CA before Staughton LJ, Hobhouse LJ, Hutchison LJ. 30th October, 1996

LORD JUSTICE STAUGHTON: Lord Justice Hobhouse will give the first judgment.

JUDGMENT : LORD JUSTICE HOBHOUSE:

1. The facts out of which this case arises go back to 1991. In that year a firm called Birmal decided that they wanted to see if they could make castings to obtain an order from Volvo. They wanted to get an order from Volvo to supply castings for stator and retarder housings, which no doubt are parts of the engine of a Volvo motor-car. The process which Birmal had in mind to use was that involving low pressure dies. Birmal had a relationship with a firm called A.W. Plume Limited ("Plume"), the defendants in the action, and Plume in turn brought in a manufacturer of dies, which was the plaintiff in the action, Automotive Patterns (Precision Equipment) Limited, and a firm called Fondesco, whose job and skill lay in the design of dies and the making of working drawings.

2. The upshot of this cooperative effort was that Birmal placed an order with Plume in August 1992 which effectively covered all the work that needed to be done and in October of the same year Plume placed an order with the plaintiffs. It is necessary to refer to these two documents, taking the order given to Plume first. It is in the form of a letter. It refers to a meeting that had taken place a few days earlier and continues:

   "... we are pleased to confirm that you are to proceed with all speed to manufacture the following Low Pressure Dies:

   1. *Stator Housing [and it gives the part number and the die number]*
   2. *Retarder Housing [and it gives the part number and the die number of that as well].*

   These dies are to be manufactured and fully commissioned to Birmal's satisfaction, in accordnace with (a) Birmal Tooling Model Supply Conditions and (b) Addendum to Terms and Conditions of Supply, with associated Coreboxes, dated August 1991, and in line with Detroit Diesel Allison porosity specification for Finished Cast Aluminuim Parts [and it then gives a reference]."

   The cost of the stator housing was £60,000 in all and the cost of the retarder housing was £212,200. The order letter then continued:

   "Delivery: 20- off sound castings, both dimensionally and metallurgically sound, ie: Stator Housing - 7th February 1992, Retarder Housing - 27th March 1992.

   Payments will be made against your invoices only on approval by Birmal, in writing, for each of the following stages:

   1. *Initial payment of 10% against total for both tools to the value of £27,220, on completion of General Arrangement drawings and approval by Birmal - Week 38.*
   2. *Interim payments of 45% on completion of 20 Sound Castings approved by Birmal for each of the two Dies.*
   3. *Final Payment of 45% on the approval of Volvo accepting the 20- samples after fully machining no later than 8- working weeks from the date Birmal approves these castings. If Volvo exceed this period to complete their testing programme, Birmal will make the final payment in any case, but without discharging the Supplier, AW Plume Limited, from his obligations under this Contract.*

   Should Volvo find fault with the 20- sample batches, AW Plume Limited will continue to execute this Contract until the Customer Quality Standards have been achieved, as stated earlier, at no further cost to Birmal.

   Our Official Order will follow in due course."

3. If there was such an additional document it has not been included in our bundle. It is agreed that as between Birmal and Plume the letter from which I have quoted was the relevant document.

4. It is commented that the obligations of Plume under this order extend beyond the mere provision of dies. It was the responsibility of Birmal to see to the provision of 20 sound castings for each of the types of product and, furthermore, the timetable for payment which is referred to relates to the provision of the castings and their approval and not simply to the question of the delivery of the dies.

5. The order which Plume in turn placed with the plaintiffs was in these terms:

"To manufacturer complete as required Stator Retarder Drawing [giving the number] and Housing Retarder Drawing [giving the number] including sand cores and sand core carrier device, all as terms and conditions of order, costings and payments as agreed and specified by Messrs Birmal Ltd.
The terms and conditions and details of same are all as specified in the Birmal covering letter and specification sheets sent to ourselves on August 19th 1991 [that is the document from which I quoted a moment ago], and all as agreed between Messrs Fondesco Ltd, Automotive Patterns (Precision Equipment) Ltd and A.W. Plume Ltd.
Total price as agreed at this juncture between your Mr A Williams and our Mr A.W. Plume on 14th February 1992 is £170,835.00. This price will be subject to possible revision and adjustment either way, subject to the commissioning, and any savings that are possible accordingly."

The letter concluded, after referring to certain amendments, with this statement: *"Further copy of Birmal letter 19th August 1991 and Terms and Conditions [are] attached".*

6. It is accepted that the Plume order to the plaintiffs incorporated the terms and conditions of the Birmal order to Plume, including the provision for the payment of the price in appropriate percentages on the fulfilment of the conditions there referred to.

7. This scheme of contracting could give rise to obvious problems in that the rights of the plaintiffs against Plume were being intermingled with the rights of Plume against Birmal without the precise relationship being clearly spelt out and it likewise left the plaintiffs at risk to some extent in relation to the performance by Plume of its obligations to Birmal.

8. The dies were made by the plaintiffs. They were apparently made in accordance with the drawings and specifications; any allegation to the contrary has been rejected by the county court judge. They were delivered in the following year and as a result of certain variations the net contract price as between Plume and the plaintiffs became £212,892.38.

9. In fact sums were paid by Plume, which did not have regard strictly to the contractual conditions, in various tranches over a period of time in 1992 and 1993, which amounted in all to £175,400. That left a difference of £37,492.38, which was the subject of the action.

10. The difficulties have arisen because problems arose between Plume and Birmal and Volvo. Castings were made from the dies. Those for the stator were approved but there came a time in 1993 when, it appears, Volvo decided not to place any order with Birmal and therefore the projected work became otiose. The retarder castings were never approved either by Birmal or Volvo and Volvo did not continue further with Birmal. This in turn led to a breakdown in the relationship between Birmal and Plume. Claims and counterclaims were made, the one against the other. Plume had been paid about 81 per cent of the sums which had been agreed between Plume and Birmal but had not been paid the balance. Matters as between Plume and Birmal continued simply as a matter of argument and eventually the claims and cross-claims were not pressed.

11. As between the plaintiffs and Plume, the plaintiffs insisted on their right to be paid the full price and on 28th September 1993 they issued the writ. It was a fairly brief document. It was specially endorsed and it effectively was a claim for the price of goods sold and delivered to the defendants. There was a reference to their manufacture at the request of the defendants and there was a reference to the invoices which they had furnished to the defendants. They gave credit for the sums which they had received and they claimed the balance which they said was outstanding.

12. The defendants served a defence and counterclaim. In that document they took a large number of points. They alleged among things that there was no contractual relationship between the defendants and the plaintiffs; that there had been a consortium and that the plaintiffs' remedy, if any, was solely against Birmal. They also alleged that there were defects in the goods which had been supplied, that is to say, the dies. They pleaded that the payment conditions, which I have quoted from the letter, had not been fulfilled and indeed they said that, applying those conditions, there had been an overpayment having regard to the percentages set out in those conditions. They also counterclaimed against the plaintiffs.

13. The defence to the counterclaim which was served by the plaintiffs made various responses to the allegations and points but it did not as such raise any specific response to the defence which was

raised on the existence of the condition with regard to the obligation to pay the price. It did not make any allegations of breach of contract on the part of the defendants beyond such breach of contract as was implicit in the alleged failure to pay the price. Furthermore it did not allege any repudiation of the contract by the defendants let alone any accepted repudiation. The reply referred in several places to the existence of the contract. It made no allegation that the contract had been discharged or rescinded.

14. The matter proceeded to trial. The trial took three days. It was heard by Judge Michael Baker sitting in the County Court at Chichester. Oral evidence was called. The parties were represented by counsel who made submissions, including written submissions which were provided to the judge at the end of the hearing.

15. The judge reserved judgment until 2nd November when he delivered a short, written judgment consisting of two pages. When I say "short" it is very closely typed and it did deal with the matters that he understood had been raised before him. He exonerated the plaintiffs from any breach of contract on their part. He confirmed that there was a contract between the plaintiffs and Plume and not simply between the plaintiffs and Birmal. He then went on to deal with the other defences which had been raised. At the top of the second page of his judgment he said this: *"It is common ground that the contract was as per Birmal's terms and conditions. One of those terms was that final payment (45%) was only to be made once Volvo (Birmal's customer) had accepted 20 castings which they found to be satisfactory. That never happened. As Counsel for the Plaintiffs concedes in his closing submission that causes difficulty for the Plaintiffs. In fact in my view it means that the claim in contract must fail".*

16. The effect of what the judge was there saying was that there was a contractual defence to the claim for the price which the plaintiffs had made. He treats that point as being effectively conceded by the plaintiffs' counsel and indeed before us Mr King-Smith, who has appeared for the plaintiffs, accepts that that is fair comment on the way he presented the case in the county court.

17. However, the judge did not stop there because, in opening his case in the county court on behalf of the plaintiffs, Mr King-Smith had made it clear that he was presenting an alternative case of ***quantum meruit,*** claiming an equivalent sum but on the basis of quasi contract or implied contract or the doctrine of restitution rather than as a contractual claim. The judge then went on to consider that claim and he upheld it. He considered that the breakdown of relations between the defendants and Birmal was, if anything, the responsibility of the defendants. He concluded that it would be inequitable for the court not to find that the defendant was liable to the plaintiff and he gave the plaintiff a judgment for the full amount of their claim.

18. The defendants have appealed to this court and the simple ground of appeal, putting on one side other matters which have been raised, is that, since the judge did not make any finding or reach any conclusion that the contract between the plaintiffs and the defendants had ceased to be on foot, there was no answer to the contractual defence and no scope for a claim made in ***quantum meruit***_.

19. It is necessary to consider what were the structure of the relationship between the parties and the rights of the plaintiffs. The plaintiffs had sold and delivered goods to the defendants which had not been rejected by the defendants. Therefore the plaintiffs prima facie had a good claim for the price of those goods. The price would either be a price stipulated in the contract or a reasonable price either on the basis of some implied agreement or on the basis of quasi contract. The facts alleged by the plaintiffs in their especially endorsed writ show a good prima facie claim. The defendants likewise did raise a good prima facie defence - they pleaded the contract. They pleaded the contract terms which stipulated a condition which had to be fulfilled before the later percentages of the contract price became payable by the defendants to the plaintiffs.

20. There might have been various answers that could have been made to that contractual defence. Such defences can be met by arguments concerning the construction of the contract or waiver or impossibility or non-fulfilment of a condition which fell within the control of the opposite party. There are a number of ways in which a response to the reliance upon such a condition can be made. But in this particular action none of those responses had been made. The relevant factual allegations had not

been made. The judge made no findings in respect of them. Indeed it is clear, both from what we have been told and from what the judge said, that in the county court the plaintiffs effectively conceded that they had no answer to the contractual defence. Therefore, the plaintiffs were not entitled to succeed on that view of the issues.

21. I will mention that there was another argument which was advanced, which really related effectively to what might be described as a moral obligation of the defendants to pay the plaintiffs. This was put in paragraph 4 of the written submissions which the plaintiffs' counsel put in after the end of the hearing at the county court, and they submitted that there was an obligation on the defendant to obtain the remaining £55,000 from Birmal but they did not do so. The point was picked up by the judge in these terms: *"The fact that the Defendants did not sue Birmal for what they alleged Birmal owe them does not affect the Plaintiffs' claim against the Defendants. Had they done so, and succeeded, there would have been no question but that the Defendants would have had to pass on to the Plaintiffs what the Defendants owed them. The Defendants cannot be heard to say that because they have not been paid in full by Birmal they are not liable to the Plaintiffs".*

22. That argument does not relate to the terms of the contract between the plaintiffs and the defendants. Whether or not the defendants had been paid by Birmal is beside the point. The conditions related to the approval of castings not to the question whether payment had actually been made. As a matter of morals and fair dealing there is much to be said for the suggestion that, if the defendants had been paid in full by Birmal, then they ought to pay the plaintiffs in full and that is no doubt what would have happened, but it does not advance the legal analysis or the determination of the legal issue to raise such points.

23. The basis of the judge's decision was his acceptance of the claim in ***quantum meruit . Quantum meruit*** is based upon an implied contract or the principle of restitution or unjust enrichment. The plaintiffs in support of their case relied upon the case of **Planche v. Colburn** which goes back to 1831. It was a case in which the plaintiff was employed by the defendant to prepare and write an article for an encyclopedia. His task related to the entry on costume and ancient armour. He was to be paid £100. However, the defendant found that the earlier parts of the encyclopedia were not selling as well as he had hoped and therefore he decided to abandon the project and told the plaintiff so. However, the plaintiff had already done a lot of work on writing the article and carrying out the necessary research. He sued the defendant for the full £100. After a trial in front of the jury he was awarded only £50. It was argued in the Court of Common Pleas that this verdict in his favour from the jury could not be upheld. The Chief Justice, Lord Tindal, said:
"The fact was, that the defendants not only suspended, but actually put an end to, 'The Juvenile Library'; they had broken their contract with the plaintiff; and an attempt was made, but quite unsuccessfully, to show that the plaintiff had afterwards entered into a new contract to allow them to publish his book as a separate work.
I agree that, when a special contract is in existence and open, the plaintiff cannot sue on a ***quantum meruit****: part of the question here, therefore, was whether the contract did exist or not. It distinctly appeared that the work was finally abandoned; and the jury found that no new contract had been entered into. Under these circumstances the plaintiff ought not to lose the fruit of his labour...".*

24. That clearly establishes that, if the special contract (as it is called) is displaced, then a person who has done work or provided materials is entitled to sue for a ***quantum meruit***, but if the special contract remains on foot then he is not entitled to do so.

25. The same principle is to be found in the cases relied upon by the defendants. It is only necessary to make very short quotations from these. The first I will take is from what Lord Dunedin said in the case of **Olanda** which is reported as a note to [1919] 2 K.B. 728 and following. It was a decision of the House of Lords and concerned a claim for a ***quantum meruit*** in relation to the carriage of goods. Lord Dunedin said at 730: *"As regards quantum meruit, where there are two parties who are under contract, quantum meruit must be a new contract and in order to have a new contract you must get rid of the old contract".*

26. Similarly in **Steven v. Bromley,** which was a case which had a similar subject-matter but on the facts led to a different conclusion - it is reported a few pages earlier at page 722 of the same volume - Lord

Justice Scrutton said at 727: *"It is a commonplace of the law that there can be no implied contract as to matters covered by an express contract until the express contract is displaced. A well-known example of this is where an agent works on the terms that he shall receive a commission if successful. That excludes a claim on a quantum meruit for work which does not result in success. But where work is done outside the contract, and the benefit of the work is taken, a contract may be implied to pay for the work so done at the current rate of remuneration, and the terms of the express contract may remain binding in so far as they are not inconsistent with the implied contract."*

27. Similar statements are to be found in Chitty on Contracts and Goff and Jones.

28. In the present case the plaintiffs have not alleged that the contract between the plaintiffs and the defendants was discharged by a breach, nor have the plaintiffs alleged that there was any accepted repudiation of their contract, nor that it had been frustrated. Similarly, the judge has not made any such findings. It follows that it must be accepted that the contract remained on foot and the contractual provisions remained in force. Therefore, the plaintiffs' claim in the action is subject to the contractual provisions and, since the contract provided that the relevant sums should not be paid until certain conditions had been fulfilled (and those conditions had not been fulfilled), the plaintiffs' claim cannot be upheld. The plaintiffs remain bound by the contract.

29. This in effect was what they conceded at the trial before the county court judge and it follows that their alternative claim must fail. In my judgment the defendants' appeal to this court must be allowed.

JUDGMENT : LORD JUSTICE HUTCHISON:

30. I agree that this appeal should be allowed for the reasons that my Lord has given. The manner in which the plaintiffs' claim was pleaded was consistent and consistent only with a claim for moneys due in respect of goods manufactured and delivered. There was no assertion of repudiation of a contract or acceptance of repudiation, nor any claim for damages for breach of contract. While the statement of claim was drawn in terms which were wide enough to comprise a claim for payment on a ***quantum meruit*** basis, it is, I consider, plain from the language of the reply that the claim the plaintiffs were advancing was a claim for moneys due pursuant to a contract. For reasons which I need not rehearse, since my Lord has dealt with them, that claim was unsustainable and it seems that counsel for the plaintiffs appreciated as much when at the hearing he sought leave to advance an alternative claim on ***quantum meruit***. Despite objection from counsel for the defendants the judge allowed this alternative to be relied upon. He did not, however, require amendment of the pleadings, perhaps because he accepted the argument that the statement of claim was technically wide enough to cover such a claim. It seems that the principal argument upon which Mr Hamilton relies before us, that so long as the contract subsisted a claim in quantum meruit was impossible to maintain, was raised before the judge and that he heard some argument to that effect, though nothing in his judgment indicates that this was so.

31. The purpose of pleadings is to define the real issues and by doing so concentrate the minds of advocates and the court on what those issues are and what must be proved in relation to them. It would, in my view, have been very much better had the pleadings been amended to reflect what was in truth a quite different case involving, as it did, the assertion that the contract was at an end and had come to an end by accepted repudiation. I strongly suspect that if that had been done much anxiety and expense would have been avoided.

JUDGMENT : LORD JUSTICE STAUGHTON:

32. Contrary to popular opinion, we in these courts try to arrive at a just result and not to become bogged down in technicalities. But there are times when failure by the parties to comply with the rules of procedure and undue tolerance by the judge makes it very difficult to see where justice lies. This is such a case. I do not complain that the judge allowed Automotive, the plaintiff company, to produce a new case at the trial, if indeed they did, but that it should have been formulated in writing so that everybody knew where they were going.

33. It is not disputed that a claim for payment of the price must fail, because the condition upon which it became due had not been fulfilled. That is subject to a point which I will presently mention. The case

for Automotive, as it seems to me, was that it was the fault of Plume that the condition had not been fulfilled. Plume, it was said, as it seems to me, owed a duty to encourage or persuade or oblige Birmal to secure the approval of Volvo and the payment of what was due.

34. The law on that aspect of contractual relations is tolerably clear. It was established in two cases; one in 1881 and the other in 1949. They are **Mackay v. Dick** (1881) 6 A.C. 251; and **Mona Oil Equipment and Supply Co Ltd v. Rhodesia Railways Ltd** [1949] 2 All Eng 1014. The upshot of those cases is summarised by Mr Justice Devlin in the **Mona** case at page 1017. There he says that the decision in **Mackay v. Dick** contained two separate and independent propositions. The first of them was to be found in the speech of Lord Blackburn as follows: *"... where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect".*

35. The principle is elaborated somewhat in Chitty on Contracts, paragraph 8-035: *"Where each party is bound to co-operate with the other to secure delivery of the goods to the buyer the implication is that each will use due diligence in performing his part."*

36. I think the principle is somewhat wider still. Where co-operation is necessary for the fulfillment of the contract, there is an implied term requiring co-operation. In the present case it could well be argued that co-operation on the part of Plume in securing the approval of Birmal and of Volvo was necessary to the fulfillment of the contract and therefore there was an implied term that co-operation by Plume was required.

37. The second principle derived from **Mackay v. Dick** stated by Mr Justice Devlin in the **Mona** case was this: *"If the breach of the implied term prevents the plaintiff from performing a condition binding on him, he is to be taken as having fulfilled that condition, and, if the condition is one on which his right to payment depends, he may sue for payment instead of damages".*

38. In the present case it seems to me that there was a term at least that Plume would use their best endeavours to secure approval by Birmal and Volvo. Furthermore, if they failed to do that, then the law would treat the condition as fulfilled, that is to say the condition of approval by Birmal and Volvo, and accordingly the remedy available to Automotive would have been the price. It was not a question of a plea that they were entitled to how much they deserved or even how much the goods were worth (***quantum meruerunt or quantum valebant***). It was a contractual claim.

39. The first problem is, as Lord Justice Hobhouse has pointed out, that Automtive disclaimed any contractual claim in the course of the trial. That might be a serious obstacle; but it was not by any means the worst problem that they had to overcome. It was simply not investigated as to whether Plume had done their best to get approval from Birmal and Volvo, as far as I can see. At any rate, if it was investigated the judge never made any findings as to whether or not that happened.

40. Mr Hamilton in the course of his argument said (and this appears to be correct) that the problem arose because Volvo decided that they did not want goods of this kind - they changed their requirements. Birmal thereupon, as Mr Hamilton said, lost interest in any further tests. So those two parties simply abandoned the contract and made no further attempt to fulfill the condition of payment. Plume protested for a time and then Birmal, who (as was said in the course of the argument) were evidently not born yesterday, came up with a counterclaim for £300,000 against Plume. There was a degree of implausibility in that counterclaim, but it seems to have been sufficient to persuade Plume not to pursue their attempts to obtain approval from Birmal and Volvo, or some other remedy if approval was not forthcoming. They simply shied away from further dispute with Birmal.

41. That is all that one can extract from the documents and evidence so far as we have been shown them. On that material I cannot see that any breach of the implied obligation to co-operate in order to secure fulfillment of the condition was proved. It may or may not be the case that Plume used their best endeavours to secure fulfillment. At all events the judge did not find that they had failed to do so. That being the way in which, in my judgment, the case ought to have been put, it was not made out on behalf of Automotive.

42. For the reasons given by Lord Justice Hobhouse I agree that the claim which was in fact pursued fails, and that this appeal ought to be allowed.

43. Before leaving the case I feel bound to say that it seems a great pity that three days were spent on evidence when the real point was, as it seems to me, never grasped. I lay no blame on anyone in particular. It must have cost a great deal of money. We may by now have reached the point where litigation is so expensive that those who owe debts of £30,000 can safely refuse to pay, simply because the creditor will know that it is not worth his while to claim. It is to be hoped that some solution will be found. In many of the courts in the United States mediation is compulsory, or at least has to be seriously considered. If and when we develop a system of mediation, this might well have been a case which would have benefited by it. But at the end of the day legal rights must be capable of enforcement, because otherwise unscrupulous people - and by that I do not mean either of the parties to this case - will simply take advantage of the fact that the law is for all practical purposes not available to those to whom they owe money.

Order: Appeal allowed; costs of claim in court below and of appeal be for appellant; order of court below as to counterclaim to stand.

MR GAVIN HAMILTON (instructed by Messrs Myers Ebner Deaner, London W6 7LP) appeared on behalf of the Appellant (Defendant).
MR JAMES KING-SMITH (instructed by Messrs Staffurth & Bray, Bognor Regis, West Sussex) appeared on behalf of the Respondent (Plaintiff).