CA on appeal from QBD Manchester District Registry, TCC (HHJ Gilliland QC) before Hooper LJ; Lloyd LJ; Richards LJ. 17th October 2008

Lord Justice Lloyd:

1. This appeal is against an order made by His Honour Judge Gilliland Q.C. on the basis of one of the last judgments he delivered as a judge of the Technology and Construction Court. It brings to this court for the second time the issue whether the contractor under a particular building contract was entitled to determine the contract by notice to the employer in July 2006 and walk away from the project or whether, as the employer contends, it thereby repudiated the contract and is accordingly liable in damages.

2. On 9 November 2006 the judge held that the contractor's notice of determination of the contract dated 4 July 2006 was valid, based on a default on the part of the employer in January 2006. This court allowed the employer's appeal against that finding: [2007] EWCA Civ 601; the House of Lords upheld that decision: [2008] UKHL 12. In the meantime, however, this court had remitted to the trial judge the question whether the contractor's notice of determination was valid on the basis of an earlier default on the part of the employer. The judge heard argument on that point on 31 August 2007, having directed that no further evidence should be adduced, and again held in favour of the contractor in his judgment handed down on 6 December 2007. He refused permission to appeal, but Dyson LJ granted permission to appeal on four out of the eight grounds originally advanced on behalf of the employer.

The facts in outline

3. The contract was between Reinwood Ltd, the Claimant and Appellant, as employer, and L Brown & Sons Ltd, the Defendant and Respondent, as contractor. It was dated 16 January 2003 and was in the form of a JCT Standard Form of Contract, 1998 Edition, With Quantities incorporating Amendments 1 of 1999, 2 of 2000 and 3 of 2001. There were individual amendments, but none of relevance for present purposes. It was for construction work at Duke Street, Castlefield, Manchester, the project including both commercial premises on the ground floor and residential premises on several upper floors. The contract sum was £6.2 million, with the usual provision for monthly Interim Certificates on the 7th day of every month. The Architect was identified, as was the Quantity Surveyor, namely Messrs Thomas & Adamson. The date for possession was 14 July 2003 and the date for completion 18 October 2004. The retention percentage was 3%.

4. Because the work related partly to residential and partly to commercial accommodation, some of the supplies of goods and services to be made under the contract would be zero-rated (residential) and the rest (commercial) would be chargeable to VAT at the standard rate. The contract sum was exclusive of VAT and special provision was made in the contract for dealing with VAT, to which I shall turn in detail later. In outline, Interim Certificates were for sums exclusive of VAT, and it was for the contractor to make and serve on the employer separate provisional assessments of VAT. Not until March 2005 did the contractor raise this issue for the first time, and no provisional assessment was raised before April 2005.

5. In brief, the employer did not pay the VAT which was the subject of the first provisional assessment. On 12 May 2005 the contractor gave notice of a "*specified default*" in respect of this non-payment. Later the parties agreed an amount (smaller than the amount that had been provisionally assessed in April) as being due for VAT and the employer paid that amount. However, the notice of default had been served and, if valid, it was not deprived of effect by the subsequent agreement and payment of a lesser sum for VAT.

6. On 26 January 2006 the contractor gave another notice specifying a default, following the employer's decision to withhold £61,629 on account of liquidated and ascertained damages when paying the sum due on interim certificate number 29, issued in January 2006.

7. On 28 June 2006 the employer failed to pay £39,981 due under Interim Certificate number 34. On 4 July 2006 the contractor served notice of determination of the contract, expressly relying on the notice of default dated 26 January 2006, and not referring to the previous notice of default dated 12 May 2005.

8. The result of the appeals from the first judgment is that the employer was entitled to make the deduction that it did from Interim Certificate 29, so that it was not in default in January 2006 and the notice of default dated 26 January 2006 was not valid. The question now is whether the earlier notice of default was valid and, if so, whether the contractor is entitled to rely on it as justifying the notice of determination dated 4 July 2006.

The contractual provisions

9. In order to explain the points that arise on this appeal, against that background, I must refer to several provisions of the contract: first those relevant in the main contract and then the relevant terms in the separate VAT agreement incorporated by clause 15.

10. Determination by the contractor is governed by clause 28. It is necessary to consider parts of clause 28.2, as follows:

> *"28.2.1 If the Employer shall make default in any one or more of the following respects:*
>
> *.1.1 he does not pay by the final date for payment the amount properly due to the Contractor in respect of any certificate and/or any VAT on that amount pursuant to the VAT agreement; …*
>
> *the Contractor may give to the Employer a notice specifying the default or defaults (the "specified default or defaults") …*

28.2.3 If the Employer continues a specified default … for 14 days from receipt of the notice under clause 28.2.1 … then the Contractor may on, or within 10 days from, the expiry of that 14 days by a further notice to the Employer determine the employment of the Contractor under this Contract. Such determination shall take effect on the date of receipt of such further notice.

28.2.4 If …

- the Contractor does not give the further notice referred to in clause 28.2.3 and

- the Employer repeats (whether previously repeated or not) a specified default …

then, upon or within a reasonable time after such repetition, the Contractor may by notice to the Employer determine the employment of the Contractor under this Contract. Such determination shall take effect on the date of receipt of such notice.

28.2.5 A notice of determination under clause 28.2.3 or clause 28.2.4 shall not be given unreasonably or vexatiously."

11. The contractor's case is that the notice given in May 2005 validly specified a default under clause 28.2.1, namely the employer's failure to pay VAT due on an amount due in respect of an Interim Certificate. That default continued for 14 days but the contractor did not give a notice of determination as it could have done under clause 28.2.3. In June 2006 the employer again failed to pay a sum due on an Interim Certificate, and thereby repeated the specified default. By virtue of clause 28.2.4 that entitled the contractor to give notice of determination of the contract.

12. In order to see whether the notice in May 2005 was valid and effective it is necessary to examine the VAT agreement, but it is also necessary to take into account some of the provisions of clause 30 of the main agreement as to Interim Certificates.

"30 Certificates and payments …

30.1.1.1 The Architect shall from time to time as provided in clause 30 issue Interim Certificates stating the amount due to the Contractor from the Employer, specifying to what the amount relates and the basis on which that amount was calculated; and the final date for payment pursuant to an Interim Certificate shall be 14 days from the date of issue of each Interim Certificate. …

30.1.2.1 Interim valuations shall be made by the Quantity Surveyor whenever the Architect considers them to be necessary for the purpose of ascertaining the amount to be stated as due in an Interim Certificate.

30.1.2.2 Without prejudice to the obligation of the Architect to issue Interim Certificates as stated in clause 30.1.1.1, the Contractor, not later than 7 days before the date of an Interim Certificate, may submit to the Quantity Surveyor an application which sets out what the Contractor considers to be the amount of the gross valuation pursuant to clause 30.2. … If the Contractor submits such an application the Quantity Surveyor shall make an interim valuation. To the extent that the Quantity Surveyor disagrees with the gross valuation in the Contractor's application … the Quantity Surveyor at the same time as making the valuation shall submit to the Contractor a statement, which shall be in similar detail to that given in the application, which identifies such disagreement."

13. The papers do not include any interim valuation made by the quantity surveyors, but it was not in dispute that the architect required such a valuation for the purposes of each Interim Certificate, and that each successive valuation was supplied not only to the architect but to both employer and contractor.

14. As I have mentioned, clause 15 introduced supplemental provisions dealing with VAT which were referred to as the VAT agreement. By clause 15.2 all references to the Contract Sum were to be taken as references to that sum exclusive of any VAT, and recovery by the contractor from the employer of VAT properly chargeable by the Commissioners of Customs & Excise (now HMRC) was to be under the provisions of the VAT agreement.

15. In the VAT agreement itself it is necessary to consider clauses 1.1, 1.2 and 1.3. The references to VAT regulations are out of date, but nothing turns on that as the substituted regulations are to the same effect:

"1.1 … the Contractor shall not later than the date for the issue of each Interim Certificate and, unless the procedure set out in clause 1.3 of this Agreement shall have been completed, for the issue of the Final Certificate give to the Employer a written provisional assessment of the respective values (less any Retention Percentage applicable thereto) of those supplies of goods and services for which the Certificate is being issued and which will be chargeable, at the relevant time of supply under Regulation 26 of the Value Added Tax (General) Regulations 1985 on the Contractor at

.1 a zero rate of tax (Category (i)) and

.2 any rate or rates of tax other than zero (Category (ii)).

The Contractor shall also specify the rate or rates of tax which are chargeable on those supplies included in Category (ii), and shall state the grounds on which he considers such supplies are so chargeable.

1.2.1 Upon receipt of such written provisional assessment the Employer, unless he has reasonable grounds for objection to that assessment, shall calculate the amount of tax due by applying the rate or rates of tax specified by the Contractor to the amount of the assessed value of those supplies included in Category (ii) of such assessment, and remit the calculated amount of such tax, together with the amount of the Certificate issued by the Architect, to the Contractor within the period for payment of certificates set out in clause 30.1.1.1 of the Conditions.

1.2.2 If the Employer has reasonable grounds for objection to the provisional assessment he shall within 3 working days of receipt of that assessment so notify the Contractor in writing setting out those grounds. The Contractor shall

within 3 working days of receipt of the written notification of the Employer reply in writing to the Employer either that he withdraws the assessment in which case the Employer is released from his obligation under clause 1.2.1 of this Agreement or that he confirms the assessment. If the Contractor so confirms then the Contractor may treat any amount received from the Employer in respect of the value which the Contractor has stated to be chargeable on him at a rate or rates of tax other than zero as being inclusive of tax and issue an authenticated receipt under clause 1.4 of this Agreement.

1.3.1 … After the issue of the Certificate of Completion of Making Good Defects under clause 17.4 of the Conditions the Contractor shall as soon as he can finally so ascertain prepare a written final statement of the respective values of all supplies of goods and services for which certificates have been or will be issued which are chargeable on the Contractor at

.1.1 a zero rate of tax (Category (i)) and

.1.2 any rate or rates other than zero (Category (ii))

and shall issue such final statement to the Employer.

The Contractor shall also specify the rate or rates of tax which are chargeable on the value of those supplies included in Category (ii) and shall state the grounds on which he considers such supplies are so chargeable.

The Contractor shall also state the total amount of tax already received by the Contractor for which a receipt or receipts under clause 1.4 of this Agreement have been issued."

16. Clause 3.1 provides that, if the Employer disagrees with the Contractor's final statement under clause 1.3, he may request the Contractor to obtain the decision of the Commissioners on the tax properly chargeable on the Contractor for all supplies of goods and services under the contract, so long as he makes the request before any payment or refund has become due under clause 1.3.3 or 1.3.4.

Relevant communications between the parties

17. As I have mentioned, the question of VAT was not raised by Browns until March 2005. Both parties must have been well aware that part of the work was zero-rated and the rest standard-rated for VAT, and that this would give rise to issues of apportionment. On 23 March 2005 Mr Jepson, for Browns, wrote to Reinwood referring to this issue. In the course of his letter he said this:

"Obviously we would need to agree a methodology for calculation of the standard rated supply and would confirm our intention to apply for an interim element of VAT within the March 2005 valuation.

It would seem appropriate to base the figure upon extracts of the Valuation provided by Thomas and Adamson which we would of course have to verify in order that we can correctly account for VAT in accordance with the current VAT regulations.

I look forward to hearing from you in this respect."

18. Reinwood did not respond to this letter. By a letter dated 11 April 2005 Mr Jepson wrote again, referring to his previous letter and saying this:

"In the absence of a reply to the above letter I write to advise that we have abstracted the elements relating to the ground floor commercial units in respect of Valuation No. 20 and advise that our provisional assessment value appertaining thereto is in the sum of £415,000."

19. He enclosed a VAT invoice for 17.5% of that sum, £72,625, and asked for payment by 21 April. The invoice is headed "*To VAT only in respect of works to the ground floor commercial units*".

20. On 14 April Mr Bradshaw on behalf of Reinwood sent an email to Mr Jepson, copied to representatives of Thomas & Adamson, on the subject of VAT. It seems that he had tried to contact Mr Jepson by telephone, but had failed. The text of the email is as follows:

"Nigel

Apologies for the formal approach, I've tried your office but you were out at lunch.

We've received an invoice from Browns of Wilmslow (copied to T & A) advising that you have extracted the elements of construction relating to the ground floor commercial units in the sum of £415,000. The VAT relating to this equates to £72,625 – can Browns provide further substantiation to how the figure of £415,000 has been derived? Obviously I'd like the figure verified by T & A before we release such a large sum against vatable works.

I look forward to receiving your response by return, could you please also forward any substantiating information to T & A for validation.

Thanks in advance

Kind Regards

Ian"

21. The first two issues on the appeal turn on the letter of 11 April and the email of 14 April. Nevertheless it is instructive to see how the communications proceeded after that.

22. On 20 April Mr Jepson wrote to Thomas & Adamson, copying the letter to Mr Bradshaw, asking for their verification of the sums due in respect of the ground floor commercial units, and seeking a prompt response so that Browns could correctly account to HM Customs & Excise for VAT. It seems likely that 30 April was the end of a VAT quarter for Browns, so that VAT on supplies up to that date would have to be accounted for by the end of May.

23. On 5 May 2005 Browns sent to Thomas & Adamson a page setting out a calculation for VAT which gave a figure of £414,934.04. It is reasonable to assume that these calculations had been done, whether or not embodied in this document, before the letter dated 11 April was sent. I need not set out the details of the calculation, but it proceeded as follows. First, the floor areas of the various areas from basement slab up to the 6th floor were given, and of that part of the ground floor which represented the commercial premises. From this, three percentages were derived: the commercial area as a percentage of the whole (7%), as a percentage of the superstructure (8%) and as a percentage of the ground floor (42%). Then one of these percentages was applied to each of a number of sums under headings which were no doubt derived from the quantity surveyors' valuation (though 3.5% was applied to one item: materials on site). It was common ground that, without knowing what the percentages were, and which was applied to which item, Reinwood could not have worked out how Browns had got to their figure of £415,000.

24. On 12 May 2005 Mr Murphy, managing director of Browns, wrote to Reinwood giving notice of default under clause 28.2.1.1, in respect of Reinwood's failure to pay the VAT on the sum specified in the provisional assessment dated 11 April.

25. On 17 May Mr Bradshaw of Reinwood sent a further email to Mr Jepson, taking issue with the VAT calculation. He accepted certain elements in the calculation, but suggested that others should not have been included at all and yet others had been included at too high a figure. He therefore asked for it to be recalculated. On 1 June Browns did supply a revised calculation, omitting any sum under one head and applying the agreed percentage to lower sums under a number of heads (even though, because a later valuation had been issued in the meantime, some of the overall sums had been increased). Further discussion ensued, as a result of which on 8 June a further calculation was put forward, taking into account yet another valuation, but reducing the amount chargeable to VAT still more, to £287,673.08. This showed £50,342.79 as being due. A few days later Browns issued a revised VAT invoice for this amount, backdated to 30 April 2005. Later they issued a further credit against this invoice because it had not allowed for the deduction of the 3% retention. Reinwood paid the amount ultimately agreed in this way.

26. Moving on in time, on 26 January 2006, Browns wrote to Reinwood giving notice of default under clause 28.2.1.1 in respect of the failure to pay £49,303 due on 25 January. It was this notice that was held to have been invalid in the first appeal.

27. In June 2006 Reinwood failed to pay a sum which was due under the contract, namely £39,981 due under Certificate number 34 on 28 June. The failure is said to have been the result of an administrative oversight. On 4 July 2006 Browns gave notice of determination of the contract under clause 28.2.4. The letter identified the failure to pay that sum, and went on to say *"this default repeats the previously highlighted default set out in our notice to yourselves dated 26 January 2006"*. That is the notice whose validity is primarily in issue in the proceedings.

The Contractor's VAT obligations

28. The judge summarised the position as regards VAT as follows

> *"12. The receipt referred to in clause 1.4 of the VAT Agreement is the ordinary VAT invoice. Regulation 26 of the VAT Regulations referred to in clause 1.1 has since been replaced by Regulation 93 of the VAT Regulations 1995 as amended but apart from certain anti-avoidance provisions (which are not relevant) its effect has not been altered. The regulation provides that where stage payments are made by the employer under a building contract such as the JCT contract in the present case, the time of the taxable supply by the contractor is the earlier of each time that a payment is received by the contractor or each time that a VAT invoice is issued by the contractor. The contractor is accountable to HM Customs and Revenue for all tax due on supplies made by him (less any input tax on his own purchases). The basic scheme of the VAT legislation thus is that whenever the contractor receives an interim or final payment under a building or construction contract, he is accountable for VAT on any vatable supplies included within the payment. It is clear to my mind that the provisions of clauses 1.1 and 1.2 of the VAT Agreement are intended to provide a mechanism whereby the contractor can ensure where the work for which he is being paid is liable to VAT that in addition to the cost of the work, he will also be paid at the same time the appropriate amount of VAT in respect of the cost of that work and for which he is in turn accountable to HM Revenue and Customs. Thus unless the employer has reasonable grounds for objection to the contractor's written provisional assessment of the value of the contractor's vatable supplies and gives the appropriate notice, the employer must in my judgment calculate and pay (less any retention) by the specified date the full amount of the VAT on those supplies. If the employer does have reasonable grounds for objecting to the contractor's provisional assessment, he must inform the contractor within 3 working days of his grounds. The contractor must then within 3 working days either withdraw his provisional assessment or confirm it. If the assessment is confirmed by the contractor the position appears to be that if the amount of VAT remains disputed and if the employer does not pay the full amount claimed by reference to the provisional assessment, the contractor may nevertheless treat the actual payment as a VAT inclusive payment and issue a VAT invoice accordingly. The practical effect of this will be that less than the full certified amount will be treated as having been paid but the full amount of the VAT on that reduced amount will have been paid. If the contractor withdraws his provisional assessment, clause 1.2.2 does not make clear what is to happen in relation to any liability of the contractor to account for VAT on monies paid for his services. It seems clear that the employer no longer has to calculate and pay the amount of VAT on the assessed values of the supplies in question and it seems to have been assumed by the draftsman that the contractor is no longer seeking to be paid VAT in addition to the amount of the interim certificate and that presumably a fresh assessment will be made subsequently. Whether the withdrawal of a provisional assessment would have the effect of relieving the contractor from his liability to account to HM Customs and Revenue for VAT on the actual*

payment if it includes a payment for vatable supplies seems to me to be doubtful. It may be that it has been assumed by the draftsman that HM Customs and Revenue would be prepared to wait until the VAT is actually paid before assessing the contractor on the basis that the payment was VAT inclusive. Alternatively if monthly certificates are being issued it may be that it was expected that the matter would be dealt with in the next payment and that in practice that could (but not necessarily) fall within the same accounting period of the contractor for VAT thus avoiding any difficulty in relation to accounting for VAT. Whatever the position may be, it does seem to me that clause 1.2 has not been as happily drafted as it might have been."

29. It is common ground that, if the employer serves a valid objection under clause 1.2.2, it does not have to pay to the contractor the amount specified in the provisional assessment. It will pay the amount of the Interim Certificate, but no extra amount (at that stage) for VAT. As the judge said, the position as regards the contractor is unclear if it does not opt to treat the payment made on the Interim Certificate as if it were VAT-inclusive. But on the one hand it is clear that it matters for the contractor to know whether the employer does object to the assessment, and on the other hand it seems that the contractor does not have to issue a VAT invoice in advance of receiving payment under the Interim Certificate, and that if it does not do so, then the time of the supply of the relevant services, for VAT purposes, is the date on which the contractor receives payment under the Interim Certificate. It may be, therefore, that in the present instance Browns imposed on themselves an avoidable obligation to account for VAT earlier than they need have done by issuing a VAT invoice and sending it to the employer together with the letter dated 11 April 2005.

The issues

30. Browns were entitled to determine the contract in July 2006 if, but only if, the default in June 2006 repeated an earlier default which had been specified in a notice under clause 28.2.1.1. The first question is therefore whether the default notice dated 12 May 2005 was valid. On this two issues arise: first, was the letter dated 11 April 2005 a valid provisional assessment under clause 1.1 of the VAT agreement; secondly, if so, was the email dated 14 April a valid objection under clause 1.2.2?

31. If the notice of default in May 2005 was valid, Reinwood contends that Browns nevertheless waived their right to rely on it, either by giving notice specifying a default in January 2006, rather than giving notice to determine the contract on the basis that the default in January was a repeat of the earlier specified default, or by referring in the July 2006 notice to the January default and not to the May 2005 default.

Did Browns make a valid provisional assessment in April 2005?

32. On behalf of Reinwood, Mr Furst Q.C. argued that, in a case where the sum due under an Interim Certificate falls to be apportioned between zero-rated and standard-rated supplies, it is not sufficient for the contractor to state an amount as being standard-rated, and that the basis of the calculation of that amount must be explained. Either the word "assessment" itself carries that obligation, or it is drawn from the requirement to state the grounds on which the contractor believes that the relevant supplies are standard-rated. He also relied on the need for the employer to be able to form a view as to whether he has reasonable grounds for objecting to the assessment: in order to do so, he contended, the employer needs to be in a position to understand the basis of the calculation. If his arguments based on the word "assessment" and on the obligation to state "the grounds" were not to prevail, he also submitted that a term should be implied into the contract requiring the contractor to explain the basis of the calculation. No such term had been pleaded, and it seems to me that Reinwood can only rely on the express provisions in the contract.

33. For Browns, Mr Marrin Q.C. submitted that, where (as here) there is zero-rated work and standard-rated work, the assessment must state the value of the standard-rated work, the rate at which it is chargeable, and why it is so chargeable. The employer will have received the corresponding Interim Certificate and the quantity surveyor's valuation, and will therefore know the gross sum; since there is at present only one rate at which VAT can be chargeable, it is unnecessary to do more than identify the amount which is subject to the standard rate of tax. The letter and the invoice between them stated that the value was £415,000, the rate was 17.5% and the reason why it was so chargeable was that it related to the commercial part of the development. He argued that, although Reinwood would not have been able to reconstruct Browns' figure without knowing how it had been arrived at, Reinwood was in a perfectly good position, with the advice of the quantity surveyor if desired, to take its own view as to what the right amount was, and that, if it thought that £415,000 was excessive, it would be open to Reinwood to object on the ground that Browns' figure was too high.

34. Both Counsel said that the contract calls for and expects co-operation between the parties. Mr Furst submitted that a bare unexplained figure was not sufficient, and that an objection by the employer that the contractor's figure was excessive, without any supporting explanation, would not qualify as "reasonable grounds" under clauses 1.2.1 and 1.2.2. He pointed out that, if an unexplained figure was sufficient under clause 1.1, the contractor could put such a figure forward at every stage, the employer could object at every stage, and the situation might never be sorted out until the last stage, by resort to the Commissioners. He suggested that this is far from what is likely to have been intended.

35. I do not accept the argument that an *"assessment*" of a value must include an explanation of the basis on which it is reached. In my judgment an assessment need do no more than state what the relevant figure is. Under clause 1.2.1 it is to the assessment that the employer may object, and it seems to me clear that what it would object to is the figure.

36. If Reinwood is to succeed on this point it must be because of the contractor's obligation to *"state the grounds on which he considers such supplies are so chargeable"*, that is to say, chargeable at a rate other than zero. The ground on which a part of the relevant supply is standard-rated is (in the present case) that it relates to the construction of commercial rather than of residential accommodation. That is one thing that has to be stated (expressly or impliedly) in order to satisfy clause 1.1. Mr Furst's argument involves a contention that the Contactor must go further and state why he considers that the amount in question is the amount so chargeable. I can see that it may be very helpful if the contractor does so, and Browns could no doubt have supplied the workings (as it did on 5 May) with the letter of 11 April. However, as a matter of the interpretation of the clause, I do not see that this is necessary.

37. What the contractor has to do under clause 1.1 is to make and give to the employer *"a written provisional assessment of the respective values … of those supplies of goods and services for which the Certificate is being issued and which will be chargeable"* at zero and at any positive rate of VAT, specifying the positive rate, and giving the grounds on which the positive rate is chargeable. It seems to me that this formulation shows that the "*grounds"* are only required to explain why a positive rate of tax (and, if it were relevant, which out of several) is applicable, not to explain how the assessed value has been calculated. By contrast, the contract is specific in requiring that an Interim Certificate must specify, among other things *"the basis on which [the certified amount] was calculated":* see clause 30.1.1.1. The absence of any comparable wording from clause 1.1 of the VAT agreement seems to me to be significant and revealing.

38. On this point, the judge, with his great experience of matters of this kind, said this at paragraphs 27 to 28:

> *"27. … The scheme of the VAT agreement is that it is for the contractor to make a provisional assessment and for the employer to consider that assessment. That assessment however is only a provisional assessment of the value of the vatable works. It is not intended to be a precise and detailed calculation. When the employer receives such a provisional assessment there is in my judgment no reason why an employer should not himself be able to form his own view on the value of the vatable element of the work which he has contracted to have constructed. It is not necessary that the employer should have details of how the contractor has arrived at his assessment of the value of the works before the employer can make his own assessment and object.*
>
> *28. Under the JCT contract there will have been at least one and more likely several valuations and the employer will in principle be in as good a position as the contractor to form a view as to the value of the work which has been carried out and he will know how much he has had to pay or will have to pay under the relevant certificates which will have been issued as the work progresses. He will also know what work is comprised in the relevant certificate or valuation. In the present case the Claimant on receipt of the letter dated 11 April is likely to have had a copy of the relevant valuation since the Architect is supposed to provide the documentation to both parties at the same time. There is, it seems to me, no reason whatsoever why the Claimant could not have looked at the valuation and made its own assessment (or instructed the quantity surveyors had it so wished, as indeed it subsequently appears to have done) to check the value of the ground floor commercial works and if that differed from the Defendant's provisional assessment, then to have given the appropriate notice of objection within 3 days stating, if appropriate, as the ground for objection that the assessment was incorrect and that the correct value should have been some other figure."*

39. I respectfully agree. For those reasons, I would reject the first of the permitted grounds of appeal, namely that there was no valid provisional assessment.

40. I recognise that this could mean that the contractor might never put forward more than a bare unexplained figure by way of a provisional assessment, that the employer might, on advice, object each time that the figure was too high, and that, unless the parties co-operated outside the framework of the contractual provisions, the true position might not be sorted out until the final stage by reference to the Commissioners. It seems to me relatively unlikely that this would occur without any attempt by the parties to work out the correct position in the meantime, but it would not be an unworkable or absurd result even if the respective parties did dig their heels in and rely on the strict position under the contract. I note that, in the course of the sequence of events directly relevant to this appeal, the first failure to collaborate was that of Reinwood in not responding to Browns' letter dated 23 March 2005.

Did Reinwood notify Browns of an objection to the provisional assessment?

41. The second ground of appeal is that the email dated 14 April amounted to a valid objection under clause 1.2.2. I have quoted the email above. It seems to me that what it lacks is any clear indication that Reinwood did object to the assessment. It is a fair comment that it asked for verification by the quantity surveyor. It did not amount to an admission or agreement that the sum was correct. But an objection under clause 1.2.2 has particular consequences for the contractor, which may affect its liability to account for VAT. It is therefore essential that the contractor should know whether the employer is relying on clause 1.2.2 or not. Mr Marrin submitted that the employer must expressly "take a stand" and that it had not done so by this email. I agree.

42. Despite the opening reference to *a "formal approach",* it seems to me that there is nothing in the email which indicates that Reinwood was seeking to rely on its rights under clause 1.2.2. There is no use of the word *"objection"* or any similar or related word, nor does the email set out any grounds of objection. All it does is to seek further clarification, partly from Browns and partly from the quantity surveyors. The latter could have been sought directly immediately upon receipt of the letter of 11 April. In the absence of knowing the basis of Browns' calculations, the quantity surveyors would have had to work out their own approach, but they would have had all

the necessary material available to them, and there seems to be no good reason why they should not have been able to advise Reinwood quickly as to what figure they considered to be appropriate for the purpose. Unless this was close to or in excess of £415,000 that would have enabled Reinwood to serve a notice of objection under clause 1.2.2 setting out the ground that Brown's figure was too high. Being based on Thomas & Adamson's advice, that would have been a reasonable ground. I accept Mr Furst's point that Reinwood did not know and could not tell that Browns had failed to deduct the Retention, as they should have done. I agree with the judge that this is no more than a point on quantum, which has no more significance than getting the figure wrong in other respects.

43. In my judgment, in order to qualify as a notice of objection under clause 1.2.2, the employer would have had to have used the word *"object"* or *"objection",* or some other language making it clear that it refused to accept the assessment as correct, and it would have to indicate why it so objected or refused. I agree with Mr Marrin that it would not be a valid objection that the contractor had not given enough of an explanation of how it made its assessment, but it would be enough to say that the assessment was too high.

44. As it is, the email of 14 April 2005 was equivocal. It did not accept or admit that the sum claimed was due but it did not object, in terms or otherwise, to the assessment nor did it give any grounds for doing so other than, at most, the lack of explanation.

45. For those reasons I would reject the second ground of appeal. I therefore conclude that the notice of default dated 12 May 2005 was valid, that Reinwood committed a specified default in April 2005, and therefore that the default in June 2006 was a repetition of a specified default. Browns were entitled to rely on this unless they had waived their right in the meantime.

Did Browns later waive their right to rely on Reinwood's default in April 2005?

46. The first argument raised in this respect was that Browns waived the right to rely on the earlier default when they served a notice of default under clause 28.2.1 in January 2006. This argument, said to be based on waiver by election, seems to me wholly lacking in substance. The proposition is that Browns had to choose between two inconsistent courses of action at that stage, that is to say that, if the contractor has already served one notice of default, the next time that the employer commits a similar default, the contractor cannot serve a further notice of default, without precluding itself from relying later on the earlier default, unless it expressly reserves the right to do so when serving the new notice of default. Given that one of the purposes of serving a notice of default under clause 28.2.1 is to prompt the employer into remedying the default, I can see no basis for the suggested inconsistency. It is also undermined by the words quoted above from clause 28.2.4 "(*whether previously repeated or not*)", which seem to me to indicate that the contractor can use this procedure cumulatively, not just once. I agree with the judge that, while service of the January notice (if it had been valid) would have precluded the contractor from determining the contract under clause 28.2.4 in reliance on the January default (though of course if the notice had been valid and had not been complied with, there would have been a separate right to determine under clause 28.2.3), it would not have prevented it from relying on the earlier default on a later occasion following some later repetition of a specified default, as occurred in June 2006. It might well be relevant for the contractor to be able to rely on earlier defaults if the employer sought to argue that the determination was unreasonable or vexatious, under clause 28.2.5.

47. Quite apart from the fact that the January notice was invalid, because the employer was not then in default, I therefore conclude that this ground of appeal is not justified.

48. The second argument about waiver is based on the fact that the notice of determination served in July 2006 referred expressly to the January notice of default, and not to the earlier notice in May 2005. This is not a case of waiver by election, but what is said to be pure waiver. It is accepted that a notice of determination under clause 28.2.4 does not need to specify the default relied on. The judge held, having heard Mr Murphy's oral evidence, that though he did rely on the January default (as he thought it to be) he was not only relying on that default when he gave notice of determination.

49. Mr Furst put this point to us with the assistance of a passage in the speech of Lord Hailsham LC in ***Banning v Wright*** [1972] 1 W.L.R. 972 at 979: *"In my view, the primary meaning of the word "waiver" in legal parlance is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted."*

50. That was a tax case about what might or might not have been the waiver of the terms of a lease. Nothing in that case, or in anything else shown to us, suggests to me that pure waiver could operate so as to preclude Brown from relying on the earlier notice of default despite not having mentioned it in the notice of determination. The examples given of pure waiver are all concerned with prospective operation, discharging a party from future performance of the obligation waived. They do not relate to waiver of the consequences of past conduct.

51. The Appellant's contention is inconsistent with the general principle of contract law that if a party refuses to perform a contract, giving a reason which is wrong or inadequate, or giving no reason at all, or terminates a contract under a contractual provision to that effect, the refusal or termination may nevertheless be justified if there were at the time facts in existence which would have provided a good reason for the refusal: Chitty on Contracts 29th ed., paragraph 24-014. That principle is often used in relation to facts unknown to the party refusing at the time of its refusal, but there is no reason why it should not be used in relation to facts which were known to that party at that time. Waiver can apply to qualify that principle, but only in cases of, in effect, estoppel.

52. Accordingly it seems to me that neither of the waiver grounds of appeal can succeed, and that the appeal ought therefore to be dismissed. In my judgment the judge was correct to hold that the notice of determination under clause 28.2.4 was valid, because of the valid notice of default dated 12 May 2005, despite the invalidity of the notice of default served in January 2006.

Lord Justice Richards

53. I agree.

Lord Justice Hooper

54. I also agree.

ORDER : 1 The Claimant's Appeal against the Order dated 6 December 2007 is dismissed.

2. The Claimant shall pay the Defendant's costs of the Appeal, summarily assessed in the sum of £56,000.00, by 4pm 31 October 2008.

3. the Claimant's application for leave to appeal to the House of Lords is refused.

Stephen Furst Q.C. and Andrew Singer (instructed by Hill Dickinson LLP) for the Appellant
John Marrin Q.C. and Alexander Hickey (instructed by Hammonds LLP) for the Respondent