Haden Young Ltd v Laing O'Rourke Midlands Ltd [2008] ABC.L.R. 05/08

JUDGMENT : The Hon. Mr Justice Ramsey: TCC. 8th May 2008

Introduction

1. These proceedings concern claims arising from the design and installation of mechanical and electrical works ("the M&E Works") carried out by Haden Young Limited ("HYL") for Arena Coventry, now known as the Ricoh Arena ("the Project"). The Project consists of a football stadium for Coventry City Football Club, a multi-functional space for trade exhibitions, music concerts and sports functions, a leisure centre and gym, office space and various hospitality areas, an hotel and a casino.

2. The main contractor for the design and construction of the Project was Laing O'Rourke Midlands Limited ("LOR") and the employer was Coventry North Regeneration Limited ("CNRL"). They entered into a contract ("the Main Contract") dated 19 December 2003 which incorporated the JCT Standard Form of Building Contract with Contractor's Design with various standard and bespoke amendments.

3. No sub-contract document was ever signed by LOR and HYL and a dispute has arisen as to the existence of a contract between them. HYL contends that no sub-contract came into existence and LOR disputes this. This judgment is concerned with various issues relating to the existence of a contract and the nature of the legal obligations between HYL and LOR.

4. It was important that the work achieved sufficient completion so that a match could be played in the new stadium on 20 August 2005. In the event, CNRL's representative issued a statement that practical completion had been achieved on 19 August 2005 and the football match took place on 20 August 2005.

5. On 31 October 2005 the parties entered into an agreement referred to as a Further Services Agreement ("the FSA"). That relates to work and services which were performed by HYL after 19 August 2005. An issue arises as to the effect of clause 21 of the FSA.

6. On 20 December 2006 HYL commenced proceedings against LOR in which they claimed sums on a quantum meruit for work done up to 19 August 2005 and under or for breach of the FSA thereafter. In its Defence and Counterclaim dated 23 March 2007 LOR pleaded the existence of a sub-contract and made various claims against HYL. These were responded to by HYL in its Reply and Defence to Counterclaim dated 22 May 2007.

7. Directions were given in relation to a trial of preliminary issues concerning the existence of a sub-contract and related issues. Disclosure took place relevant to the preliminary issues; witness statements and supplemental witness statements were exchanged.

8. A list of those preliminary issues, with which this judgment is concerned, is attached as an Appendix.

Background

9. On 20 June 2003, prior to submitting its tender to CNRL for the Main Contract, LOR sent HYL an invitation to tender for the design, supply and installation of the combined Mechanical, Electrical and Plumbing Services Sub-contract for the Project, enclosing the anticipated form of the main contract. HYL responded by producing a lump sum fixed price tender by letter dated 14 August 2003, setting out certain "*contractual clarifications*".

10. On 17 November 2003 LOR sent HYL draft warranty documents and requested comments no later than 26 November 2003. HYL sent comments on 20 and 26 November 2003 which essentially sought a limit on indemnity insurance cover of £5 million, a limitation on the number of assignments from two to one and the removal of any condition that made HYL's payment subject to the provision of warranties.

11. LOR sent HYL a proposed Letter of Intent on 25 November 2003 to which HYL responded on 11 December 2003. There was then a meeting and LOR set out its reply in a letter dated 15 December 2003 and a fax dated 6 January 2004. Originally LOR pleaded that the Letter of Intent, as amended, was accepted by HYL by conduct and governed the relationship between HYL and LOR in the event that no contract was concluded. That contention is no longer pursued by LOR.

12. LOR first sent HYL a proposed sub-contract on 17 December 2003 and in the covering letter requested that HYL should execute the sub-contract as a deed and return two copies within seven days. At about the same time HYL obtained the Main Contract Preliminaries and General Conditions from LOR.

13. The signed Main Contract is dated 19 December 2003. In the form of main contract which had originally been sent to HYL on 20 June 2003, Clause 2.5.3 of the JCT Standard Form of Building with Contractor's Design had been deleted. That clause provides: "*the Contractor's liability for loss of use, loss of profit or other consequential loss arising in respect of the liability of the Contractor referred to in Clause 2.5.1 shall be limited to the amount, if any, named in Appendix 1*". Clause 2.5.1 concerns liability for design. In the signed Main Contract Clause 2.5.3 was no longer deleted and Appendix 1 provided for the limit to be £7,500,000.

14. After an exchange of correspondence, a meeting was held on 19 January 2004 between Mr Page of HYL and Mr Arneill of LOR to review the sub-contract documents. In that meeting the £7.5 million limit in Clause 2.5.3 of the Main Contract was discussed and the question posed of how it would be "stepped down" to HYL. HYL indicated at the meeting that it would not accept the full figure in the Main Contract. In addition, in relation to warranties, HYL stated that it would require the limit of maximum liability to be agreed.

15. In the meantime Pinsents, solicitors acting on behalf of CNRL, had written to LOR on 16 January 2004 responding to HYL's comments on the forms of collateral warranty which HYL had sent to LOR in November 2003. Generally

Pinsents' letter showed that the amendment to the indemnity insurance cover of £5m, as proposed by HYL, was acceptable but some issues, including the number of assignments, remained to be resolved.

16. On 26 January 2004, LOR wrote to HYL to say that the figure for the limit in the Main Contract would be "*stepped down*" into the sub-contract, meaning that the limit of £7.5 million would be applied to HYL's equivalent liability under the sub-contract. In relation to the warranties LOR stated that Pinsents' comments had been sent to HYL and that the aggregate liability would need to be discussed further.

17. HYL responded on 16 February 2004 and proposed a figure of £1.5 million as a limit on their liability to LOR for consequential loss under the sub-contract. In relation to the warranties, HYL stated that they accepted the amended warranty sent by Pinsents, subject to there being two assignments, one without permission and one with.

18. LOR replied on 18 February 2004 to repeat that the figure of £7.5 million in the Main Contract would be "stepped down" into the sub-contract. In relation to warranties it was stated that CNRL had been contacted in respect of the number of assignments. On 25 February 2004 HYL informed LOR that the proposal from Pinsents as to assignments was acceptable.

19. On 1 March 2004 LOR wrote to HYL to say that it believed that the warranties were agreed "*with the only exception being agreement of the level of consequential losses*." LOR also stated that the only areas of debate still outstanding related to three matters including "*Clause 2.5.3 level of consequential losses plus similar item in warranties*."

20. On 12 March 2004 LOR wrote to Pinsents in relation to HYL's request that its contractual losses should be restricted to £1.5 million and that this would apply both to the sub-contract and the warranties. Pinsents raised concerns stating that it was a late request and that it would be difficult to obtain the approval of the beneficiaries under the warranties. Pinsents also pointed out that this cap of £1.5 million could expose LOR to a gap between the liability of LOR and the liability of HYL to the beneficiaries.

21. The concerns raised by Pinsents were communicated by Mr Arneill of LOR to Mr Page of HYL on 12 March 2004. He said: "*a possible way forward is that this limit does not impact on the PI level of £5m ie any consequential losses associated with PI items would be recoverable under the PI insurance up to the capped level*."

22. Also on 12 March 2004 Mr Page responded and said:
"*HYL PI insurance cover confirmed and agreed at £5m.*
HYL maximum aggregate liability for consequential losses (loss of use etc) is agreed at £1.5m.
However, if [LOR] legal advisors consider that amended wording to contract is needed to reflect this provision, then HYL agreement is subject to review and acceptance of proposed changes – [LOR] to advise position."

23. Mr Arneill replied on 17 March 2004 and said "*there is one point in respect of consequential losses where you state it is agreed which is currently not correct. I have proposed your figure of £1.5m as the cap to the Client's team and this had generated their concerns on the levels available resulting in the exchange of e-mails last week. The Client's team are actually looking at a level of £5m to match the PI level*."

24. Mr Page stated in his further response to Mr Arneill on 17 March 2004: "*Whilst we acknowledge the cap level you have agreed with the Employer under the main contract, our position as a sub-contractor to you is different and we have proposed a reasonable commercial compromise to suit. We do not feel that any "concerns" of the Employers team are relevant to us, especially as we have already agreed to stand by the PI cover of £5m that we previously tabled*."

25. Mr Arneill left the Project to take up a new post in Dubai. On 1 April 2004 Mr Hall of LOR wrote to Pinsents to say that there was to be a meeting with HYL and he would like to know the current stance of the Employer, Tenants and other beneficiaries to the cap on liability proposed by HYL. In response on 1 April 2004 Pinsents said that CNRL had instructed them to reject HYL's cap request but they were checking with the other beneficiaries. In addition Pinsents stated "*If LOR accept the cap in the sub-contract (as I understand you might), Haden drop their request for the same in the warranties, and do not request a "no greater liability clause" in the same then the tenants may be less concerned*."

26. On 23 April 2004, Mr Hall wrote to Pinsents to say that he had now met with HYL who had asked him to propose for inclusion in both the warranty and the sub-contract of "*an aggregated cap on liability for consequential loss (2.5.3 type losses and aggregated consequential losses under the warranty) of £5m in lieu of the £1.5m previously offered*". Pinsents responded to Mr Hall on 26 April 2004 to say that they were putting the proposal to the beneficiaries for their consideration and would revert to LOR as soon as they received responses.

27. Mr Hall chased Pinsents on 5 May 2004. He said that he was to keen to close out the consequential loss cap in the warranty so that he could get the warranties and the Sub-contract documents sorted out. On 10 June 2004 Pinsents raised with Mr Hall the issue of whether any monies recoverable from the indemnity insurance of £5 million were included in the cap. If so, they pointed out the £5 million cap was less attractive than the £5 million indemnity insurance and £1.5 cap on consequential loss.

28. HYL, in the meantime, had been carrying out necessary preparatory activities and in July 2004 commenced work on site, although there is a difference between the parties as to whether it was 12 or 19 July 2004 when work on site actually commenced. By that time HYL had already made their first application for payment on 28 April 2004 and continued thereafter to submit regular monthly applications.

29. On 10 August 2004 LOR sent HYL a further set of sub-contract documentation and, as it did in its 17 December 2003 letter, requested that it should be executed as a Deed and returned within seven days.

30. In response to those documents HYL said on 27 September 2004 that as not all "*step down*" matters had been dealt with they were still unable to sign the document. In the following months there was discussion between the parties on the "attendances" required for the M&E Works.

31. In relation to the warranties, on 8 October 2004 Mr Bravington of LOR wrote to Mr Page of HYL and, in order to advance the agreement of the warranties, suggested that a meeting between Pinsents, HYL and LOR was probably the best way of closing out the remaining issues. He wrote again on 2 December 2004 having received no substantive response.

32. In closing submissions, LOR laid great emphasis on a meeting which took place on 16 December 2004 between Mr Cheshire and Mr Pike of LOR and Mr Currie, Mr Tovey and Mr Sisson of HYL. Notes prepared by Mr Sisson relating to that meeting reveal little but a manuscript note in Mr Pike's diary notes that "Cov *sub signing – BEFORE XMAS*" indicating that it was intended that the sub-contract for the Coventry Project would be signed before Xmas.

33. On the following day, 17 December 2004, in a Project Manager's Report prepared by Mr Sisson the following was noted under item 16, Contract Document Status:

"*The 2no. contract issues are now resolved.*

Main Contractor attendances are now concluded.

[HYL] requested that the agreed programme be included within the contract documentation in lieu of a start date and period of time – [LOR] to respond.

Contract documents have been signed and returned from Head Office."

34. Mr Sisson also noted in a fax to Mr Pike and Mr Churchill of LOR on 21 December 2004: "*We…confirm that our valuation will be issued to you on 23.12.04 – as our agreed contract with you.*"

35. On 22 December 2004 HYL were in contact with Pinsent Masons (following the merger of Pinsents and Masons) in relation to the warranties. Mr Page of HYL spoke to Mr O'Carroll and offered a compromise which was a £5 million indemnity insurance cover and a £1.5 million consequential loss cap outside the £5 million insurance cover. He also proposed two assignments without consent but subject to notice. He wrote to LOR on the same day to inform LOR of this and said: "*As also advised earlier this week, the resolution of the warranty issues…may well have an impact on the relevant clause in the sub-contract concerning consequential losses. You will appreciate that the signing of the sub-contract will need all these outstanding matters cleared first.*"

36. There was then no substantive response by Pinsent Masons to HYL's proposal. On 28 February 2005 Mr Johnston, who had previously been working for Pinsents but had now been engaged by LOR as a Contractual Services Manager, emailed Mr O'Carroll at Pinsent Masons following an earlier telephone request for an update in relation to HYL's warranty. He added:

"*As I stated in the message I left last Thursday, we urgently need to sign up Haden's sub-contract. They have said they have not yet agreed the terms of their warranty and are using this as a reason not to enter into contract. I understand from colleagues dealing with the detail of those negotiations that there is one outstanding point regarding an overall cap on Haden's liability. I further understand that agreement is awaited from your client and the other beneficiaries. It may be that you are awaiting instructions?*"

37. Mr Page of HYL then wrote to LOR on 1 March 2005 to say that he had received no response from Mr O'Carroll since he had made the compromise proposal on 22 December 2004 and that he had tried to contact Mr O'Carroll without success. He asked LOR to say how it wanted HYL "*to proceed with this matter which is holding up completion of the sub-contract*".

38. Mr O'Carroll, now of Pinsent Masons, responded by email on 28 February 2005 to Mr Johnston to say that he was liaising with solicitors for the other interested parties and taking instructions from CNRL on HYL's current proposals and hoped to be in a position to provide responses by email "*during the course of tomorrow*".

39. Mr Johnston of LOR again contacted Mr O'Carroll on 21 March 2005 saying that it was a month since he had first contacted him and there had been no further response. He added "*As previously explained this delay is the sole reason for Haden not signing their sub-contract*".

40. There was no further response from Mr O'Carroll. On 14 April 2005 Mr Currie of HYL wrote to Mr Cheshire of LOR and said:

"*As you may know, we have been unable to conclude the sub-contract for this project. The principle issue (apart from the fact that the document Laing O'Rourke have issued does not yet fully reflect all the agreements made) is that of the appropriate level of the cap for consequential losses.*

At Laing O'Rourke's request, we made direct contact in December of last year with your legal representatives Pinsents and we made some without prejudice compromise proposals to try to resolve the matter.

Mr Chris O'Carroll of Pinsents has yet to respond to these proposals and we have been unable to make further contact with him despite leaving messages for him to call us back.

We wrote to Laing O'Rourke on 1 March 2005 asking for advice on how we should proceed but in the absence of a response I would request your assistance to move this matter to a mutually acceptable conclusion so that the sub-contract can be finalised and signed."

41. Mr Cheshire made a manuscript note on Mr Currie's letter. It was addressed to Mr Johnston and Mr Hall and said "*Please review/action. Need to get resolved asap.*" Mr Johnston emailed Mr O'Carroll seeking a response to his previous emails.

42. The next substantive correspondence came on 20 May 2005 when Mr Page of HYL wrote to Mr Bravington of LOR concerning the sub-contract documents which had been enclosed with the letter of 10 August 2004. He stated : "*As you know, there have been subsequent discussions and correspondence between us to try and resolve and agree outstanding issues on the documents. Whilst good progress has been made we believe that it is in both our companies' interests that the matters are closed out and the Sub-Contract duly signed and executed without further delay.*

With this objective, we set out below the necessary amendments that we believe need to be made to the documents, including for those matters already agreed between us."

43. In relation to the warranties he stated: "*As you are aware and at your instruction we have been in direct contact with your legal advisors, Pinsents to try to agree the appropriate cap on our Sub-Contract liability. After a number of discussions we have made a final proposal on the 22nd December 2004 to Pinsents. As they have not responded (despite several requests to them and yourselves) we must assume that our proposal is agreed and the following amendment is therefore required.*

Add new clause as follows:-

"8 In respect of Article 9 of the Main Contract, the Subcontractor's corresponding liability under such warranties shall be limited to £1,500,000.00…"

44. He also proposed that numbered documents 8 and 9, which were LOR's letters of 26 January 2004 and 18 February 2004 containing the suggestion that the figure in the Main Contract should be "*stepped down*" into the sub-contract, should be deleted.

45. He then concluded the letter: "*We look forward to your early agreement to the above but in line with our common objective to finalise these matters, we would advise that should we not hear from you to the contrary within the next seven days, we will amend the Sub-Contract accordingly and sign and execute it for return to yourselves.*"

46. On the copy of that letter received by LOR a manuscript note was added stating "*Meet to resolve issues by end of week 27/5.*" In an internal LOR note dated 23 May 2005 concerning the status of HYL on the project, prepared by Mr Hayes, the following was noted: "*SUB CONTRACT STATUS REPORT: Please note that their subcontract has yet to be agreed and potentially complex issues are still not clarified between the parties.*"

47. There was a meeting on 27 May 2005 at Tamworth between Mr Hall of LOR and Mr Currie of HYL at which Mr Hall put forward a without prejudice proposal for the resolution of issues with HYL both on the Project and also on a project for Selfridges in Birmingham and a ProCure 21 Project in Lichfield.

48. The suggestion in that proposal for the Coventry Arena project was that the sub-contract sum should be increased, a bonus should be provided for completion by 19 August 2005 and this included for all variations instructed or otherwise at 13 May 2005 and all loss and/or expense incurred up to 13 May 2005. It was proposed that: "*The subcontract documentation is to be signed by [HYL] in the form currently drafted by [LOR] with the only allowable amendment being the cap on liability which will be addressed in a supplemental letter confirming that the matter has not yet been concluded with the Employer.*"

49. After that meeting Mr Hall of LOR circulated internally a copy of the proposal which he had tabled at the meeting and he summarised the key issues coming out of the discussion. After dealing with the proposed dates for completion and the financial position, Mr Hall noted: "*I advised that we also required [HYL] to sign their subcontract as currently drafted with the exception of the liability point within the warranty and subcontract which would be reserved either by an additional clause or by a side agreement. He confirmed that this was the only point between us and that, whilst he would take advice, he did not see this as an issue.*"

50. On 31 May 2005 HYL responded to the proposal and stated "*In respect of the subcontract document we would refer you to our letter dated 20 May 2005 which deals with these issues in more detail.*"

51. By this stage Mr Paul Grammer had become involved on behalf of LOR. He had been asked to deal with commercial matters on the Project. In particular, on 19 May 2005 he had concluded an agreement with the Employer, CNRL, fixing a new completion date of 20 August 2005 and reaching a settlement on the final account and on extension of time under the Main Contract, taking into account matters which had occurred up to 13 May 2005. He had asked Mr Hayes, who had himself recently become involved in the Project, to prepare the status report dated 23 May 2005 referred to above.

52. There followed further correspondence and discussions in early June 2005, resulting from the proposal made on 27 May 2005 and relating to the three projects, including the Project. The discussions focussed on the proposed completion date and the financial proposal. Evidently the commercial imperative was for completion to take place to permit the football match to be played on 20 August 2005.

53. A meeting was then held on 14 June 2005 between Mr Grammer of LOR and Mr Currie, Mr Page and Mr Tovey of HYL. At the end of the meeting the notes prepared by HYL record that Mr Grammer commented on HYL's approach not to sign contracts; that Mr Currie stated that this was not the case; that warranties and outstanding issues were discussed and that Mr Grammer believed these issues could be resolved at project level. In a

manuscript note made in his diary relating to this meeting Mr Grammer noted that outstanding issues were "*Cap on liability. Payment terms. Structure of Numbered documents*".

54. Mr Grammer wrote to Mr Currie after that meeting and confirmed the way forward in terms of completion by 19 August 2005 and the resolution of the financial differences between the parties.

55. In an internal email dated 24 June 2005 Mr Bravington of LOR listed issues to be dealt with the following week. He referred to the HYL sub-contract. He said "*we haven't yet responded to their letter re signing sub-contract*". He referred to the fact that David Richards of LOR "*had a big issue*" on Room Data Sheets.

56. At an internal HYL meeting on 16 August 2005, there were two actions noted for Mr Page: "*Letter to LOR to summarise outstanding matters to conclude formation of Sub-Contract*" and "*Due to above "no contract" in place! May need to take advice – no need to progress immediately.*" The first action led to Mr Page of HYL writing to Mr Bravington of LOR on 18 August 2005. He referred to HYL's letter of 20 May 2005 and stated: "*Whilst the contents of the above letter remain valid, we would clarify the following…*". He then set out some proposed amendments to the Numbered Documents.

57. In the event, Practical Completion took place on 19 August 2005 and Coventry City played their first match in the stadium on 20 August 2005.

58. Disputes then arose between LOR and HYL as to the basis on which HYL should carry out work after Practical Completion when the Arena was being occupied and used. This led to a suspension of works by HYL on 23 September 2005 and to LOR saying that they would employ others to complete the work.

59. On 28 September 2005 HYL wrote to LOR in response to correspondence and said:

"*In the light of the contents of these letters and the increasingly belligerent tone of this and other recent correspondence concerning your approach to the further work you wish us to carry out and the valuation of and payment for work already done, we have felt constrained to seek legal advice. This has included leading counsel's advice that has unequivocally confirmed that there has never been any agreement between us on the terms of a subcontract or a letter of intent.*"

Thus we are under no obligation to continue with any works you require to be completed and we are entitled to a quantum meruit in relation to all the works carried out to date."

60. In early October 2005 there followed without prejudice discussions and correspondence which in the end led to the parties entering into the FSA on 31 October 2005 under the title "Agreement to carry out further services in respect of Project Arena Coventry". Under Clause 21 of the FSA there was a provision stating that the Agreement was without prejudice to the parties' contentions as to the existence of a sub-contract. There is a dispute as to the meaning of Clause 21 and that provision.

Witness Evidence

61. I heard evidence from a number of witnesses. HYL served witness statements and called evidence from Kevin Page who, as noted above, was involved in commercial and contractual matters on the Project; from Mark Sisson, the Project Manager and from Alex Currie, a Director of the Claimant who had specific responsibility for the Midlands & Southern Region which included the Coventry Project in May 2005.

62. LOR served witness statements and called evidence from Richard Pike, who acted as a Project Leader involved in the commercial and performance aspects of HYL's work and from Paul Grammer, the commercial director of Laing O'Rourke Construction Limited who, as stated above, had become involved in the Project in about May 2005. LOR also served witness statements from Paul Arneill who was Senior Commercial Manager for LOR's Midlands business until March 2004; from John Hayes who was Senior Commercial Manager from March 2004; from John Humpage who was involved as Senior Procurement Manager in 2003 and 2004 and from Phil Mauer who was involved in the project from June 2003 to December 2003 as Senior Estimator.

63. In this case the evidence in the witness statements and the oral evidence explored what had been said and done by representatives of the parties during the period from 2003 to 2005. The relevance of some of that evidence diminished as the scope of the issues narrowed. Evidently, the subjective views of whether the witnesses thought there was a sub-contract do not assist in determining whether, objectively, there was a sub-contract. Some of the witnesses had a limited involvement either in relation to the period of time or to the communications which passed between the parties. Generally, where the witnesses were trying to recall what happened or what was said at meetings then I consider they did their best to recall those matters accurately and truthfully. At times, though, some of the evidence bordered on submissions as to the existence of a sub-contract and I have therefore gained little assistance from such evidence.

64. The position in relation to the statements of Mr Arneill, Mr Hayes, Mr Humpage and Mr Mauer, who were not called, was discussed at the hearing. It was agreed that under CPR Pt 32.5 where a party puts in a witness statement but does not call that witness or put in the witness statement as hearsay evidence then the other party may put it in as hearsay evidence. Mr Roger Stewart QC, on behalf of LOR, did not seek to put in the witness statements of Mr Hayes, Mr Humpage and Mr Mauer, nor did Mr Martin Bowdery QC, on behalf of HYL and I have therefore not taken those statements into account. In relation to Mr Arneill's statement Mr Bowdery indicated that he wished to put it in as hearsay evidence. Accordingly, I have treated Mr Arneill's statement as being hearsay and accorded it more limited weight on that basis.

The Issues

65. As noted above, the parties have agreed a series of Issues which reflect the pleaded differences between them. I now turn to consider those Issues.

Issue 1: Was there a sub-contract concluded between the Parties for the M&E Works?

66. This case provides another example of an instance where the parties did not sign a sub-contract but where the sub-contractor proceeded with the works and the contractor paid sums by reference to the terms of a draft sub-contract. HYL asserts that there is no contract because all essential terms were not agreed; LOR asserts that a contract came into existence, although there was no executed contract, because all essential terms were agreed.

67. By the end of the hearing it had become apparent that there were four main issues relating to the existence of a sub-contract. The first issue related to the agreement of a limit of liability to be included in the warranties to be provided by HYL. LOR accepts that the relevant provision in the warranties was not agreed but submits that such agreement is not essential to the existence of a sub-contract. HYL submits that it is essential. The second related to the agreement of a limit on consequential losses claimable by LOR from HYL under the sub-contract. In relation to this limit, LOR accepts that the agreement of such a limit was essential to the agreement of a sub-contract but contends that the parties agreed a limit of £1.5m. HYL submits that there was no such agreement. The third issue concerns HYL's submission that there was no signed and executed form of sub-contract and that such an executed form of sub-contract was necessary for an agreement to come into existence. LOR does not accept this. The fourth issue raised by HYL relates to the scope of the M&E Works and whether the work shown on Room Data Sheets was agreed.

Contract Formation: the law

68. I first consider the principles of law to be applied in cases where no contract has been signed and where negotiations have continued in correspondence and at meetings during the course of the project. In such cases the courts have had to analyse what passes between the parties to see whether, objectively, they have come to an agreement on all essential terms.

69. In ***Pagnan S.P.A. v Feed Products Limited*** [1987] 2 Lloyd's Rep 601, the parties negotiated for the sale and purchase of feed pellets by exchange of telexes and discussions. The court had to decide whether objectively there was a concluded agreement by considering what the parties said and did. At first instance, Bingham J held that, although certain terms of economic significance to the parties were not agreed, neither party intended agreement of those terms to be a precondition to a concluded agreement. Rather he held that the parties regarded those terms as relatively minor details which could be sorted out without difficulty once a bargain was struck. Thus he decided that the parties did mutually intend to bind themselves on agreed terms, leaving certain subsidiary and legally inessential terms to be settled later.

70. In considering and upholding those conclusions on appeal, Lloyd LJ summarised the principles of law to be derived from authorities as follows at 619:

> "*(1) In order to determine whether a contract has been concluded in the course of correspondence, one must first look to the correspondence as a whole.*
>
> *(2) Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that contract shall not become binding until some further condition has been fulfilled. That is the ordinary "subject to contract" case.*
>
> *(3) Alternatively, they may intend that the contract shall not become binding until some further term or terms have been agreed.*
>
> *(4) Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled.*
>
> *(5) If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty*
>
> *(6) It is sometimes said that the parties must agree on the essential terms and it is only matters of detail which can be left over. This may be misleading since the word "essential" in that context is ambiguous. If by "essential" one means a term without which the contract cannot be enforced then the statement is true: the law cannot enforce an incomplete contract. If by "essential" one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by "essential" one means only a term which the Court regards as important as opposed to a term which the Court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound and if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the Judge "the master of their contractual fate". Of course the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when the parties enter into so-called "heads of agreement" ."*

71. In ***G Percy Trentham Ltd v. Archital Luxfer*** [1993] 1 Lloyd's Rep 25, there was a dispute as to the existence of a contract which had been fully performed. The contention that there was no contract arose in response to subsequent claims for delays and defects. Steyn LJ described the negotiation process as follows at 26:

"*There was no orderly negotiation of terms. Rather the picture is one of the parties, jockeying for advantage, inching towards finalisation of the transaction. The case bears some superficial resemblance to cases that have become known as "battle of the forms" cases where each party seeks to impose his standard conditions on the other in correspondence without there ever being any express resolution of that issue. In such cases it is usually common ground that there is a contract but the issue is what set of standard conditions, if any, is applicable. Here the issue is one of contract formation. Moreover, the present case is different in the sense that Trentham's case was that the sub-contracts came into existence not simply by an exchange of correspondence but partly by reason of written exchanges, partly by oral discussions and partly by performance of the transactions.*"

72. He then considered the principles to be applied at 27:

"*It seems to me that four matters are of importance. The first is the fact that English law generally adopts an objective theory of contract formation. That means that in practice our law generally ignores the subjective expectations and the unexpressed mental reservations of the parties. Instead the governing criterion is the reasonable expectations of honest men and in the present case that means that the yardstick is the reasonable expectations of sensible businessmen. Secondly, it is true that the coincidence of offer and acceptance will in the vast majority of cases represent the mechanism of contract formation. It is so in the case of a contract alleged to have been made by an exchange of correspondence. But it is not necessarily so in the case of a contract alleged to have come into existence during and as a result of performance. See* ***Brogden v. Metropolitan Railway*** *(1877) 2 A.C. 666;* ***New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite & Co. Ltd.*** *[1974] 1 Lloyd's Rep. 534 at p. 539, col. 1; [1975] A.C. 154 at p. 167 D-E;* ***Gibson v. Manchester City Council*** *[1979] 1 W.L.R. 294. The third matter is the impact of the fact that the transaction is executed rather than executory. It is a consideration of the first importance on a number of levels. See* ***British Bank for Foreign Trade Ltd. v. Novinex*** *[1949] 1 K.B. 628, at p. 630. The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential. In this case fully executed transactions are under consideration. Clearly, similar considerations may sometimes be relevant in partly executed trans actions. Fourthly, if a contract only comes into existence during and as a result of performance of the transaction it will frequently be possible to hold that the contract impliedly and retrospectively covers pre-contractual performance. See* ***Trollope & Colls Ltd. v. Atomic Power Construction Ltd.,*** *[1963] 1 W.L.R. 333.*"

73. HYL relies on the summary at para 2-017 of ***Keating on Construction Contracts (8th Edition)*** where it is stated:

"*It is sometimes difficult to determine whether a concluded contract has come into existence when there have been lengthy negotiations between the parties but no formal contract has ever been signed. It is suggested that a useful approach is to ask whether the following can be answered in the affirmative:*

(a) in the relevant period of negotiation, did the parties intend to contract?

(b) at the time when they are alleged to have contracted, had they agreed with sufficient certainty upon the terms which they then regarded as being required in order that a contract should come into existence?

(c) did those terms include all the terms which even though the parties did not realise it, were in fact essential to be agreed if the contract was to be legally enforceable and commercially workable?

(d) was there a sufficient indication of acceptance by the offeree of the offer as then made complying with any stipulation in the offer itself as to the manner of acceptance?

On such an approach the court's task is to review what the parties said and did and from that material to infer whether the parties' objective intentions as expressed to each other were to enter into a mutually binding contract."

74. I consider that the summary in this passage accurately reflects the approach set out in the authorities. In this case it is evident from the documents and the oral evidence that the parties intended to create legal relations. Further, subject to the question raised in relation to the Room Data Sheets, which might affect the scope of the work, this is not a case where the matters in dispute were, although the parties did not realise it, in fact essential for the contract to be legally enforceable and commercially workable. The main issues are therefore:

(1) Did the parties regard agreement of the terms of the warranties as being essential in order for a contract to come into existence?

(2) Did LOR accept by conduct any offer made by HYL as to the limit of consequential losses under the sub-contract, equivalent to Clause 2.5.3 of the Main Contract?

(3) Was there sufficient indication of acceptance, complying with any stipulation as to the manner of acceptance?

(4) Was the scope of work in the Room Data Sheets agreed?

Was the agreement of the warranties essential?

75. The provision of warranties to third parties is now commonplace within construction projects. Building owners, tenants and funders wish to have the comfort of a binding contract with the ultimate designers, contractors or sub-contractors so as to avoid the uncertainty implicit in establishing a common law duty of care.

76. In this case there were provisions as to warranties in both sets of draft sub-contract documents and in the Main Contract. In the draft sub-contract sent by LOR to HYL on 17 December 2003 and in the subsequent version of 10 August 2004 there was a provision at Clause 19 of the Addendum to the Appendix to DOM/1 that:

"*The Sub-Contractor shall complete and return to the Contractor following the execution of the Sub-Contract, the Warranty Agreement(s) in the form set out in the document(s) attached hereto. The Contractor shall not be liable to*

make any payment under this Sub-Contract until the Sub-Contractor has complied with this provision. Further, and without prejudice to any other rights and remedies which the Contractor may possess, the Contractor shall be entitled at any time to determine the employment of Sub-Contractor under the Sub-Contract in the event that the Sub-Contractor does not procure and deliver to the Contractor the aforesaid Warranty Agreement."

77. In the version of the draft sub-contract sent to HYL on 17 May 2004 and 10 August 2004, there was also reference to Articles 9.2, 9.3 and 12A of the Main Contract.

78. Article 9.2 provided that: "*The Contractor shall within 28 days (or within a further period of 28 days where the Contractor has following a request from the relevant Sub-Consultant or specified design sub-contractor requested in writing to the Employer within such initial 28 day period that specified reasonable amendment(s) be made to the relevant form of collateral warranty set out in Appendix C of the Employer's Requirements) of a written request by the Employer to do so procure and deliver to the Employer deeds of collateral warranty in the respective forms set out in Appendix C of the Employer's Requirements (subject to such reasonable amendments as are approved by the Employer and the relevant beneficiary of the collateral warranty such approval not to be unreasonably withheld or delayed) from any Sub-Consultant engaged by the Contractor in connection with the design of the Works and any specified design sub-contractors listed in Article 9.3 in favour of…*".

79. Article 9.2 then identified the beneficiaries and Article 9.3 included the sub-contractors responsible for Mechanical and Electrical Installations as "specified design sub-contractors" under Article 9.2. Article 12A then referred to the Employer's right to deduct payment if LOR failed to deliver warranties to CNRL.

80. However, although Volume 2 of the Employer's Requirements contains at Appendix C a coversheet for a section containing "*Warranty Agreements*", the executed version of the Main Contract has a line through the coversheet with the words "*not used*". Equally, in Clause 19 of the Addendum to the draft sub-contract although there is a reference to the form of warranty being in the document attached, there was no such document.

81. The draft sub-contract documents therefore did not include a form of warranty and this, at first sight, would tend to indicate that the parties did not treat the agreement of the terms of the warranty as being essential to the existence of a sub-contract. Indeed even where there is a standard form of warranty attached, as the provisions in this case show, those terms are not immutable. Article 9.2 of the Main Contract provided for sub-contractors such as HYL to be able to request amendments to be made to the relevant form of collateral warranty so that the warranty was to be "*subject to such reasonable amendments as are approved by the Employer and the relevant beneficiary of the collateral warranty such approval not to be unreasonably withheld or delayed*". Again this flexibility would tend to suggest that the precise terms of the warranty would be unlikely to be essential to the existence of a sub-contract. As Lloyd LJ said in ***Pagnan*** at 619: "*there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later*" so that such matters will be treated as not being essential to the formation of the contract.

82. If matters had rested with the terms of the draft sub-contract then it would have been difficult for HYL to assert that the terms of the warranties were essential to the formation of the sub-contract. The position however was different because the form and terms of the warranties were dealt with in correspondence by LOR, HYL and Pinsents, acting on behalf of CNRL from November 2003. The question is therefore whether in the light of the provisions in the draft sub-contract documents and, more particularly, the communications between the parties, the term of the warranties as to the limit on consequential or aggregate loss was regarded as essential to the formation of the sub-contract.

83. As Bingham J said in ***Pagnan*** at 611: "*Where the parties have not reached agreement on terms which they regard as essential to a binding agreement, it naturally follows that there can be no binding agreement until they do agree on those terms: see* ***Rossiter v. Miller,*** *(1878) 3 App. Cas. 1124 at p. 1151 per Lord Blackburn. But just as it is open to parties by their words and conduct to make clear that they do not intend to be bound until certain terms are agreed, even if those terms (objectively viewed) are of relatively minor significance, the converse is also true. The parties may by their words and conduct make it clear that they do intend to be bound, even though there are other terms yet to be agreed, even terms which may often or usually be agreed before a binding contract is made: see* ***Love and Stewart*** *per Lord Loreburn L.C. at p. 476.*"

84. In this case, it is accepted by LOR that agreement of the terms of the limit of liability for consequential losses under the sub-contract, equivalent to Clause 2.5.3 of the Main Contract, was essential for there to be a binding agreement. It submits, though, that the position is different in relation to the agreement of a limit in relation to the warranties. LOR points out that, as the evidence showed, it is common for parties to enter into contracts before the terms of the warranties are agreed. LOR submits that the following matters show that objectively the parties did not regard the terms of the warranties as being essential to the formation of a contract:
    (1) HYL had made it plain in November 2003 that the provision of the warranties should not be linked to payment or termination provisions.
    (2) HYL could not suffer any commercial detriment if the terms of the warranties were not agreed but were "*to be agreed*" as warranties would not be provided if they were not agreed. The terms could not therefore be essential.
    (3) LOR's position was that they wanted the sub-contract finalised which was more important than the agreement of warranties. The warranties were important for LOR because it had already agreed to provide them under the Main Contract but they were not regarded as being essential to the formation of the sub-contract.

(4) LOR sought to have the sub-contract signed even when the warranties were not agreed indicating objectively that the warranties were not regarded as essential.

85. LOR submits that, as set out by Steyn LJ in ***Trentham*** at 27 "*the fact that the transaction is executed … may make it possible to treat a matter not finalised in negotiations as inessential.*" LOR submits that the parties in this case were able to carry out the works without agreement of the terms of the warranty.

86. HYL submits that this was not a case where the parties approached the question of the limit on consequential losses under the sub-contract separately from the question of the question of limits under the warranties. Whilst HYL accepts that it would have been possible for the parties to treat the two matters separately, it submits that they did not do so. Rather, HYL submits that the exchanges between the parties show that the agreement of the limit of liability under the warranties was essential.

87. I consider that HYL is correct in its submission and that the agreement of the limit of liability under the warranties was essential to the formation of a contract between HYL and LOR. First, the parties approached the agreement of the term as to consequential loss under the sub-contract and the limit under the warranties as being inextricably linked. Thus, because the limit under the sub-contract was essential, as LOR accepts, it is difficult to make a distinction between the terms of the sub-contract and the terms of the warranties in that respect. Secondly, as the evidence shows, the parties accepted that there could be no binding contract until the terms of the warranties were agreed. Thus they in fact treated the agreement of the terms of the warranties as essential.

88. I shall deal with these related matters below.

The link between the limit in the warranties and the limit in the sub-contract

89. As the evidence set out below shows, the parties approached the agreement of the term as to consequential loss under the sub-contract and the limit under the warranties as being inextricably linked. There was no suggestion from February 2004 onwards that there could be a separate agreement of the consequential loss under the sub-contract and the limit under the warranties.

90. The question of liability for consequential losses first arose after receipt of the Main Contract in December 2003 incorporating Clause 2.5.3 and the limit of £7,500,000. At the meeting on 19 January 2004 between Mr Page and Mr Arneill the issue was how that limit would be "stepped down" into the sub-contract. However, at the same time, in relation to warranties, HYL stated that it would require the limit of maximum liability to be agreed. There was therefore a link between the issues from this early stage.

91. On 26 January 2004, LOR wrote to HYL to say that the figure of £7.5 million in the Main Contract would be "*stepped down*" into the sub-contract and that, in relation to warranties, the aggregate liability would need to be discussed further. Again the two were linked. In response, on 16 February 2004, HYL proposed a figure of £1.5 million as a limit on their liability to LOR for consequential loss under the sub-contract.

92. On 1 March 2004 LOR wrote to HYL to say that it believed that the warranties were agreed "*with the only exception being agreement of the level of consequential losses*" and identifying one of the outstanding areas of debate to be "*Clause 2.5.3 level of consequential losses plus similar item in warranties*" again linking the two.

93. On 12 March 2004 LOR raised with Pinsents HYL's request that its contractual losses should be restricted to £1.5 million and that this would apply both to the sub-contract and the warranties. The discussion then concentrated on agreeing that figure in relation to the warranties. By the time Mr Arneill left the Project the indications were that, as set out in Mr Arneill's letter of 17 March 2004, CNRL and the other beneficiaries would require the limit to be at the level of £5m to match the PI insurance cover.

94. When Mr Hall took over from Mr Arneill in April 2004, he passed on the revised position of HYL which, as he set out in his letter to Pinsents of 23 April 2004, was the inclusion in both the warranty and the sub-contract of "*an aggregated cap on liability for consequential loss (2.5.3 type losses and aggregated consequential losses under the warranty) of £5m in lieu of the £1.5m previously offered*". This, too, linked the limit in the sub-contract and in the warranties.

95. The sub-contract documentation sent to HYL on 10 August 2004 included Numbered Documents 8 and 9, the effect of which was to step down the £7.5 million figure into the sub-contract. HYL's response of 27 September 2004 was that they were still unable to sign the document.

96. From 8 October 2004 Mr Bravington of LOR tried to arrange a meeting between Pinsents, HYL and LOR and wrote again to HYL on 2 December 2004 having received no substantive response.

97. In a letter dated 15 December 2004 Mr Bravington proposed that matters concerning the warranties should be resolved between HYL directly with Mr O'Carroll or alternatively by way of a meeting as he had previously proposed. He also said that the outstanding attendance matters had been finalised and asked for HYL to sign and return the sub-contract documents.

98. At the meeting of 16 December 2004, which I deal with below, the parties discussed how to proceed with the warranties and on the basis that the warranties were resolved, it was foreseen, at least by Mr Pike, that the sub-contract would be signed by Christmas. There was no further discussion of the warranties and the limit under the sub-contract at that meeting. However, on 22 December 2004 Mr Page spoke to Mr O'Carroll and offered a compromise which was a £5 million indemnity insurance cover and a £1.5 million consequential loss cap outside the £5 million insurance cover. He wrote to LOR on the same day and said: "*As also advised earlier this week, the*

resolution of the warranty issues…may well have an impact on the relevant clause in the sub-contract concerning consequential losses. You will appreciate that the signing of the sub-contract will need all these outstanding matters cleared first." This continued the link between the limit in the sub-contract and that in the warranties.

99. When Mr Johnston contacted Mr O'Carroll on 28 February 2005 he said that HYL "*have said they have not yet agreed the terms of their warranty and are using this as a reason not to enter into contract*." He evidently understood the link. This was also reflected in Mr Page's letter to LOR on 1 March 2005 when he asked LOR how it wanted HYL to proceed with the limit under the warranties "*which is holding up completion of the sub-contract*".

100. The matter had not proceeded further when Mr Currie wrote to Mr Cheshire on 14 April 2005 and said that the principal reason why HYL had been unable to conclude the sub-contract was that of the appropriate level of the cap for consequential losses which was held up by the lack of response from the beneficiaries through Pinsent Masons.

101. In his letter of 20 May 2005 Mr Page raised with Mr Bravington the attempts to agree the appropriate cap on HYL's Sub-contract liability in relation to warranties and also the need for Numbered Documents 8 and 9 to be deleted. The two matters were still being dealt with together.

102. The proposal at the meeting on 27 May 2005 was for the August 2004 agreement to be signed "*with the only allowable amendment being the cap on liability which will be addressed in a supplemental letter confirming that the matter has not yet been concluded with the Employer*." That, again, recognised the link between the limit in the sub-contract and the limit in the warranties which was a matter for agreement by the Employer.

103. At the meeting held on 14 June 2005 between Mr Grammer of LOR and Mr Currie, Mr Page and Mr Tovey of HYL, the note prepared by Mr Grammer referred to "*Cap on liability*." Mr Grammer confirmed in evidence, that he understood that the limit under the sub-contract and the limit under the warranties were linked. There was no change in the position from that date onwards.

104. I consider that, as the evidence shows, Mr Grammer was right when he said that, because of the potential linkage between the warranty and the sub-contract, HYL were not prepared to agree one without the other. Rather the agreement had to deal with both points. Therefore, just as LOR accepts that agreement on the limit of consequential loss under the sub-contract was essential so, in my judgment, was agreement on the linked limit on liability under the terms of the warranties essential to the formation of a sub-contract. Objectively, the communications between the parties amply demonstrate that.

The link between the warranties and the sub-contract

105. The evidence also shows that the parties accepted that there could be no binding sub-contract until the terms of the warranty were agreed.

106. As set out above, in the period between January 2004 and December 2004 the parties were attempting to agree the limit of consequential losses in both the sub-contract and the warranties and to do this needed to negotiate through Pinsents, the limit of such losses in the warranties.

107. At the meeting of 16 December 2004, which I deal with below, the parties discussed how to proceed with the warranties and on the basis that the warranties were resolved, it was foreseen, at least by Mr Pike, that the sub-contract would be signed by Christmas. It is evident that there was a link between the discussion on the warranties and the ability to sign the sub-contract.

108. When Mr Page wrote to LOR on 22 December 2004, after making the compromise offer to Mr O'Carroll, he said "*As also advised earlier this week, the resolution of the warranty issues…may well have an impact on the relevant clause in the sub-contract concerning consequential losses. You will appreciate that the signing of the sub-contract will need all these outstanding matters cleared first*." From that it is clear that until the limit of loss under the warranties had been resolved the sub-contract could not be concluded because of the potential impact of the term in the warranties on the clause in the sub-contract concerning consequential losses. As set out below, the reference to the "signing" of the sub-contract reflected the fact that the way in which the parties envisaged that the sub-contract would be concluded was by a signed document.

109. As set out in his email of 28 February 2005 to Mr O'Carroll, Mr Johnston clearly understood HYL's position that the agreement of the sub-contract depended on the terms of the warranties when he said "*we urgently need to sign up Haden's sub-contract. They have said they have not yet agreed the terms of their warranty and are using this as a reason not to enter into contract*."

110. This is further reflected in Mr Page's letter to LOR of 1 March 2005 where he chases agreement of the limit of the warranties and asks how LOR wanted HYL "*to proceed with this matter which is holding up completion of the sub-contract*"

111. Mr Currie's letter of 14 April 2005 to Mr Cheshire also repeated this. He said "*As you may know, we have been unable to conclude the sub-contract for this project. The principle issue … is that of the appropriate level of the cap for consequential losses*." He then referred to the position as between LOR, HYL and Pinsent Masons and said "*I would request your assistance to move this matter to a mutually acceptable conclusion so that the sub-contract can be finalised and signed*." This makes it clear that the sub-contract could not be finalised until the question of the warranties was resolved.

112. Mr Page's letter of 20 May 2005 made the same point when he said in relation to the discussions "*Whilst good progress has been made we believe that it is in both our companies' interests that the matters are closed out and the*

Sub-Contract duly signed and executed without further delay." He referred to the warranties and proposed an amendment to the sub-contract. Importantly, when putting LOR on notice as to "deemed acceptance" he added "*should we not hear from you to the contrary within the next seven days, we will amend the Sub-Contract accordingly and sign and execute it for return to yourselves*."

113. The proposal put forward on 27 May 2005 also reflects the understanding that the agreement of the warranty was required for the finalisation of the sub-contract. LOR accepted that the terms of the cap on liability in the sub-contract could not be resolved until the matter had been concluded in relation to the warranties. The proposal to enter into the sub-contract without such agreement was, as set out above, not accepted by HYL. Objectively this demonstrates, in my judgment, that the sub-contract depended on the term being agreed under the warranties.

114. There was nothing at the meeting on 14 June 2005 with Mr Grammer which changed that position and when Mr Page wrote to Mr Bravington on 18 August 2005 he repeated the position set out in HYL's letter of 20 May 2005.

115. On that evidence, I conclude that objectively the parties treated the agreement of the limit of consequential losses as being essential to the formation of the sub-contract. As Lloyd LJ said in Pagnan, the parties "*may intend that the contract shall not become binding until some further term or terms have been agreed*." In my judgment that is what the parties intended in this case.

116. It follows that both because of the link between the limits under the warranties and the limits under the sub-contract and also the fact that the parties treated agreement of the limit in the warranties as essential to the formation of the sub-contract, that there could be no concluded sub-contract until the limit in the warranties had been agreed. As LOR accepts and as the evidence shows, there never was any agreement of the limit in the warranties. Therefore, on this basis, I conclude that there was no binding sub-contract concluded between the parties.

Did LOR accept HYL's offered limit of consequential losses

117. As I have said, LOR accepts that the limit of consequential losses under the sub-contract was essential to the formation of the sub-contract. I now turn to consider whether that limit was agreed. This raises two questions. First, what offer was made by HYL? Secondly, was that offer accepted?

118. LOR contends that HYL made an offer of a limit on consequential losses of £1.5 million which was accepted by conduct. HYL contends that, although it offered a limit of £1.5 million, that was never accepted by LOR.

119. LOR submits that HYL's consistent position was that there should be a limit on consequential losses of £1.5 million and at no time did LOR express any objection to that limit. Rather, LOR submits that the documents show that HYL understood that limit to have been accepted. LOR submits that it was content for HYL to deal directly with Pinsents and this indicates that LOR had no objection to the limit.

120. LOR relies particularly on the evidence of the meeting on 16 December 2004 as only being consistent with LOR having accepted HYL's position and submits that the contemporaneous documentation indicates that there was a concluded agreement. LOR states that any concerns related to signing the agreement rather than agreeing its terms and submits that, as HYL said on 20 May 2005, LOR would be deemed to accept the position.

121. HYL submits that the parties continued to negotiate the terms of the limit even after the date when LOR contends that there was an agreement. Further, HYL submits that there was no offer made by HYL which was accepted by the unequivocal, clear and consistent conduct of LOR.

122. In order for LOR to establish that there has been an acceptance by conduct, it has to be clear that LOR acted with the intention of accepting the offer. In ***Yorkshire Water Services Limited v. Taylor Woodrow Construction Northern Limited and Others*** [2003] EWHC 1114 (TCC) Forbes J decided that on the facts of that case a limitation of liability had been accepted by conduct. In doing so he adopted the principles stated by Black J in ***Day Morris Associates v. Voyce and Another*** [2003] EWCA Civ 189 where she said:

> "*35. A contractual acceptance has to be a final and unqualified expression of assent to the terms of the offer. Conduct will only amount to an acceptance if it is clear that the offeree did the act in question with the intention of accepting the offer. But the test as to whether there has been such agreement is an objective one. It follows that conduct which demonstrates an apparent intention to accept can be sufficient, despite uncommunicated mental reservations on the part of the offeree. However, it seems to me that for that situation to arise, the conduct in question must be clearly referable to the offer and, in the absence of knowledge of the offeree's reservations, not reasonably capable of being interpreted as anything other than acceptance ….*"

123. I also respectfully adopt that passage. In my judgment, in this case it must be shown that LOR did an act which was clearly referable to an offer by HYL and with the intention to accept that offer. On an analysis of the facts in this case I do not consider that there was any acceptance by LOR by conduct of any offer made by HYL for a £1.5 million limit on consequential losses.

124. The first time when a figure of £1.5 million was offered by HYL was on 16 February 2004 when HYL put forward that figure in response to LOR's position that the figure of £7.5 million in the Main Contract had to be stepped down into the sub-contract. LOR's reply of 18 February 2004 repeated that the figure of £7.5 million in the Main Contract would be "stepped down" into the sub-contract and, in doing so, evidently did not accept HYL's offer. This is consistent with LOR's statement in the letter of 1 March 2004 that one of the outstanding areas of debate was "*Clause 2.5.3 level of consequential losses…*".

125. HYL was still seeking a limit of £1.5 million under both the sub-contract and the warranties and concentration then shifted onto seeing whether the limit could be agreed in relation to the warranties. This led to Mr Arneill's suggestion on 12 March 2004 of a possible way forward by reference to the PI insurance cover. Mr Page's response proposed "*HYI PI insurance cover confirmed and agreed at £5m HYL maximum aggregate liability for consequential losses (loss of use etc) is agreed at £1.5m.*"

126. Mr Arneill's reply of 17 March 2004 stated that the reference to consequential losses being agreed was "*currently not correct*". This was a reference to the position under both the sub-contract and the warranties. It made clear that the figure of £1.5 million had not been agreed.

127. In April 2004 the matter was taken up by Mr Hall who reported to Pinsents on 23 April on HYL's revised offer for the inclusion in both the warranty and the sub-contract of "*an aggregated cap on liability for consequential loss (2.5.3 type losses and aggregated consequential losses under the warranty) of £5m in lieu of the £1.5m previously offered*".

128. In July 2004 HYL commenced work on site and they had, prior to that, been carrying out design and other preparations. Their first application for payment was on 28 April 2004 and they continued to do at regular monthly intervals. By that time the limit being offered by HYL was not £1.5million but £5million and there is nothing to show that any conduct by LOR in commencing work on site can come within the requirement that it was conduct which demonstrates an apparent intention to accept a particular limit of consequential losses.

129. When LOR sent HYL the further set of sub-contract documentation on 10 August 2004, they included at Numbered Documents 8 and 9 the LOR faxes of 26 January 2004 and 18 February 2004 which contained a statement of LOR's position that the figure of £7.5 million was to be "*stepped down*" and incorporated as the limit in the sub-contract.

130. LOR relies on the meeting of 16 December 2004. That meeting was a six-monthly review meeting between Mr Cheshire of LOR and Mr Currie of HYL. There was no evidence from Mr Cheshire but I heard from Mr Currie and also from Mr Pike of LOR and Mr Sisson of HYL who also attended the meeting. Mr Pike's evidence in his witness statement was based on his diary note. He said that it was intended to sign the sub-contract before Christmas and, with the attendances issue having been resolved there were no issues outstanding save that HYL were to resolve the warranty terms with Pinsent Masons. In his oral evidence he accepted that the outstanding matters on the warranties would need to be closed out before a sub-contract was signed. His evidence overall was to the effect that both parties were working as if a contract were in place, subject to the outstanding issues being resolved.

131. Mr Currie accepted that Mr Pike's note seemed to suggest that the issue of both the warranties and signing the sub-contract were raised at the meeting on 16 December but he did not recall a discussion on the sub-contract at the meeting. Mr Sisson was aware that by this time two issues concerning fire officer's requirements and attendances had been resolved but said that Mr Page was dealing with the sub-contract conditions. He accepted that he must have thought that matters had been agreed at the meeting on 16 December to make the comment in his report of 17 December 2004 about the sub-contract being signed but said that he was wrong about it.

132. I consider that on the evidence in the documents and given by the witnesses there was a brief discussion of the question of signing the sub-contract at the meeting on 16 December 2004. The fact that the two issues of fire officer's requirements and attendances had been resolved meant that from the perspective of Mr Sisson and Mr Pike the path was clear to conclude the contract. The remaining issue in relation to the warranties was to be resolved, as Mr Bravington had suggested in his letter of 15 December 2004 either by a meeting or a direct approach from HYL to Pinsent Masons. On the basis that this would soon be resolved, it was then foreseen, at least by Mr Pike, that the sub-contract might be signed before Christmas. I consider that this represents the extent to which matters were discussed on 16 December 2004. I do not accept that anything was said at the meeting on 16 December 2004 to indicate that all essential terms had been agreed or that anything by way of conduct can be relied on as accepting any limit of liability under the sub-contract.

133. That analysis of the position is also consistent with what happened subsequently. Mr Page made a revised offer to Mr O'Carroll on 22 December 2004 in relation to the warranties. It was for a £1.5 million consequential loss cap outside the £5 million insurance cover. As Mr Page pointed out to LOR in his letter to Mr Bravington of 22 December 2004, the resolution of the warranty issues might well have an impact on the relevant clause in the sub-contract concerning consequential losses. That statement is inconsistent with there being an existing agreement of a sub-contract limit of £1.5 million and LOR did not dissent from that statement.

134. The matter remained in abeyance awaiting a response from Mr O'Carroll to the HYL compromise proposal of 22 December 2004. It was on 14 April 2005 that Mr Currie wrote to Mr Cheshire stating that LOR and HYL had been unable to conclude the sub-contract, the principal issue being the appropriate level of the cap for consequential losses. Nothing of substance then happened until Mr Page wrote to Mr Bravington on 20 May 2005 proposing that Numbered Documents 8 and 9, which proposed a £7.5m limit being stepped down, should be deleted.

135. Whilst that letter stated that "*should we not hear from you to the contrary within the next seven days, we will amend the Sub-Contract accordingly and sign and execute it for return to yourselves*", that did not happen and instead on 27 May 2005 LOR put forward a different proposal that the Sub-contract documentation should be signed by HYL as drafted on 10 August 2004 with the cap on liability being addressed in a supplemental letter noting that the matter has not yet been concluded with the Employer. There was certainly no acceptance of the terms of HYL's letter of 20 May 2005.

136. I accept Mr Currie's evidence as to what happened at the meeting on 27 May 2005 which differs from what is recorded in Mr Hall's internal note. Whilst it is evident that the limit of liability point within the warranty and Sub-contract was the only substantive issue between the parties, I accept Mr Currie's evidence that he did not say that "*he did not see this as an issue*" as recorded by Mr Hall in that internal note. Mr Hall did not provide a witness statement or give evidence before me. The comment recorded in Mr Hall's note is also inconsistent with HYL's further response on 31 May 2005 when, in respect of the Sub-contract document, it referred again to the letter of 20 May 2005.

137. Mr Grammer's involvement did not take things further. He was understandably concerned to achieve the new completion date of 20 August 2005 and reach a settlement with HYL to match the settlement he had achieved with CNRL under the Main Contract. It is clear that, as recorded by Mr Grammer in his note after the meeting on 14 June 2005 with Mr Currie, Mr Page and Mr Tovey, that the "*cap on liability*" and the "*structure of numbered documents*" were still outstanding. This negatives any agreement on these matters by that stage.

138. That remained the position whilst the parties worked to achieve the 20 August 2005 completion date. Again on 18 August 2005 Mr Page wrote to Mr Bravington referring to HYL's letter of 20 May 2005 as remaining valid, setting out some further proposed amendments to the Numbered Documents, indicating again that the limit of liability under the sub-contract had not been concluded.

139. On that basis, I do not consider that any offer of a sub-contract limit of £1.5 million or any other sum was accepted by LOR by conduct. In my judgment LOR has not established that it did an act which was clearly referable to a limit of £1.5m (or any other sum) offered by HYL and with the intention of accepting that offer. As LOR properly accepts this limit or cap on liability was a term which the parties regarded as essential to the formation of a contract. It therefore follows that the parties' failure to agree upon this essential term means that there was no concluded sub-contract.

Was there any stipulation as to the manner of formation of the sub-contract?

140. As Lloyd LJ said in ***Pagnan*** at 619: "*Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that contract shall not become binding until some further condition has been fulfilled.*"

141. In ***Jarvis Interiors Limited v. Galliard Homes Limited*** [2000] BLR 33 the Court of Appeal had to consider a case where negotiations had continued after Jarvis had commenced work under a letter of intent which remained effective in the event that the parties did not enter into a formal contract. The draft contract documents included a provision at Clause 4.1.3 of the Preliminaries that the "*Contract will be executed as a deed under seal.*" In giving a judgment on this issue with which the other members of the Court of Appeal agreed, Lindsay J held that the wording of the letter of intent and Clause 4.1.3 supported the judge's conclusion at first instance that "*applying the reasonable expectations of sensible businessmen, such a contract would have been subject to a contract to be executed under seal.*"

142. At [46] Lindsay J continued: "*As for a more legalistic analysis, the use of the definite article in preliminary 4.1.3 in context suggests, in my judgment, a clear requirement by Galliard, unless the contrary was either expressly agreed between the parties or arose between them by necessary implication, that whatever, if any, contract emerged in consequence of the invitation which the preliminaries represented, it would have to be under seal and therefore also that the option afforded by the articles (of execution under hand) was excluded. A person, such as Jarvis, dealing with Galliard on the basis of those preliminaries would, in my view, be entitled to proceed upon the footing that, unless some antecedent agreement was expressly made or could be inferred by necessary implication, then there would be no contract between it and Galliard on the basis of the preliminaries unless and until there was a deed between them. The effect was thus in that respect akin to the effect of the familiar phrase 'subject to contract' save that it was more similar to the less familiar 'subject to formal contract'.*"

143. In this case, therefore, the question must be whether on the basis of the documents and the communications between the parties, the parties proceeded on the footing that there would be no contract unless and until there was a formal contract.

144. I therefore turn to consider the effect of the relevant documents and communications. Matters commenced when LOR first sent HYL a proposed sub-contract on 17 December 2003, it requested HYL to execute the sub-contract as a deed and return two copies. LOR therefore envisaged that the sub-contract would be in the form of an executed document. The same request was made when the revised documents were sent through to HYL on 10 August 2004.

145. Mr Page in his letter to LOR on 22 December 2004 stated: "*You will appreciate that the signing of the sub-contract will need all these outstanding matters cleared first.*" The reference to the "signing" of the sub-contract was, in my judgment, a reflection of the fact that the way in which the parties envisaged that the sub-contract would be concluded was by a signed document. I do not consider that, when read in context, Mr Page was referring to a formal signing of a sub-contract which had already been concluded. Mr Page had stated "*the resolution of the warranty issues…may well have an impact on the relevant clause in the sub-contract concerning consequential losses.*" The fact that the agreement of the warranties might have an impact on the terms of the sub-contract indicates that the signing was not just a formality but was the envisaged way in which the agreement would be concluded.

146. Mr Johnston clearly understood HYL's position on the need for a formal document when he said in his email of 28 February 2005 to Mr O'Carroll, "*we urgently need to sign up Haden's sub-contract. They have said they have not yet*

agreed the terms of their warranty and are using this as a reason not to enter into contract." This supports the view that the signing of the contract was equivalent to entering into the sub-contract

147. In his letter of 14 April 2005 to Mr Cheshire, Mr Currie also referred to the fact that HYL had "*been unable to conclude the sub-contract for this project*." He requested "*assistance to move this matter to a mutually acceptable conclusion so that the sub-contract can be finalised and signed*." Again, the conclusion of the sub-contract was envisaged to be by the signing of a document.

148. Mr Page's letter of 20 May 2005 referred to it being "*in both our companies' interests that the matters are closed out and the Sub-Contract duly signed and executed without further delay*" again linking the signing and execution of the sub-contract being the way in which the sub-contract would be formed. Importantly, when putting LOR on notice as to "deemed acceptance" he added "*should we not hear from you to the contrary within the next seven days, we will amend the Sub-Contract accordingly and sign and execute it for return to yourselves*." This is a clear reference to this being the method by which the contract would be concluded. In my judgment it reflected the need for a contract to be "*signed and executed*" as a deed.

149. The proposal put forward on 27 May 2005 also reflects the understanding that the agreement would be formed by the execution of a document. The proposal was for the sub-contract documentation to be concluded by being signed, with a side letter dealing with the limit on liability.

150. There was nothing at the meeting on 14 June 2005 with Mr Grammer which changed that position. Mr Page's letter to Mr Bravington on 18 August 2005 again referred to changes to the sub-contract documents, which again shows that it was a signed document which was anticipated.

151. I therefore conclude that on the basis of the documents and the communications between the parties, the parties proceeded on the footing that there would be no contract unless and until there was a formal signed and executed contract. It was evidently the intention of both parties from 17 November 2003 to 18 August 2005 that the sub-contract would be formed by the signing and execution of the sub-contract documentation. This did not happen and therefore, in my judgment, there was in any event no concluded sub-contract between the parties.

The Room Data Sheets

152. The Room Data Sheets ("RDSs") contain information of the scope of the finishes, equipment and M&E work to particular areas or rooms. On 10 November 2003 there was a meeting between HYL, LOR and Drivers Jonas (acting on behalf of CNRL) to agree the contents of the RDSs. This led to HYL sending RDSs by email to LOR on 21 November 2003.

153. On 25 November 2003 Drivers Jonas sent RDSs which LOR forwarded to HYL for checking on 27 November 2003. HYL wrote to LOR on 3 and 4 December 2003 setting out comments on the RDSs which had been received from Drivers Jonas. HYL then received a copy of the Main Contract RDSs which were reviewed at meeting on 13 January 2004 between HYL, LOR, Drivers Jonas and others.

154. In these proceedings there remains an issue relating to the scope of the work set out in RDSs. The issue was narrowed at the hearing to the question whether changes required by HYL in emails of 3 and 4 December 2003 represented the agreed scope. HYL contends that the RDSs in Appendix D to the Contractor's Proposals Revision B were the agreed documents whilst LOR contends that the Main Contract Room Data Sheets were the agreed documents.

155. LOR says that all but one of the changes in HYL's emails were incorporated into the Main Contract RDSs but that, in fact, a number of the changes were not incorporated in the RDSs in the Contractor's Proposals, Revision B.

156. HYL contends that there are minor discrepancies between the RDSs incorporated into the Main Contract and those in the Contractor's Proposals, Revision B.

157. The evidence given by Mr Page on this subject was derived from the documents and from conversations with those involved at the time. He could not therefore deal with the details of what was agreed or what happened to the RDSs. However, in my view, the issue between the parties after the meeting on 10 November 2003 was essentially to align the sub-contract documents to what had been agreed at that meeting.

158. In my judgment, if the scope of the M&E Works indicated on the RDSs had remained the only issue between the parties this would not have prevented there being a concluded sub-contract. There was an "agreement" at the meeting on 10 November 2003 and evidently the dispute was whether the RDSs included in the Main Contract or in the Contractor's Proposals, Revision B reflected that agreement or whether some changes were required to one or both sets to bring them into line with what was agreed on 10 November 2003.

159. In any event, I consider that where the parties have executed the work any dispute as to whether certain detailed work was included in the sub-contract or was additional work would not of itself prevent a concluded agreement. These are typically matters of detail rather than being essential to the formation of an agreement. As Steyn LJ said in ***Trentham v. Archital Luxfer*** at 27:

"*The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential.*"

160. I do not consider that, independently of the other issues, the fact that there is some asserted uncertainty about the RDSs would prevent there being a concluded sub-contract in this case.

Summary

161. In relation to Issue 1, I therefore conclude that for the reasons set out above, there was no concluded sub-contract between the parties because the parties had not agreed on the limit of liability under the warranties or the sub-contract and had not entered into a signed and executed agreement.

Issue 2: If the answer to (1) is yes, what documents, if any, were incorporated into any such sub-contract?

162. As the answer to Issue 1 was "no", there was no sub-contract concluded between the Parties for the M&E Works, this Issue does not arise.

Issue 3: If the answer to (1) is no, is HYL estopped from contending that no sub-contract was concluded between the Parties?

163. As the answer to Issue 1 was "no", there was no sub-contract concluded between the Parties for the M&E Works, this issue arises for decision.

164. LOR contends that if it is held that no sub-contract was concluded then HYL is estopped from contending that no sub-contract was concluded between the parties. LOR relies on an estoppel by representation or an estoppel by convention.

165. LOR refers to the decision of His Honour Judge Esyr Lewis QC in ***Mitsui Babcock Energy Limited v. John Brown Engineering Ltd*** (1996) 51 Con LR 129. In that case the parties had signed a contract for the design, manufacture and installation of two heat recovery system generators for a power station but, at that stage, had not reached agreement on the performance tests to be carried out on the installed generators or the consequences of failure of those tests. Rather the relevant clause was struck through and annotated with *'to be discussed and agreed'*. Judge Esyr Lewis QC held that the outstanding term was not essential to the formation of the contract. He then went on to consider, obiter, the question of estoppel. He said at 186:

"*Were it necessary, I would be prepared to find that it would not be fair and just in this case for BEL to resile from the agreement they purported to make with JBE in June 1993. I consider that both parties from that time, and indeed earlier, conducted themselves on the basis that they had a binding agreement. Ipso facto, I think they were representing to each other that that was the position. I think it would be unjust now for BEL to be able to walk away from the agreement in order to obtain payment for their work on a different basis from that agreed between the parties. The amount and terms of payment, which was the subject of agreement, are not matters which BEL say were uncertain. BEL received payments on the basis of the agreed terms and, in the months before they asserted that there was no binding contract, were asking for more money by reference to the terms of the June 1993 agreement. During that time the documents do not show them to be pressing JBE for agreement of cl 35 or tolerances and I consider it relevant that BEL's work was near its end when they alleged there was no contract.*"

166. LOR submits that the position in this case is similar and gives rise to an estoppel which prevents HYL from arguing that they are not bound by the representations and/or conventions to the effect that HYL was obliged to carry out the works in accordance with the agreed terms of the sub-contract and was entitled to be paid in accordance with the agreed price.

167. In relation to estoppel by representation, LOR submits that HYL represented that it was entitled to be paid for the M&E Works in accordance with the agreed price and terms of the sub-contract and that these representations were consistent, repeated, clear and unequivocal. The applications for payment and the contractual claims were made without any qualification or suggestion that HYL were not entitled to the payments on that basis or that they were entitled to payments on some other basis. LOR also contends that there was clear and continuing detrimental reliance on those representations in that the works continued to be monitored and valued in accordance with the requirements of the Sub-contract. In the absence of those representations, LOR submits that it would have approached the question of valuation and of HYL's continuing employment differently. There was no open book approach to valuation, there was no record of the time/costs spent on any particular element of the works or re-design, re-work or remedial works. There was no record or monitoring of the time and costs spent in respect of variations.

168. Further, LOR submits that, by representing throughout the course of the works that it was bound by the agreed terms of the Sub-contract, HYL denied LOR the opportunity of obtaining some commercial comfort in respect of defective works by obtaining guarantees, employing alternative contractors for some or all of HYL's works, especially the more technical or specialist packages.

169. In relation to estoppel by convention, LOR submits that if HYL did not make representations, then a convention arose between the parties to the effect that HYL was bound by the agreed terms of the sub-contract and was entitled to payment in accordance with the terms of the sub-contract. LOR states that both parties operated the contract and dealt with the other on the assumed state of fact or law that their obligations and entitlements would be governed by the agreed terms of the Sub-contract. Further, LOR submits that it acted to its detriment in reliance on that convention which subsisted until 28 September 2005.

170. HYL submits that neither estoppel by convention nor estoppel by representation can be used to create or effect an agreement or legal relationship which does not otherwise exist. It contends that LOR's submissions go against the principle that estoppel by representation and convention cannot be used as a sword.

171. HYL refers to the decision of the Court of Appeal in ***SmithKline Beecham v. Apotex Europe*** [2006] 4 All ER 1078 where Jacob LJ held at [103]:

"*Mr Waugh contends that the pleading is not sustainable, even to the Pt24 standard for three distinct reasons. (a) An inter-partes estoppel cannot operate as to expand or contract the effect of a court order (b) an estoppel cannot be used as a key element of a claim (sword not shield) and particularly it cannot operate to create a legal relationship when there was none at the outset. (c) In any event the material pleaded is an inadequate basis to found an estoppel. I think he was right for all three reasons. …*"

172. HYL also relies on the decision in ***Baird Textiles v. Marks & Spencer plc*** [2002] 1 All ER (Comm) 737 in which Baird had been a long term supplier to Marks and Spencer but the parties had no express supply contract. Marks and Spencer ended supply arrangements with Baird who contended that Marks and Spencer were bound by an implied contractual obligation or alternatively estopped from denying that the relationship between the parties was long term and only terminable following reasonable notice of three years. Marks & Spencer asked for Baird's claim to be dismissed under CPR 24.2. Morrison J dismissed the claim for an implied contract but held that the claim for an estoppel should proceed to trial. Both parties appealed the decision. The Court of Appeal dismissed Baird's appeal and allowed Marks & Spencer's cross-appeal dismissing Baird's estoppel claim.

173. In considering whether Baird had real prospects of success in establishing that Marks and Spencer were obliged to give three years' notice prior to ending any supply arrangements, Judge LJ held at [54] that:

"*In reality BTH's possible success in this litigation would depend on establishing liability against M&S in equity when it would not otherwise be liable in contract, and would represent a dramatic, if not indeed a revolutionary development of the legal principles governing the enforcement of private obligations.*"

174. In any event HYL submits that the ingredients for estoppel are not made out. For both estoppel by representation and estoppel by convention the representation or common assumption must be unambiguous and unequivocal. HYL submits that LOR has not identified any unambiguous and unqualified representation from HYL that the Parties were in a contractual relationship. Further HYL states that there was no such unequivocal common assumption.

175. HYL submits that the representations and course of dealing relied upon by LOR to establish an estoppel ignore the fact that the dealings were in the context of contractual negotiations by which HYL made it clear that it would not enter into a sub-contract in the absence of agreement of outstanding issues.

176. HYL refers to the decision of Dyson J in ***Stent Foundations Ltd v. Carillion Construction (Contracts) Ltd*** 78 Con LR 188 where, having found that a contract existed, Dyson J considered, obiter, whether the management contractor was estopped from denying the existence of the sub-contract by acting throughout the works as if it were the management contractor. He stated at 198:

"*Mr Bowdery submits that WCM represented, or alternatively there was a clear common understanding between the parties, that a contract existed between them, in that (a) all applications for payment were made through and by WCM, (b) WCM directed and managed the piling works and was paid for the piling works as if WCM was the management contractor responsible for those works. In the result, it is submitted that WCM is estopped from denying that it was responsible for the piling works and contractually obliged to pay for them.*

Had it been necessary to decide this issue, I would have found in favour of WCM. The short answer to Mr Bowdery's arguments is that, on the hypothesis that no sub-contract was in fact concluded, all of the conduct relied on by him is explicable on the basis that the parties were acting in anticipation that they would conclude a binding sub-contract that would operate retrospectively. I do not consider that the conduct is clearly and unequivocally consistent with there being in place a concluded binding sub-contract."

177. Further, HYL submits that there can be no question of LOR having relied upon or having been misled by HYL's conduct into believing that a sub-contract was concluded between the parties and certainly not in a manner which would make it unjust or unconscionable for HYL to depart from such a position. HYL refers to LOR's internal discussions and discussions with third parties in which LOR was clear that no sub-contract was yet concluded. In particular it refers to Mr Johnston's email of 28 February 2005 to Pinsent Masons stating: "*we urgently need to sign up Haden's sub-contract. They have said they have not yet agreed the terms of their warranty and are using this as a reason not to enter into contract.*"

178. The classic statement of the requirements for an estoppel by representation were set out in the speech of Lord Tomlin in ***Greenwood v. Martin's Bank*** [1933] AC 51 at 57 where he said:

"*The essential factors giving rise to an estoppel are I think:-*

(1.) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made.

(2.) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made.

(3.) Detriment to such person as a consequence of the act or omission."

179. Similarly, the requirements for an estoppel by convention are to be found in the judgments in ***Amalgamated Property Co v. Texas Bank*** [1982] QB. At 122 Lord Denning MR said:

"*When the parties to a transaction proceed on the basis of an underlying assumption - either of fact or of law - whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them - neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.*"

180. Eveleigh LJ at 126 and Brandon LJ at 130 referred to the passage in ***Spencer Bower and Turner, Estoppel by Representation, 3rd ed. (1977)*** on estoppel by convention where the authors said at p.157:

"*This form of estoppel is founded, not on a representation of fact made by a representor and believed by a representee, but on an agreed statement of facts the truth of which has been assumed, by the convention of the parties, as the basis of a transaction into which they are about to enter. When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped as against the other from questioning the truth of the statement of facts so assumed.* "

181. I consider that the application of the principles of estoppel to a case such as this raises considerable difficulties. The general principles of contract mean that parties are free to negotiate and agree on the terms of the contracts by which they are to be bound. If parties negotiate but do not agree upon all the terms which are essential for a contract to come into existence between them, then the general principles of contract formation would be negated if, despite this, they are bound by the terms of a contract they did not agree to make. This too would mean that the estoppel created rights and obligations or acted as a sword when an estoppel can only act as a shield to preclude a party from asserting a particular set of facts or a state of affairs.

182. As set out by Jacobs LJ in ***SmithKline Beecham v. Apotex Europe*** at [103], an estoppel cannot be used as a key element of a claim so as to create a legal relationship when there was none at the outset.

183. Equally as set out in ***Baird Textiles v. Marks & Spencer plc*** English law does not enable the creation or recognition by estoppel of an enforceable right so as to create a cause of action: see Sir Andrew Morritt V-C at [38]. Judge LJ at [54] pointed out that to create liability in equity when it would not otherwise be liable in contract would represent a dramatic, if not indeed a revolutionary development of the legal principles governing the enforcement of private obligations. At [94] Mance LJ said:

"*As I have already said, the fact that there was never any agreement to reach or even to set out the essential principles which might govern any legally binding long-term relationship indicates that neither party can here objectively be taken to have intended to make any legally binding commitment of a long-term nature, and the law should not be ready to seek to fetter business relationships with its own view of what might represent appropriate business conduct, when parties have not chosen, or have not been willing or able, to do so in any identifiable legal terms themselves. These considerations, in my judgment, also make it wrong to afford relief based on estoppel, including relief limited to reliance loss, in the present context.*"

184. There are therefore major obstacles in the way of establishing a contract by estoppel. I do not consider that there is any difference between a party that seeks to bring a claim by way of a contract based on estoppel or one that seeks to defend a claim by asserting a contract based on estoppel. In this case LOR relies on estoppel to prevent HYL from arguing that they are not bound to carry out the works in accordance with the agreed terms of the Sub-contract and to be paid in accordance with the agreed price. In this way, LOR seeks to rely on the estoppel so as to create a contract which it then relies on to assert that the rights and liabilities are those under the contract. That, in my judgment, is to use estoppel to assert an obligation equivalent to a cause of action.

185. In this case, an analysis of the requirements for an estoppel reinforces the difficulty. The underlying factual basis for the estoppel is that HYL and LOR acted throughout the period from April 2004 to August 2005 as if the sub-contract terms applied to the relationship between them. HYL made applications for payment, applied for extensions of time and generally acted by reference to the terms of the draft sub-contract. LOR equally paid HYL on that basis. The difficulty with LOR's submissions is that, by acting as it did, HYL was not representing that a sub-contract had been entered into and LOR was not induced into believing that a sub-contract was in place.

186. I accept the evidence of the HYL witnesses that they conducted themselves in the way they did in the expectation that a sub-contract would eventually be agreed. There are many cases where contractors or sub-contractors start on site without having a concluded contract. Whilst those in a managerial capacity are negotiating the terms of the contract those involved in carrying out the work necessarily conduct the day to day operations by reference to the draft contract documentation so that, when the expected contract is concluded and applied retrospectively, the necessary procedures have been in place for the obligations subsequently agreed. That conduct is not a representation that a contract exists. As Dyson J said in ***Stent Foundations Ltd v. Carillion Construction (Contracts) Ltd*** at 198: "*all of the conduct relied on … is explicable on the basis that the parties were acting in anticipation that they would conclude a binding sub-contract that would operate retrospectively. I do not consider that the conduct is clearly and unequivocally consistent with there being in place a concluded binding sub-contract.*"

187. Equally, in respect of estoppel by convention, I do not consider that there was any underlying assumption as to the existence of a sub-contract. The parties were clearly negotiating the terms of the sub-contract relating to the limit of liability under the warranties and the sub-contract and were fully aware that there was no contract. The only assumption made by those working on the Project was that a sub-contract would eventually be agreed, signed and executed. When the sub-contract is not agreed then there is no assumption that affects the position. There is no assumption that a sub-contract had been agreed when one was not agreed because the parties had not agreed essential terms.

188. In any event, for there to be a sub-contract based on estoppel, there would have to be a sub-contract incorporating all terms, including the limitation of liability under the warranties and the sub-contract. In the absence of agreement on these essential terms how could the parties be estopped to particular limits? The parties did not resolve this

essential term and the court cannot fill the gap by an estoppel. The difficulty is that the estoppel would have to resolve the very question of the essential term on which the parties themselves could not agree.

189. There have been cases where the court has held that an estoppel can arise in the context of a contract. In ***Whittal Builders v. Chester-le-Street DC*** (1987) 40 BLR 82 His Honour Judge Fox-Andrews QC held that where the parties to a contract had proceeded on a common assumption that their contract would be entered into under seal and one party had signed and sealed the contract on the basis of this assumption, the other party was estopped by convention from denying that the contract was under seal.

190. In ***Jones Engineering Services Ltd v. Balfour Beatty Building Ltd*** (1992) 42 Con LR 1 Hirst J had to decide whether there was a valid reference to arbitration in a case where, after an arbitrator had been appointed, one party asserted that there was no concluded sub-contract incorporating the arbitration provisions of Clause 3.1 of DOM/1. Hirst J held that there was an ad-hoc reference to arbitration and then went on to consider whether there was an estoppel. In doing so, he referred to the passage in the judgment of Lord Donaldson MR in ***Hiscox v. Outhwaite (No 1)*** [1992] 1 AC 562 where, after setting out the principle that an estoppel by convention could arise when the parties had acted upon an agreed assumption of fact, he referred to the Court of Appeal decision in ***Norwegian American Cruises A/S v. Paul Mundy, The "Vistafjord"*** [1988] 2 Lloyd's Rep 343 and said:

"*For present purposes all that need be said is that his judgment [the judgment in the Norwegian American Cruises case] is authority for the proposition that estoppel by convention is not confined to an agreed assumption as to fact, but maybe as to law, that the court will give effect to the agreed assumption only if it would be unconscionable not to do so and that, once a common assumption is revealed to be erroneous, the estoppel will not apply to future dealings.*"

191. Hirst J then said at 12:

"*Applying those tests, it is as clear as can be that there was from the inception of the arbitration, and all the way through, an agreed assumption that there was a valid arbitration agreement being on the terms of clause 3 of the printed sub-contract form. That agreed assumption was acted on throughout the arbitration proceedings, right through to the end of the thirteenth day. In my judgment, it would be most unconscionable to allow the defendants to depart from that agreed assumption, seeing that the plaintiffs have incurred substantial costs, both in their preparation for the arbitration and in their pleadings and in interlocutory matters (such as discovery) and in 13 full or part days of hearing, including legal representation, calling of witnesses, etc, in reliance on that assumption.*

I therefore hold that there is, as the plaintiffs submit, an estoppel by convention in the present case, preventing the defendants from going back on the agreed assumption that a valid arbitration agreement on the terms of cl3 existed."

192. Those cases indicate that parties may be estopped from denying that a particular term applies where they have represented otherwise or there has been an assumption to contrary effect. In those cases the provision relied on is clear. Where, however, the parties have not agreed upon an essential term, I consider that there is no place for an estoppel.

193. In relation to the need for a formal agreement, the common assumption in this case was that the agreement would be formed by a signed and executed document. In such circumstances no estoppel could arise.

194. In the circumstances, as a matter of law and, in any event on the facts, I do not consider that HYL is estopped from contending that no sub-contract was concluded between the parties.

Issue 4: If the answer to (1) and (3) is no, is HYL bound in equity as alleged by Laing?

195. As the answer to Issues 1 and 3 is "*no*", this issue arises.

196. LOR puts forward no basis for this contention, other than stating that it would not be fair or just to allow HYL to resile from the representations they made as to the basis of their entitlements and their obligations to carry out the M&E Works set out in the sub-contract documents. It is said that it would be unconscionable to allow HYL to walk away from the clear and express agreements they made in respect of price, scope, variations and quality.

197. HYL submits that there are no grounds at law or in equity which can apply and there was no binding agreement.

198. In circumstances where the parties have failed to enter into an agreement then, as Judge LJ said in ***Baird*** at [54], for equity to impose liability on a party when it would not otherwise be liable in contract "*would represent a dramatic, if not indeed a revolutionary development of the legal principles governing the enforcement of private obligations.*" Having failed to conclude an agreement and to establish an estoppel, I do not consider there is any available basis for HYL to be bound in equity.

199. Accordingly, I find that HYL is not bound in equity as alleged by LOR.

Issue 5: If the answer to (1), (3) and (4) is no, did HYL owe Laing a duty of care in carrying out the M&E Works as alleged by Laing?

200. The answer to Issues 1, 3 and 4 is *"no"*, therefore this issue arises.

201. LOR submits that even if there is no sub-contract and no estoppel then HYL assumed a duty of care to carry out the design, supply and installation of the works in accordance with the Sub-contract documents or with reasonable skill and care. It refers to the decision of the Court of Appeal in ***Crown House Engineering Ltd v. AMEC Projects Ltd*** (1989) 48 BLR 32 where the issue of whether such a duty arises was considered but not determined. It relies on the following passages from the judgments in that case:

(1) Slade LJ said at 54: *"I am not convinced that either [Goff & Jones], or any of the other reported cases cited to us, affords a clear answer to the crucial question of law: On the assessment of a claim for services rendered based*

on a quantum meruit, may it in some circumstances (and, if so, what circumstances) be open to the defendant to assert that the value of such services falls to be reduced because of their tardy performance, or because the unsatisfactory manner of their performance has exposed him to extra expense or claims by third parties? In my judgment, this question of law is a difficult one, the answer to which is uncertain and may depend on the facts of particular cases."

(2) Bingham LJ said at 57: *"But once the existence of any contract was put in issue, on grounds not said to be vexatious, so that Crown was obliged to establish its claim for interlocutory relief on a quantum meruit basis alone, the situation changed. With its contractual foundation undermined, interim certificate number 28 no longer provided a firm basis on which Crown could build its claim. Whether, and to what extent, Amec could rely on the matters previously pleaded as contractual cross-claims to diminish the reasonable remuneration recoverable by Crown became a matter of genuine controversy. Crown has argued, and the judge below accepted, that these matters are wholly irrelevant to the assessment of what reasonable remuneration Crown should recover. It may very well be that they are right and will ultimately be held to be so. But the answer does not seem to me to be clear and obvious."*

202. LOR submits that here the following facts support a duty being assumed by HYL: that HYL carried out the M&E Works in purported compliance with the Sub-contract documents; that HYL was a specialist Sub-contractor undertaking design as well as building works; that during the course of the Project HYL undertook the rectification of defects and carried out re-design from time to time.

203. LOR submits that, by undertaking the works in the way it did, HYL represented that it was carrying out the works in accordance with the sub-contract documents and HYL knew that LOR was relying on it to do so. LOR therefore contends that HYL assumed a duty to carry out the works in accordance with the sub-contract documents.

204. HYL submits that the only duty of care HYL owed to LOR in carrying out the M&E works was a duty of care not to cause damage to persons or to other property in carrying out those works.

205. The issue in this case is whether HYL owed LOR a duty of care to carry out the design, supply and installation of the works in accordance with the Sub-contract documents or with reasonable skill and care so that LOR can recover extra expense or claims by third parties if there is tardy performance or unsatisfactory performance of the M&E works.

206. LOR puts forward no authority which would impose such a duty in a case where no sub-contract has been agreed. Where the parties have attempted and failed to reach agreement as to an essential term then I do not consider that duties of care in Negligence at common law can fill the gap by imposing an obligation. To do so the court would have to establish a basis in terms of scope and extent for the price, period and standard of performance. I do not consider that duties of care in Negligence can take on the burden of setting these standards of performance when the parties and the Law of Contract cannot do so. Essentially, this Issue is concerned with the way in which the monetary value of HYL's performance is evaluated. This is dealt with, in principle, in Issue 6. Indeed the observations of the Court of Appeal in ***Crown House*** appear to have been posed in relation to proper approach to the assessment of reasonable remuneration.

Issue 6: If the answer to (1), (3), (4) and (5) is no, is HYL entitled to a reasonable remuneration under a Quantum Meruit for the M&E Works up to 19 August 2005?

207. The issue, as posed, raises simply the question of whether HYL is entitled to a quantum meruit. LOR's Opening Submissions went further than this issue and contended that the parties were not now capable of valuing the M&E Works except in accordance with the agreements as to rates and prices and variations reached during the course of the works and which formed the basis for HYL's applications and LOR's payments. LOR therefore submits that it is not now possible to carry out a fair valuation on a cost plus basis and therefore HYL's cost plus claim cannot be considered fair or reasonable.

208. HYL submits that, on the basis that it has succeeded on Issues 1, 3, 4 and 5, then it is entitled to remuneration for the M&E Works under a Quantum Meruit. So far as LOR's submission is concerned, HYL submits that the proper method of evaluating the sum on a Quantum Meruit does not arise for decision on this issue.

209. Where work is carried out while negotiations as to the terms of the contract are proceeding but agreement is never reached upon essential terms, the contractor is entitled to be paid a reasonable sum for the work carried out: ***Trollope & Colls Ltd v. Atomic Power Constructions Ltd*** [1963] 1 W.L.R. 333. The obligation is one sounding in quasi-contract or restitution: ***British Steel Corp. v. Cleveland Bridge and Engineering*** (1981) 24 BLR 94 per Robert Goff J. at 122.

210. I consider that, as HYL submits, the contentions of LOR do not arise on the issue as posed. The method by which the reasonable remuneration is to be calculated will require further investigation. For the present and on the basis of this Issue, I simply answer the question posed: HYL is entitled to a reasonable remuneration under a Quantum Meruit for the M&E Works up to 19 August 2005.

Issue 7: If a sub-contract is found to exist for the M&E Works under (1) above, is HYL still entitled to be paid for the Further Services pursuant to the FSA?

211. Although I have found that a sub-contract does not exist, having heard argument on this issue, it is convenient to deal with this issue of construction.

212. The relevant provision of the FSA provides at Clause 21: "*This Agreement is made without prejudice to the contention by [LOR] that there exists between the parties a sub-contract in respect of work carried out by HYL in respect of the Project and the contention by HYL that no such sub-contract exists. [LOR] and HYL entirely reserve their respective positions in this regard and agree that nothing within this Agreement shall be taken to imply any acceptance or otherwise of the other party's position.*"

213. LOR submits that, as a matter of construction of Clause 21, if a sub-contract were concluded then the entirety of the works carried out including those carried out by HYL and paid for by LOR pursuant to the terms of the FSA would be governed by the sub-contract.

214. LOR submits that the background to the FSA was that HYL refused to carry out further work and the parties then negotiated a separate agreement which provided that HYL would carry out what was essentially the outstanding work, performed or to be performed after 19 August 2005 and would be paid on a cost-plus basis. LOR submits that, in this context, Clause 21 has the effect of making the FSA subject to their being no sub-contract in existence. Thus, if there is a sub-contract then LOR contends that it governed the rights and obligations of the parties in respect of all of the work, including the further services. In addition, LOR submits that Clause 21 preserves LOR's right to contend that HYL was in repudiatory breach of the sub-contract and that, as damages for that breach, LOR can claim from HYL the increased cost of having the works carried out pursuant to the FSA.

215. HYL contends that Clause 21 applies to the 'Services' meaning the works carried out prior to 19 August 2005 rather than the *'Further Services'*, the works carried out pursuant to the FSA and submits that the FSA was a binding agreement in relation to those Further Services.

216. The provision included in Clause 21 of the FSA was, in my judgment, intended to preserve the rights of the parties in relation to the position prior to the 19 August 2005. Thus the parties could still argue as to the existence, or not, of a sub-contract, despite the fact that they had entered into the FSA. The FSA was without prejudice to the parties' contentions in that respect and the parties entirely reserved their respective positions. If I had found that a sub-contract did exist then I do not consider that Clause 21 would have affected the existence of the FSA as an agreement covering the rights and obligations of the parties in respect of the Further Services from 19 August 2005. Similarly in the light of my finding that there was no sub-contract, that finding has no effect on the existence of the FSA.

217. However, if there had been a sub-contract then I consider that Clause 21 of the FSA would have preserved any claim that LOR might have had against HYL for damages for breach of the sub-contract, though the scope and extent of those damages would have depended on the detailed findings in that event.

Issue 8: Is Laing estopped by representation and/or by convention from arguing that the terms and conditions of the FSA are not enforceable and/or that HYL is not entitled to payment for the Further Services as per the FSA?

218. This issue arose from HYL's contention that LOR would be estopped from alleging that the conditions of the FSA are not enforceable or that HYL were not entitled to payment for the Further Services under the FSA. In the light of my finding that a sub-contract does not exist and as to the meaning of Clause 21 in Issue 7, this issue does not arise.

Summary

219. I therefore summarise my findings on the issues as follows:
   (1) Issue 1: No sub-contract was concluded between the Parties for the M&E Works.
   (2) Issue 2 does not arise.
   (3) Issue 3: HYL is not estopped from contending that no sub-contract was concluded between the Parties.
   (4) Issue 4: HYL is not bound in equity as alleged by LOR.
   (5) Issue 5: HYL does not owe LOR a duty of care in carrying out the M&E Works as alleged by LOR.
   (6) Issue 6: HYL is entitled to a reasonable remuneration under a Quantum Meruit for the M&E Works up to 19 August 2005.
   (7) Issue 7: Even if a sub-contract had been found to exist for the M&E Works, HYL would still have been entitled to be paid for the Further Services pursuant to the FSA but LOR might have had a claim for damages for breach of the sub-contract.
   (8) Issue 8 does not arise.

220. I shall deal with the form of the declaration and any consequential matters when I hand down this judgment.

Appendix: The Preliminary Issues

(1) Was there a sub-contract concluded between the Parties for the M&E Works? [POC Paragraphs 13, 53 and 54. DCC Paragraphs 9, 10, 53, 58-61 and 62. RDCC Paragraphs 7(ii), 28, 67-84 and 85-87].

(2) If the answer to (1) is yes, what documents, if any, were incorporated into any such sub-contract? [DCC Paragraphs 66-69. RDCC Paragraph 92].

(3) If the answer to (1) is no, is HYL estopped from contending that no sub-contract was concluded between the Parties? [DCC Paragraphs 63 and 64. RDCC Paragraphs 88 and 89].

(4) If the answer to (1) and (3) is no, is HYL bound in equity as alleged by Laing? [DCC Paragraph 65. RDCC Paragraph 90.]

(5) If the answer to (1), (3) and (4) is no, did HYL owe Laing a duty of care in carrying out the M&E Works as alleged by Laing? [DCC Paragraphs 70, 191 and 192. RDCC Paragraphs 93, 215 and 216].

(6) If the answer to (1), (3), (4) and (5) is no, is HYL entitled to a reasonable remuneration under a Quantum Meruit for the M&E Works up to 19 August 2005? [POC Paragraphs 14, 55 and 56. DCC Paragraphs 10 and 87. RDCC Paragraphs 7(ii) and 94].

(7) If a sub-contract is found to exist for the M&E Works under (1) above, is HYL still entitled to be paid for the Further Services pursuant to the FSA? [DCC Paragraphs 147(1) and (2). RDCC Paragraphs 172 and 173].

(8) Is Laing estopped by representation and/or by convention from arguing that the terms and conditions of the FSA are not enforceable and/or that HYL is not entitled to payment for the Further Services as per the FSA? [RDCC Paragraphs 174-179].

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