separate contract. Therefore it falls outside the scope of the Guarantee. Accordingly, Thyssen's liability is limited to sums which are due in respect of Units 2 and 3.

29. I see some force in the second of Miss Doerries' two arguments. The contractual arrangements between RWE-IN and Butterley in respect of Units 1 and 4 were substantially different from the contractual arrangements concerning Units 2 and 3. It is true that Addendum No. 1 incorporated some of the annexes to the original Sub-Contract. However, Addendum No. 1 also had five annexes of its own in substitution for the original annexes. These annexes to Addendum No. 1 included new Bills of Quantities, a new Programme and new Milestones. The payment arrangements were different. Whatever may have been intended in April 2003 (when the Side Letter was signed), Addendum No. 1 seems to me to be arguably so far removed from the original Sub-Contract that it should properly be characterised as a separate agreement rather than a mere variation to the original Sub-Contract. Moreover, Addendum No. 1 was executed some four and a half months after the cut-off date of 17th November 2003, which had been specified in the Side Letter. For present purposes I am not required to reach a final decision on this point and I do not do so. For the purposes of CPR Part 24 I simply hold that Thyssen has a properly arguable defence that the Guarantee does not extend to Addendum No. 1.

30. I am reinforced in the views expressed above by the obvious unfairness which would result if Thyssen were held to have guaranteed Butterley's performance of Addendum No. 1. This addendum was executed some seven months after Thyssen had ceased to have any control over Butterley. Thyssen had no knowledge as to what Butterley were agreeing or doing in respect of Units 1 and 4. Units 1 and 4 formed no part of the original Sub-Contract.

Indeed, as the evidence now stands there is no evidence that Thyssen had ever been aware of the Side Letter dated 17th April 2003.

31. As to Miss Doerries' more far reaching submission, namely that Addendum No. 1 discharges all liability under the Guarantee, I do not regard this as properly arguable. If the Addendum is to be viewed as a variation of the Sub-Contract, then Clause 6(a) of the Guarantee is triggered. This has the effect of preserving the Guarantee despite the fact that the parties have agreed a variation which is prejudicial to the Guarantor.

Part 5. The Termination Issue

32. Mr. Leech accepts that the letters sent by RWE in November and December 2004 did not have the effect of terminating the Sub-Contract under Clause 45.2(a). RWE did not go through all the necessary hoops in order to comply with the Clause 45.2(a) procedure. Accordingly, Mr. Leech pins his case to Clause 45.2(c). He submits that RWE's letter dated 14th December 2004 or alternatively RWE's letter dated 1st December 2004 had the effect of terminating the Sub-Contract under Clause 45.2(c).

33. So far as the letter of 14th December is concerned this was clearly a valid notice of termination under Clause 45.2(c), in the event that the Sub-Contract was still in existence on that date. The letter of 14th December expressly refers to Clause 45.2(c). It asserts correctly that Butterley is in administration. It states that the Sub-Contract is being terminated with immediate effect. It requires that any remaining staff of Butterley leave site forthwith.

34. A more problematic issue is the effect of RWE's letter dated 1st December. This letter does not expressly refer to any sub-paragraph of Clause 45.2. The first two sentences would appear to have been written with sub-paragraph (a) in mind. However, there is no express reference to sub-paragraph (a). Furthermore, the letter does not give seven days' notice, which would have been the necessary next step if RWE were operating the Clause 45.2(a) procedure. The third sentence of RWE's letter dated 1st December appears to have been written with sub-paragraph (c) in mind. However, there is no express reference to sub-paragraph (c). Furthermore, the letter does not state that RWE is terminating the Sub-Contract. Instead the letter uses the phrase "forced to invoke Clause 45.2 of the Sub-Contract". Since there was more than one way in which RWE might have wished to invoke Clause 45.2, the meaning of that phrase is unclear.

35. Miss Doerries contends that RWE's letter of 1st December 2004 was a purported notice of immediate termination pursuant to Clause 45.2(a). Miss Doerries further contends that RWE had failed to comply with Clause 45.2(a) in a number of respects. Accordingly, RWE's letter dated 1st December was an unlawful termination, which therefore constituted a repudiatory breach of contract. Butterley accepted that repudiatory breach by stopping work.

36. I have come to the conclusion that Miss Doerries' argument, though attractively presented, has no prospect of succeeding at trial. I reach this conclusion for three reasons.

    (i) If RWE were seeking to operate Clause 45.2(a), RWE would have been bound to give seven days' notice in the letter. The fact that RWE neither gave seven days notice nor referred to Clause 45.2(a) indicates that RWE was not taking this course.

    (ii) If the language of the last sentence of the letter is construed as notice of immediate termination then such termination must have been effected under sub-paragraph (c), not sub-paragraph (a). I say this because the whole of the last sentence of the letter is clearly directed to sub-paragraph (c). The word "therefore" links the second half of the sentence to the first half. RWE is asserting that it is forced to invoke Clause 45.2 because of the constant signs of Butterley's insolvency.

    (iii) The very fact of immediate termination (if that is the effect of the letter, as Miss Doerries argues) is a pointer towards sub-paragraph (c), not sub-paragraph (a). Immediate termination is permissible under sub-paragraph (c). It is not permissible under sub-paragraph (a).

37. Let me now look at the matter more broadly. In my view the letter of 1st December was unclear. It did not effect a termination of the Sub-Contract under Clause 45.2, nor did it constitute a repudiation of the Sub-Contract. It left the rights of both parties intact. On this analysis the Sub-Contract remained in force until 14th December, whereupon RWE effectively terminated it pursuant to Clause 45.2(c).

38. Let me now assume that my analysis in the previous paragraph is wrong. On this assumption RWE's letter of 1st December was giving notice of immediate termination. If that is the true interpretation of the letter then, for the reasons indicated above, RWE can only have been terminating under Clause 45.2(c). On the date when that letter was delivered, namely 2nd December 2004, RWE was clearly entitled to terminate on that basis. Self-evidently, Butterley was insolvent.

39. Let me now draw the threads together. However one analyses the correspondence and the indisputable facts, the conclusion is always the same. By December 2004 RWE was entitled to terminate the Sub-Contract pursuant to Clause 45.2(c). RWE served notice effecting such termination either on 2nd December or, more probably, on 14th December 2004. The pleaded defence that RWE repudiated the Sub-Contract cannot succeed.

Part 6. RWE's Claim for Over-Payment

40. Following the termination of the Sub-Contract, RWE made its own assessment of the value of the works done by Butterley. This led to the conclusion that RWE had over-paid Butterley by £492,786.40 plus VAT. By an invoice dated 1st March 2005 RWE sought payment of that sum from Thyssen.

41. Mr. Leech submits that this assessment exercise was carried out by RWE pursuant to Clause 45.3 of the Sub-Contract conditions. He further submits that RWE's assessment under Clause 45.3, whether right or wrong, is final and unchallengeable. This latter submission cannot be right. Clause 45.3 does not say that the assessment is final and unchallengeable. Furthermore, such a term would be a distinctly odd one to imply in the absence of express words. I have no doubt whatsoever that an assessment under Clause 45.3 of the Conditions can be challenged either by adjudication or by arbitration or by litigation, as the case may be.

42. Mr. Leech's next submission is that any challenge to an assessment under Clause 45.3 must be made within a limited period. Initially he suggested that three months was the outer limit. Subsequently he submitted that the challenge must be made before completion of the works. I am afraid that there is no proper basis for these submissions. When the draftsman of the Conditions wishes to impose a time limit for challenging a certificate or assessment, he does so in express terms. See, for example, Clause 33.11(b) where a time limit of 12 weeks is imposed upon any challenge to the final certificate. In the absence of express words it is quite impossible to imply into Clause 45.3 some arbitrary time limit for the making of a challenge.

43. Mr. Leech's next submission is that, when one looks at the evidence, RWE's assessment of the over-payment in the sum of £493,786.40 was plainly correct. In order to deal with this issue, both Mr. Leech and Miss Doerries have spent a considerable amount of time taking me through interim applications, interim valuations, colour-coded spreadsheets, expert reports, records of what was agreed and not agreed at site meetings, schedules, sheets of calculations and the like. Detailed investigations of this nature are, of course, part of the daily work of the Technology and Construction Court. Nevertheless, with the utmost respect to counsel, this is not the stuff of a summary judgment application under Part 24 of the Civil Procedure Rules.

44. Having listened with care to the submissions of both counsel and studied the documents, it seems to me likely that RWE did make over-payments to Butterley, both in respect of Units 2 and 3 and also in respect of Units 1 and 4. However, in the absence of a full trial with oral evidence, I am quite unable to say what those over-payments (if any) were. I am also unable to identify any minimum sum attributable to Units 2 and 3 which might form the basis of an order for interim payment.

45. There was some debate between counsel as to whether, when and how any over-payment identified under Clause 45.3 might become due for repayment to RWE. Clause 45.3 does not expressly contemplate that over-payment might have occurred. Nevertheless, the contracting parties cannot have intended that the Sub-Contractor should keep any such over-payment as a windfall. There is room for argument as to whether RWE's right to recover any over-payment arises immediately under Clause 45.3 or whether RWE must await completion of the Sub-Contract works. However, that issue is likely to be only of academic interest to the parties, since the works are now very nearly complete.

46. The next argument which I must address is Miss Doerries' contention that RWE knowingly made over-payments to Butterley during the course of the works. In those circumstances, Miss Doerries submits, Butterley's liability to repay the over-payments is a liability which falls outside the scope of the Guarantee. Miss Doerries has taken me to a number of documents which lay the evidential foundation for this defence. Thyssen may well establish at trial that during the course of the works RWE knowingly made certain over-payments to Butterley. Such over-payments were presumably made for the commercial purpose of maintaining progress on the works.

47. Mr. Leech submits that if RWE knowingly made over-payments in respect of certain interim applications, that does not relieve the guarantor of liability. He relies upon the express terms of the Guarantee, in particular Clause 1, Clause 4 and Clause 6(b). I was initially attracted by Mr. Leech's submissions on this issue. I have come to the conclusion, however, that Miss Doerries has raised an arguable defence which Thyssen is entitled to advance at trial. It seems to me that Clause 6(b) of the Guarantee is not wide enough to embrace over-payments knowingly made by RWE to the Sub-Contractor. Such over-payments do not fall within the category of "indulgence, forgiveness or forbearance", when that phrase is read in the context of the whole of Clause 6(b). It must at least be arguable that deliberate over-payments made by RWE to the Sub-Contractor fall outside the scope of the Guarantee.

48. Let me now draw the threads together. For the reasons set out above Thyssen has an arguable defence to the whole of RWE's claim under the Guarantee in respect of over-payment. Accordingly, RWE's application for summary judgment, alternatively interim payment in respect of that head of claim must be dismissed.

Part 7. RWE's Claim for the Costs of Completion

49. Clause 45.4 of the Conditions entitles RWE to complete the works and then to recover from Butterley the extra costs which it has incurred. In so far as those extra costs are attributable to Units 2 and 3, RWE is entitled to recover those extra costs from Thyssen under the Guarantee. This follows from the conclusions reached in Parts 4 and 5 of this judgment. RWE's pleaded case is that the extra costs attributable to all four units amount to £1,677,571.73. Since the commencement of proceedings further work has been undertaken. RWE contends that the extra costs now amount to £2,104,666.85. The build-up of this figure is explained in the second witness statement of Mr. Guenter Bachstein, who is Vice-President of RWE and also the head of its Project Management Division. I am content to proceed on the basis of Mr. Bachstein's final figures, even though the claim form and Particulars of Claim have not yet been amended to incorporate those figures.

50. Miss Doerries' first objection to this head of claim is that it is premature. Under Clause 45.4 RWE is only entitled to recover the extra costs after completion of the works. This is a point which Thyssen's solicitors have made in correspondence on a number of occasions.

51. It is quite correct that the works were not complete when proceedings were issued. At the present time it appears that the works are almost but not quite complete, as explained in paragraph 52 of Mr. Bachstein's second witness statement.

52. In response to the argument on prematurity Mr. Leech submits that although this may prevent summary judgment being given for a specific sum, RWE is still entitled to a declaration. Both in the claim form and in the application for summary judgment RWE claims a declaration that it is entitled to the additional costs incurred in completing the works.

53. On this issue I accept Mr. Leech's submissions. There is a clear dispute of principle between the parties. RWE contends that it is entitled to recover the extra costs in respect of all four units under the Guarantee. Thyssen contends that it has no liability in this regard. For the reasons set out in Parts 4 and 5 above I have come to the conclusion that RWE is correct in respect of Units 2 and 3. Leaving aside issues as to quantum, Thyssen has no arguable defence to the claim under the Guarantee in respect of those extra costs which are properly attributable to completing the works at Units 2 and 3.

54. Rule 24.2 of the Civil Procedure Rules enables the court to give summary judgment on specific issues in an appropriate case. There are good case management reasons for taking this course. It sweeps away matters about which there can be no serious argument. It enables the parties to concentrate their attention and their endeavours upon the real issues in the case. Subject to counsel's submissions on the wording, I propose to grant a declaration to RWE along the following lines: *"The court declares that Thyssen is liable to pay to RWE the amount of any extra costs reasonably incurred by RWE in completing the Sub-Contract Works to Units 2 and 3 of Cottam Power Station, after giving credit for any sums which would have been payable to Butterley for completing those works."*

55. Let me turn next and briefly to the figures. The material which RWE has put before the court does not enable me to assess, or indeed to begin to assess, what (if any) are the extra costs attributable to Units 2 and 3. This exercise can only be undertaken when the Sub-Contract Works are complete. The works done by RWE since the date when Butterley left site must then be measured and valued in accordance with the provisions of the Sub-Contract, in particular the Bills of Quantity at Annex 1 and the rates for day works, etc. at Annex 8. This exercise (which has not yet been done) will produce the figure for which RWE must give credit. The next stage will be to identify the actual costs which RWE has reasonably incurred in carrying out those works which Butterley was obliged to do under the Sub-Contract, but which Butterley failed to complete because the Sub-Contract was terminated. Some, but not all, of the material relevant to this exercise is exhibited to Mr. Bachstein's two witness statements.

56. I anticipate that when the quantity surveyors for both parties sit down together they will be able to agree a reasonable estimate of the extra costs attributable to Units 2 and 3. However, it is quite impossible for me to do this exercise on the present material. There is no specific sum in respect of which the court can give summary judgment or make an order for interim payment. Furthermore, it would be premature to do so.

57. In the result therefore I shall give summary judgment for a declaration in respect of this head of claim but not award any financial relief.

Part 8. Conclusion

58. For the reasons set out in Parts 4 to 7 above and subject to counsel's submissions on the precise wording, I shall give summary judgment for a declaration along the following lines: *"The court declares that Thyssen is liable to pay to RWE the amount of any extra costs reasonably incurred by RWE in completing the Sub-Contract Works to Units 2 and 3 of Cottam Power Station, after giving credit for any sums which would have been payable to Butterley for completing those works."*

59. The remainder of RWE's application for summary judgment and/or interim payment is dismissed.

MR. TOM LEECH (instructed by Pettman Smith, London, SW1X 7RB) appeared for the Claimant
MISS CHANTAL-AIMEE DOERRIES (instructed by Eversheds, London, EC4V 4JL) appeared for the Defendant