CA on appeal from High Court, Leeds District Registry (HHJ Taylor QC) before Beldam LJ; Hutchison LJ; Mummery LJ. 20th November, 1997

LORD JUSTICE BELDAM:

1. The defendant in these proceedings, Chaddington Property and Development Company Limited, appeals with leave from the order of His Honour Judge Taylor, Official Referee, made on 5 July 1996 by which he ordered that the plaintiff have leave to sign judgment under Ord.14 for the sum of £88,000 with interest, and that the defendant have leave to defend the balance of the plaintiff's claim of £10,000, but such claim be stayed pending further order, that proceedings on the defendant's counterclaim be stayed pending referral for determination by arbitration under section 4 of the Arbitration Act 1950 and that the plaintiff have the costs of the applications in any event.

2. The plaintiff is a building contractor and the defendant a property development company. In 1994 the defendant was proposing to develop a site at St Mary's Manor, Beverley in Yorkshire. The defendant had bought the site in 1993 from Humberside County Council and had agreed to erect on it a new nursery school in place of the existing school. The defendant proposed to construct a building containing 31 flats on the site, together with a shared housing project of 18 houses. When the nursery school had been completed and the existing school had moved into the new premises, the old school on the site was to be demolished and a residential healthcare centre constructed. The defendant proposed to let out the construction work as four separate contracts. The first, known as the Category II contract, was for the construction of the 31 flats; the second, known as the shared housing contract, for the 18 houses, the other two were for the nursery school contract and the health centre contract.

3. During 1993 discussions had taken place between the plaintiff and the defendant which it was hoped would lead to the plaintiff being chosen as the contractor to execute all four contracts. In the event, the plaintiff entered into a contract for the first three projects, but the fourth contract for the health centre was let to another company. All the contracts entered into by the plaintiff were in the standard form, Joint Contracts Tribunal contract of 1980. The agreed price for the 31 flats was £901,233, with a completion date of 11 November 1994; the price for the construction of the 18 houses was £450,000 to be completed on the same date; the price for the works needed to erect the nursery school was £268,868, the date for completion being 25 November 1994. Work on the nursery school contract was due to begin and the plaintiff was due to be let into possession of the site by 20 June 1994. As previously stated, the school was a replacement for an existing school, and on completion and occupation of the new nursery school, the existing school was to be demolished and on its site the healthcare centre was to be erected. The original proposal or hope was that the plaintiff company would carry out the construction of the healthcare centre, but later a company called Try Limited was engaged to do the work by the defendant.

4. The plaintiff's claim in these proceedings was for sums due for work carried out under the contract to build the nursery school. Clause 30 of the contract contained the usual provisions by which the architect from time to time certified the amount due from the employer to the contractor by interim certificates. These certificates were to be issued at the intervals stated in the appendix, but no such periods were actually specified. It seems to have been the intention of the parties that stage payments would be made, but these were not specified either. In fact, some interim certificates were issued from time to time by the architects, stating the amount of work which had been carried out by the plaintiff.

5. The work on the school contract was effectively completed by 22 December 1994 and on 6 January 1995 a certificate of practical completion was issued by the architects. Mr Birch of the plaintiff believed at this time that all that had been paid by the defendant for the work done was the sum of £100,000. The plaintiff had also claimed for substantial extra work carried out under the contract. The contract had overrun by a period of six weeks which, unless the plaintiff obtained extensions of time, would have involved the payment of liquidated damages of £18,000. Mr Birch believed that the extra work he had been asked to perform greatly exceeded this figure.

6. During January and February 1995 the parties were negotiating the terms of the contract for building of the residential healthcare unit, and it seems that the plaintiff had moved on to the site of the proposed building with a view to being awarded the contract. On 15 February Mr Birch (who was the plaintiff group chief executive) met Mr Peden (the defendant's managing director) to discuss proposals for payment of significant sums which the plaintiff said were due on all three of the contracts it had been performing. The plaintiff was requiring significant payments to be made and in particular the outstanding amount of the contract price for the nursery school.

7. On 8 March 1995 Mr Birch wrote to Mr Peden to record his understanding of the defendant's proposals for payment. At this time it was still expected that the plaintiff would obtain the contract to construct the residential healthcare unit and the defendant was hoping that they would be able to discharge their liabilities to the plaintiff out of sums received once work on this fourth contract had begun. In his letter Mr Birch said in paragraph 8: *"We require satisfactory evidence that payments to us for construction of the School are covered without your contract sum for the [residential] Health Unit. You have promised this by Thursday 9 March 1995, and this should show the individual amounts and the timing of the payments to clear the £168,000 still due on the school."*

8. Mr Peden replied to this letter on 10 March 1995. He had by then decided to award the contract for the residential healthcare unit to another contractor. He said: *"In the meantime, we confirm our stated intention to pay you the remaining monies due for your works on the school from the first three monthly valuations on the Healthcare*

Unit as agreed. Correspondingly, you should now vacate the site designated for the Healthcare unit in anticipation of the arrival of another contractor ..."

9. To this letter Mr Birch replied on 14 March saying, among other things: *"On the subject of payments, in respect of the Nursery School, the amount of £268,868 is currently certified and £168,000 is overdue and remains unpaid. We would therefore appreciate settlement in respect of this certificate and also the balance of monies certified and currently overdue against the Category II contract by return."*

10. There were then further discussions between the plaintiff and the defendant. In a letter of 15 May Mr Peden, after stating that the work on the residential healthcare unit was due to begin on 15 May, said: *"This in turn will release over the pre-agreed period the outstanding balance due to yourselves in the amount of £168,000 ... which will, of course, be subject to final account negotiation and set-offs."*

11. This letter led to further discussion. On 25 May Mr Peden wrote to Mr Birch recording agreements made "between our two companies and notwithstanding the current situation on our other contracts". Mr Peden said:

"... the cause of major concern, we agree that the amount outstanding from the contract sum on the above mentioned contract [the nursery school contract], excluding final account matters, is £168,000 ... This sum was always to be paid to yourselves from the first three construction valuations of the work on site. However, due to your failure to agree [to the] satisfactory conditions of contract, the consequent delay to commencement of the construction programme by others has caused us to seek to honour this payment to you in the following manner:-

1. *Chaddington make an initial payment of £70,000 by wire transfer on 26/5/95*
2. *Chaddington make a further payment of £40,000 by cheque on 5/7/95*
3. *Chaddington make the third payment of £residual by cheque on 5/8/96*

and that W G Birch Construction agree to this method, timing and amounts of payment by signing a copy of this letter and returning it ... and further agree that the £168,000 represents monies outstanding on the school only."

12. The sum of £70,000 was paid by CHAPS transfer on 27 May but the payment promised by 5 July did not materialise. However, at a meeting on 26 July Mr Peden paid a cheque for £10,000 to Mr Oxtoby (who was the plaintiff's managing director) promising to make a further payment of £30,000 on 6 August. No further payments were made for the work carried out on the nursery school.

13. The parties apparently continued to negotiate about sums outstanding in payment for the other two contracts about extra work and contra items, and in the course of these negotiations it became apparent that neither side's accounting procedures were particularly reliable. However, the plaintiff did produce a spreadsheet showing the dates and amounts of payments made by the defendant on the three contracts. These showed that sums had been certified as due on the nursery school contract in October in a net sum of £26,966 and in November of £35,488, totalling together £62,454, and that the plaintiff had actually attributed payments which they had received to these two certified sums. Thus it is clear that Mr Birch was mistaken in thinking that only £100,000 had been paid in respect of the contract price of the nursery school. The figure should have been £162,454, which would leave a balance due on the contract price, after allowing for a sum of £4,033 retention.

14. In evidence before the Judge, Mr Peden in his affidavits said that he had merely accepted Mr Birch's figure of £168,000 as being due on the school contract. It seems reasonably clear he had no idea what the actual figure was. He denied there had been any agreement to pay the £168,000 whatever may have been said in the letter of 25 May. He said that he had personally withdrawn, what he regarded as an offer by him in the letter of 25 May, by a letter dated 1 June. This letter is handwritten and is said to have been delivered by hand and by fax to Mr Oxtoby. It refers to the plaintiff being aware that the defendant's records showed more paid towards the school works than Mr Birch had stated. There are number of features about this letter to which Mr Dennys QC, who appeared for the plaintiff, pointed which cast grave doubt whether this in fact is a contemporary document and whether it was ever sent, but I am quite satisfied that Mr Peden in the letter of 25 May had recorded an agreement and had not simply made an offer. In my view, the agreement was that the balance due on the school contract (then believed to be £168,000) would be paid, excluding final account matters. The defendant agreed to pay this sum by the three instalments stated. In my view the essential features of the agreement were an agreement to pay the balance then outstanding on the final price of the school contract, and that it would be paid, leaving aside all final account matters.

15. Mr Peden also asserted on affidavit that he had made a further payment of £31,060 in respect of amounts outstanding on the school contract. He supported his assertion by production of a photocopy cheque stub dated 2 March 1995. This cheque stub purported to show the sum paid in respect of the school contract. But in his affidavit he did not say that he had specifically told the plaintiff when paying this sum that it was in respect of work carried out on the school contract. The spreadsheet to which I have referred shows that such a sum was received by the plaintiff on 3 March and that it was attributed it to work carried out on the category II contract. On receipt of this sum, the sum unpaid on that contract was reduced to £71,740.

16. Before Judge Taylor the defendant argued that the plaintiff could not succeed in its application under Ord.14 because it was relying on a different cause of action to the cause of action pleaded in the statement of claim. It was relying on an agreement evidenced in the letter from Mr Peden of 25 May 1995 whereas the statement of claim was based on the original contract. Accordingly, the plaintiff could not succeed without an amendment and the Court ought not to grant such an amendment. Judge Taylor rejected his argument, holding that the plaintiff's claim was sufficiently pleaded and supported the application for summary judgment. He held that the defendant

was in no way prejudiced; that the claim was pleaded and formulated for an outstanding balance on the contract sum; that the agreement of 25 May was essentially the method by which the plaintiff sought to demonstrate the amount outstanding which had been agreed on that date. The Judge held that there was no inconsistency between the plaintiff's pleaded case and the claim put forward. The plaintiff had given credit for the sum of £70,000 paid on 27 May, but it appeared that no credit had been given for the £10,000 subsequently received which the plaintiff said was not attributable to the school contract. The Judge considered the defendant had showed an arguable case in respect of that sum, and deducting it from the £98,868 (the balance claimed), gave judgment for £88,868 and leave to defend as to £10,000. He also awarded substantial sums in interest.

17. On the plaintiff's summons to refer all outstanding matters to arbitration, he directed that the issues raised by the counterclaim should be referred to arbitration and stayed the plaintiff's claim in respect of the £10,000 until further order.

18. In this appeal Mr Marcus Taverner has repeated the defendant's submission that the plaintiff is seeking to recover on a different cause of action, that the cause of action on which the plaintiff's claim is based is not a breach of the original contract for the construction of the school, or for money due for work carried out under that contract, but for breach of a subsequent agreement evidenced in the letter of 25 May. The plaintiff could only succeed in its pleaded claim if it alleged sums were due on certificates properly provided in accordance with terms of the contract, and in particular clause 30, which remained unpaid. Mr Taverner submitted that the rules providing for summary judgment under Ord.14 are strict, that the Court ought not to allow any amendment and should be satisfied that the cause of action pleaded is properly made out.

19. In support of his submission, he referred us to the case of ***Gold Ores Reduction Co Ltd v. Parr*** [1892] QB 14, which is cited in the Annual Practice as authority for his proposition.

20. Mr Dennys submitted that it was unnecessary for the statement of claim to plead that certificates had been given. It was clear from the contract in question that the parties had modified the terms of the agreement and the appendix did not contain any particular dates on which certificates were to be given. The fact that certificates had in some instances been given was beside the point. The plaintiff's claim was not based on a different cause of action, for example, accord and satisfaction, but on an agreement that a specific sum was due to be paid in a particular way under the original contract. To this the parties were free to agree if they wished, but it did not mean that a different cause of action arose. The plaintiff was entitled to rely on the original contract.

21. The statement of claim sufficiently pleaded a cause of action in contract for a sum due and there was no departure from the pleaded case. Alternatively he submitted that if the Court was of the view that the claim was insufficiently pleaded, the Court had power to and should give leave to make the simple amendment required to make it clear that the sum claimed was the balance of a sum agreed to be due to the plaintiff on the original contract between Mr Peden and Mr Birch. He submitted that ***Gold Ores*** was distinguishable. It was decided 100 years ago when judgement under Ord.14 could only be obtained on a liquidated sum and when the claim for interest was clearly not able to be included in the claim. He referred us to ***Sheba Gold Mining Co. v. Trubshawe*** [1892] 1 QB 683 which was referred to in the judgment of Matthew J in the ***Gold Ores*** case at page 17. He further referred to the observation in that case (at page 683) that the Court regarded the plaintiff as seeking to abuse Ord.14 by making a claim to which it was not entitled.

22. We were further referred to the case of ***Roberts v. Plant*** [1895] 1 QB 597 and to the judgment of Lord Esher at page 603. In my view it is unnecessary to consider this case in detail. They are distinguishable. Today the courts are more concerned with substance than with form and where, as in this case, it is clear that the claim is based in contract and the substance of the claim is supported by the evidence confirming that the sum is due, then although deficiencies in the pleading cannot be made good by the evidence, there is no deficiency in the facts which go to make up the cause of action. To this I would add one qualification. In the present case it seems to me that good pleading practice would have required the plaintiff to make clear the origin of the figure of £168,000 claimed. This could easily have been done by a short explanatory paragraph, and I am quite satisfied that any Court would have allowed such an addition to the statement of claim which did not change the basis of the plaintiff's claim. In my view, there was no prejudice to the defendant in this case and I would reject the submission that the plaintiff's summons should have been dismissed for want of form or because the application was based on a different cause of action.

23. It is clear from the spreadsheet that Mr Birch was wrong in thinking that £168,000 was outstanding on the nursery school contract. Mr Peden had no idea what sum was outstanding, but each of them was in my view in agreement that the balance of the agreed price for the work of done had not been paid, was overdue and should be paid, leaving aside questions of additional work, liquidated damages and contra items. Mr Taverner sought to persuade the Court that because the parties wrongly thought that the amount outstanding was £168,000 that the agreement was void and unenforceable. I do not agree. Nor do I agree that the error should affect the application for summary judgment of the amount properly outstanding. At the time of the issue of the writ, it seems to me that the amount outstanding on the contract and which ought to have been paid, certainly within a reasonable time of practical completion, was £102,381. From this sum the defendant had paid the £70,000 and the £10,000, leaving a balance outstanding of £22,381.

24. Did the evidence of Mr Peden disclose an arguable defence to a claim in this sum? Whilst I have grave doubts about Mr Peden sending the letter of 1 June, and whether there is any basis for the suggestion that the sum of

£31,060 was specifically attributed by him to the nursery school contract, I am persuaded by Mr Taverner that those are matters for the Court to resolve. Whether it is described as a defence which is shadowy, speculative, or lacking substantial chance of success, it is in my view the kind of defence which calls for the defendant to bring a sum of money into Court. Mr Taverner further said that under ordinary principles the defendant can claim a set-off of just over £13,000 which is set out in the counterclaim, and for liquidated damages of £18,000. These matters were, however, expressly agreed between the parties to be decided apart from the payment of the outstanding balance on the contract. Payment of the outstanding balance would not preclude claims and cross-claims beings decided for extras, liquidated damages and contra items. In my view the parties had expressly agreed that these items should not be off-set against the sum of £22,381.

25. Accordingly, I would vary the Judge's order and order that on condition that the sum of £25,000 is brought into Court the defendant should have leave to defend. The addition to the sum of £22,381 it seems to me ought to be made to cover interest on the sum which, if it is due, is long overdue. I would wish to hear counsel on the further terms of this order.

26. As to the plaintiff's summons that the counterclaim should be stayed pending arbitration, insofar as it relates to claims arising under the category II contract and the shared ownership contract, I would confirm the Judge's order that the proceedings be stayed under section 4 of the Arbitration Act 1950.

27. As to the remainder of the claims arising under the nursery school contract, in my view the counterclaim should continue. The plaintiff cannot in one breath claim sums due under the contract and in the next claim that the remainder of the issues should be referred to arbitration. Again I would wish to hear counsel concerning any directions with regard to the further proceedings on the counterclaim which the Court should give.

28. Finally I would refer to an argument of Mr Taverner in reply that as the Court now (under section 43 of the Courts and Legal Services Act 1990) has power, if the parties agree, to exercise all the powers of an arbitrator, the Court ought not to exercise its discretion to stay the proceedings on the counterclaim. Mr Dennys had argued that one of the reasons why the matter should proceed to arbitration was that the powers of the arbitrator were considerably wider than those of the judge for they included power to open up questions arising under previous certificates given by the architect which a Judge could not do.

29. The Court undoubtedly does have jurisdiction, if the parties agree, that the Judge should have the powers given to the arbitrator under the agreement and that the Court can undoubtedly take into account an offer by the defendant to agree to this course. But in this case, the three contracts had been treated throughout as separate contracts, and although I would hold that the plaintiff had waived any right to arbitration on the nursery school contract, it has not done so on the other two contracts.

LORD JUSTICE HUTCHISON: I agree.

LORD JUSTICE MUMMERY: I agree.

Order: Minute of order to be supplied.

MR M TAVERNER (Instructed by Messrs Eversheds, Birmingham, B3 3LX) appeared on behalf of the Appellant
MR N DENNYS QC (Instructed by Messrs Walker Morris, Leeds, LS1 2HL) appeared on behalf of the Respondent