

Neutral Citation Number: [2007] EWHC 727 (TCC)

Case number TCC09307

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY
TECHNOLOGY AND CONSTRUCTION COURT
HIS HONOUR JUDGE STEPHEN DAVIES

MANCHESTER CIVIL JUSTICE CENTRE
1 BRIDGE STREET WEST
MANCHESTER M3 3FX

Date of hearing: 25 January 2008
Date of draft judgment: 7 February 2008
Date judgment handed down: 27 March 2008

Before:
HIS HONOUR JUDGE STEPHEN DAVIES

Between:

ENTERPRISE MANAGED SERVICES LIMITED

Claimant

and

EAST MIDLAND CONTRACTING LIMITED

Defendant

Mr Paul Darling QC, instructed by Pannone LLP, Solicitors, for the Claimant

Mr Michael O'Reilly of Adie O'Reilly LLP, Solicitors, for the Defendant

JUDGMENT

A. Introduction

1. On 11 December 2007 the claimant issued these proceedings, in which it seeks to reverse the decision of an adjudicator, given on 7 September 2006, by which the adjudicator decided that the claimant was obliged to pay the Defendant the sum of £1,131,668.29 as damages for breach of contract. On 2 January 2008 the defendant issued an application, seeking:
 - (a) Under CPR part 11, a declaration that the court has no jurisdiction to decide this claim or, if it does, that it should not exercise its jurisdiction to do so.
 - (b) Under CPR part 3.4, an order striking out the claim as disclosing no cause of action or, under CPR part 24, an order for summary judgment against the claimant on the claim.

2. Both limbs of the application rely on the same part of the same clause of the sub-contract made between the parties, which provides as follows:

'15. ... The parties shall not commence any action or proceeding other than adjudication arising out of or in connection with this Sub-Contract until such time as the Main Contract Works have been certified substantially or practically complete.'

3. It is the defendant's case that these proceedings have been brought at a time when the condition precedent to commencing proceedings other than adjudication, i.e. the certification of the main contract works as substantially or practically completed, has not been satisfied, and that this:
 - (i) prevents the court from having jurisdiction, alternatively requires the court to decline to exercise jurisdiction;
 - (ii) operates as a substantive defence to the claim asserted in the proceedings.

4. Both limbs of the application raise the same questions as to the proper construction of clause 15 which were, as identified in paragraph 22 of Mr Darling QC's skeleton argument:

'22.1. What does clause 15 mean by the Main Contract Works?
22.2. What does clause 15 require by way of certification?'

5. There are also factual questions between the parties as to whether or not the certification requirements of clause 15, whatever they are, have been satisfied. In support of its application the defendant served a witness statement from Mr Paul Hardy, a solicitor in the firm instructed by the defendant, and in response the claimant served a witness statement from Mr Dean Cooper, a divisional commercial manager of the claimant.

6. At the outset of the hearing on 25 January 2008 there was some discussion as to the nature of the exercise which the court was being invited to undertake. In the event, it was agreed between the parties that:
 - (a) The court was asked to reach a final decision on the jurisdiction point, which involved: (i) reaching a conclusion on the questions of construction, as to which (and subject to one point) no further evidence was required; (ii) reaching a conclusion on the factual questions on the evidence before me. In particular, neither party was inviting the court to order disclosure or cross-examination of witnesses to deal with this issue, very sensibly mindful of the costs and delays which would be associated with such an exercise.
 - (b) The court was asked to resolve the part 3.4 and part 24 applications in the usual manner appropriate to such interlocutory applications.
 - (c) The court was asked to determine the questions of construction as preliminary issues in the proceedings, not least in order to avoid the

possibility that the losing party might subsequently seek to contend that the determination of the questions of construction for the purposes of the jurisdiction issue was not binding in the substantive proceedings.

7. During the course of the hearing it became apparent that there was an issue as to whether or not all relevant parts of the main contract¹ had been attached to the claimant's witness evidence. In order to ensure that the defendant was not prejudiced by having agreed to the final determination of the questions of construction without having sight of all relevant terms of the main contract I directed that the claimant should either confirm that the main contract had been fully disclosed, or provide any remaining parts of it, and that the parties should have an opportunity of making submissions in relation to any relevant parts disclosed as a result before I gave my judgment. In the event, what transpired was as follows:
 - 7.1. Following the hearing last Friday 25 January 2008 I received:
 - (i) A letter to the court from the defendant's solicitors dated 28 January 2008, enclosing a copy letter to the claimant's solicitors also dated 28 January 2008, and a copy proposed letter to National Grid Legal Department.
 - (ii) A letter to the court from the claimant's solicitors dated 29 January 2008, enclosing the supplemental witness statement of Dean Cooper with attachments.
 - (iii) A further letter to the court from the claimant's solicitors dated 31 January 2008 in response to the defendant's solicitors' letter to the court dated 28 January 2008.
 - (iv) A further written submission from Mr O'Reilly entitled 'Applicant's comments arising from further disclosure of main contract'.
 - 7.2. As I understood it, the defendant's position was as follows:
 - (a) It said that it was awaiting completion of disclosure of certain main contract documents which were identified in paragraph 1 of Mr O'Reilly's further written submissions, namely: (i) appendix 2 of the deed of July 2004; (ii) a deed of January 2008.
 - (b) It was asking the court for an indication that it could send its proposed letter to National Grid Legal Department, and that the court would await the response before giving judgment.
 - (c) It sought to reserve its client's position in relation to its agreement at the hearing of 25 January 2008 to having the questions of construction of clause 15 of the sub-contract determined as preliminary issues by the court.
 - 7.3. In contrast, as I understood it, the claimant's position was that:
 - (1) It had addressed the question of disclosure of the main contract.
 - (2) It did not consider it appropriate for the court to extend the time for giving judgment to await any response from National Grid Legal Department to the defendant's solicitors' proposed letter.
 - 7.4. Having considered these communications, I advised the parties in a letter dated 1 February 2008 that:
 - (i) I did not consider that the claimant was required under the direction I gave at the hearing on 24 January 2008 to disclose the further documents referred to in paragraph 1 of Mr O'Reilly's further written submissions on the ground that they do not form part of the main contract as originally entered into in 1999 (or as in force in 2002 when the sub-contract was entered into).

¹ In fact, as will appear subsequently, there were two main contracts rather than one main contract, but since both were in identical terms I shall refer to them collectively as the main contract unless necessary to differentiate between them.

- (ii) Although it was not for the court to determine what correspondence the defendant's solicitors may choose to send to third parties, I was not prepared to await any reply from National Grid Legal Department to the defendant's solicitors' proposed letter before proceeding to judgment. In my judgment the defendant had every opportunity at the outset of the hearing to make an application for the hearing to be adjourned in order to obtain evidence in response to that filed by the claimant, and chose not to do so. I was not prepared to allow them to adduce further evidence from the employer at this stage.
 - (iii) Insofar as was relevant, I did not consider that the Defendant was entitled to resile from its agreement at the hearing of 24 January 2008 to having the questions of construction of clause 15 of the sub-contract determined as preliminary issues by the court.
 - (iv) Accordingly, I was proceeding to prepare my judgment, taking into account the supplemental witness statement of Dean Cooper with attachments and the further written submission from Mr O'Reilly entitled 'Applicant's comments arising from further disclosure of main contract'.
8. I have had the benefit of full written and oral submissions from Mr Darling QC for the claimant and Mr O'Reilly for the defendant, and I am grateful to both of them for their helpful submissions. In particular, they enabled me to understand the nature of the respective cases in relation to each of the questions of construction and the disputed factual issues.

B. The questions of construction

9. Although the parties for ease of submission divided the questions of construction into two as indicated above, I found it easier to seek to construe the phrase 'certification of substantial or practical completion of the main contract works' as a whole. It is therefore convenient for me to deal with the questions of construction together.
10. There was no dispute as to the legal principles applicable to construction of a written contract such as the present. For the general principles, Mr O'Reilly referred me to the well-known passages in the speech of Lord Hoffman in Investors Compensation Scheme v. West Bromwich Building Society [1997] UKHL 28, and submitted that clause 15 should be construed in the light of the relevant factual matrix as it existed as at the date the sub-contract was entered into. Mr Darling did not disagree, but also submitted that the principle that any restriction on the parties' right of access to the court to resolve their disputes should be as limited as possible was also engaged in a case such as this. For his part, Mr O'Reilly did not dispute the existence of this principle, but also referred me to authorities on the standard ICE form of civil engineering contract to illustrate that the courts do not regard as objectionable clauses which restrict the parties' right to arbitrate their disputes until after completion of the works.
11. Both parties also submitted that the questions of construction could not properly be answered by a construction of clause 15 in isolation from the remainder of the sub-contract and the main contract. They both referred me to substantial parts of those contracts. Accordingly, it is necessary for me to examine the relevant terms of those contracts before considering the parties' competing cases.

C. The terms of the sub-contract

12. The sub-contract is contained in a written agreement made on the 9 April 2002 between the claimant and the defendant. The written agreement begins by reciting that the claimant wishes to have provided the following works:
"The supply of all Labour, Tools and Equipment, Vehicles, Fuel, Plant and Materials ... as required to facilitate the installation/alteration of new/existing service/main laying works, including reinstatement, at various locations in the Lincoln area² on our First Connect Connections Engineering Period Contract (The Main Contract) under our Enterprise Utility Services Ltd Standard Form of Sub-Contract."
It continues by identifying the documents which form part of the agreement, which are identified as follows:
1. The Sub Contract Terms and Conditions
 2. The Schedule of Rates
 3. Letter dated 09/04/02
 4. General Requirements of Contract
 5. Particular Requirements to All Schedules.
13. As relevant, the letter provided for payment against the submission of a "tracksheet per completed job", which would detail all works undertaken in any given week valued against the agreed schedule items. It also provided that if the defendant wished to terminate the contract with the claimant at any time, then 28 days' written notice was required.
14. The sub contract terms and conditions included the following:
- (a) Clause 1, under which the defendant was deemed to have notice of all provisions of the main contract (except for details of prices), which were available for inspection on reasonable notice;
 - (b) A number of references to the " Main Contract Works", which was not defined anywhere, for example clause 5 (requiring the defendant to undertake the subcontract works in accordance with the Main Contract Works programme), and clause 7 (requiring the defendant to maintain and protect the sub-contract works until "final completion of the Main Contract Works");
 - (c) Clause 13, providing for payment on a monthly basis for the value of Sub-Contract Work "certified to be complete for the purposes of the Main Contract";
 - (d) Clause 14, providing for payment of retention, on the sooner of two dates, the second of which was "the date falling three years after substantial completion of the Main Contract Works as certified for the purposes of the Main Contract".
 - (e) Clause 15, which contained a number of provisions relating to jurisdiction and dispute resolution under which, in addition to the provision now under consideration, the parties made provision: as to the law applicable to the sub-contract; for the English courts to have exclusive jurisdiction; for a dispute escalation procedure; and for the parties to refer any dispute to adjudication at any time.
15. The "General Requirements and Guidance" document was entitled "Engineering Period Contract (Connections) Supporting Information". Relying on this, together with the nature of its contents, Mr O'Reilly submitted at the hearing that it was apparent that this was a contract document taken from the main contract. The

² It is common ground that the sub-contract was extended to cover a greater geographical area than Lincoln.

supplemental witness statement of Dean Cooper, however, who was employed as a senior quantity surveyor by one of the predecessor companies of the claimant at the time the main contract was entered into, established to my satisfaction that:

- (i) The General Requirements document was a 'non-binding guidance document' which was produced as part of the negotiations between the predecessors of the claimant and the predecessor of the employer, and did not form part of the main contract as originally entered into or as at the date of entry into the sub-contract.
 - (ii) It was not until the main contract was varied by deed of variation dated 14 June 2005 that the General Requirements document achieved any contractual status, and then only in that (clause 3.3 of the deed) the main contractor undertook to comply with the General Requirements. Even then, however, the General Requirements were to rank below the other provisions of the main contract in priority – clause 6.1.
16. Mr O'Reilly referred me in particular to clause 1.2, entitled "Philosophy of the Contract", which stated that "work will be issued under a Contract Order, which may be for a set amount of work to be performed or for all works of a particular nature within a set time period". He also referred me to clause 9, which provided further details in relation to Contract Orders, and in particular which stated that "each specific task under a Contract Order is a project and each project will have designated work documents. Upon completion of the works and of the work documents, a project completion certificate will be authorised by the Manager" (defined in clause 8.4.1 as being the Contracts Operation Manager employed by "the Employer"). Clause 9.3 provided that "a project completion certificate will only be signed by the Manager when all of the work documents have been returned". Importantly, however, it went on to state that in simple projects the instruction to carry out work would be the job voucher or similar document, and that 'on completion of the work and authorisation by the Manager, [this] will be regarded as the Project Completion Certificate". In complex projects, there might be more works documents, and once approved the Manager would 'authorise a project completion certificate and issue a copy to the Contractor'.

D. The terms of the main contract

17. Having regard to the deeming effect of clause 1 of the sub-contract, it was common ground between the parties that the terms of the main contract as at the date of entry into the sub-contract were also relevant to the construction of clause 15.
18. The relevant main contract was entered into some time in 1999 between predecessor companies of the claimant and BG plc as the predecessor of the current employer company, which has for convenience been referred to as "Fulcrum". There were in fact two main contracts, each relating to a separate geographical area, but they were in identical terms. They each comprised a two page contract agreement, executed as a deed, which by clause 3 also incorporated what were described as the General and Specific Conditions of Contract and the "Contract Data (including Tables of Rates)".
19. Clause 4 of the contract agreement provided that the contract should run for 60 calendar months from 4 October 1999, unless either: (a) the employer exercised an option for termination after 36 months; (b) "work is being performed under a Contract Order issued within the Contract Period, whether reduced or not, in which case this Contract shall continue to have force in relation to that work until the date that the work under the relevant Contract Order is completed and the Contract Period shall be extended accordingly".

20. The General Conditions of Contract comprised a substantial document with 18 separate clauses, each containing a number of separate sub-clauses. Of potential relevance to this case are the following:

- (a) Clause 1.1.1, which provided that “no amendment or addition to this Contract shall be binding on the parties hereto unless in writing and signed on [their] behalf”.
- (b) Clause 1.1.5, which provided that the contract should not be waived except “where agreed by both parties in writing or as otherwise set out in this contract”.
- (c) Clause 1.3, which contained a number of inter-related relevant definitions, including the following:
 - clause 1.3.46: “Works means all or any of the Projects ... to be performed by the Contractor under any Contract Order issued under this Contract” (emphasis added).
 - Clause 1.3.10: “Contract Order means the written signed instruction given by the Manager to the Contractor to perform the Works specified in that Contract Order”.
 - Clause 1.3.21: “Manager means the person nominated by the Employer to act as its representative in relation to the management and performance of the Works of this Contract”.
 - Clause 1.3.32: “Project is a specific task issued under a Contract Order”.
 - Clause 1.3.33: “Project Completion Certificate is a certificate authorised by the Manager which shall identify that all the Works comprising a Project and all the Work Documents have been completed”.
 - Clause 1.3.34: “Project Completion Date is the date when the Project Completion Certificate is authorised by the Manager”.
 - Clause 1.3.47: “Work Documents means those documents that the Manager deems necessary for the Contractor to complete or provide an to show that the Works have been performed in accordance with this Contract”.
 - Clause 1.3.43: “Track Sheet records: (i) the Value of Works Performed on Site; (ii) the Contract Management Costs; (iii) the Material and Design Costs; (iv) any other allowable cost”.
 - Clause 1.3.5: “Contract Commencement Date means the date upon which this contract comes into operation as set out in the Contract Data”.
 - Clause 1.3.6: “Contract Completion Date means the end of the Contract in accordance with clause 4 of the Contract Agreement”. (However there was no separate definition of or reference to any requirement for the issue of a certificate of Contract Completion.)
- (d) Clause 4.2.1, under which it was provided that “the Employer issues work to the Contractor by way of a Contract Order which shall constitute Works to be performed ...” and which, by clause 4.2.3, “may consist of any number of Projects”, so that “the Contract Order is completed on the issue of the last Project Completion Certificate of that Contract Order” (clause 4.2.4). Clause 4.4 refers to Projects, and by clause 4.4.2 it was provided that: “the Project will be completed when:
 - (i) all Works comprising the Projects are completed and
 - (ii) the Contractor produces to the Manager all the Work at Documents he intends to rely upon as the basis of any amounts due to him and
 - (iii) all the Work Documents as required by the Manager are completed and submitted to the Manager and
 - (iv) the Manager being satisfied authorises the Project Completion Certificate”.

- (d) Clause 7 dealt with payment. Under clause 7.1.3 the contractor was entitled to receive payment of his actual costs on a periodic basis, and payment of profit "where the Project Completion Certificate has been authorised by the Manager", and under clause 7.2.2(ii) it was provided that the payment mechanism designated in a contract order should operate once the " Project Completion Certificate is authorised".
21. The full version of the main contract attached to the supplemental witness statement of Mr Cooper also contained the Specific Conditions and the Contract Data. As it transpired, the only relevance of the Specific Conditions was that they made clear that all payments falling due under the main contract other than contract management costs were to be payable against authorised project completion certificates, and that contract management costs were to be payable against authorised separate track sheets. There was nothing of relevance in the Contract Data.

E. Extensions to the main contract & termination of the sub-contract

22. Given the arguments advanced by the parties, it is also relevant to identify the circumstances in which the main contract was extended, and in which the sub-contract was terminated, even though those events post-date the date of the sub-contract.
23. On 30 July 2004 there was a deed of variation in relation to the main contract. In short, it extended the duration of the main contract from 4 October 2004 to 30 June 2005.
- (1) Mr O'Reilly observed that this extension to the term of the main contract was not something which was expressly envisaged or permitted by the terms of the main contract. Mr Darling pointed to clause 1.1.1 as showing that the parties to the main contract envisaged that there might be amendments or additions to the contract. Mr O'Reilly countered by submitting that the purpose of this clause was to restrict the circumstances in which any such amendment or addition might operate, rather than expressly to permit such acts.
 - (2) It should also be noted that by clause 7 of the deed further provision was made as to what information the track sheets should record, and also that payment should be made 28 days after receipt of the relevant track sheet.
24. On 14 June 2005 there were two further identical deeds of variation entered into in relation to the geographical areas covered by the main contract. In short, by clause 2.1 they extended the duration of the main contract to "31 March 2006 or the date of completion of all work issued to the Contractor on or before that date, whichever is the later, or such date as may be mutually agreed".
- (a) Clause 3.1 provided that the Deed itself was to constitute a Contract Order requiring the contractor to undertake the work set out in, and ordered by the employer pursuant to the schedules to the Deeds.
 - (b) I have already referred to the fact that by this deed the main contractor undertook an obligation to comply with the General Requirements. Although Mr O'Reilly submitted in his supplemental argument that this was insufficient to vary or override the terms of the main contract in relation to the matters

contained in them, I disagree. In my judgment it is apparent that notwithstanding the priority clause and the non-waiver clause, the parties obviously intended the contract-specific General Requirements to identify how the main contract should be operated on a practical level, and the requirements of clause 1.1.1 in relation to amendments to the contract were complied with via the deed itself.

25. Sometime in early December 2005 the defendant gave notice of termination of the sub-contract, with effect from the 31 December 2005. It is the claimant's evidence, which was not specifically challenged by the defendant, that the last projects worked on by the defendant under the sub-contract would have been completed on or around that date.
26. It is also the claimant's evidence that the last projects worked on by it pursuant to the deeds of variation of 14 June 2005 were completed on or around 31 March 2006. However, the claimant has admitted that even after 31 March 2006 it continued to work for the employer undertaking similar work to that undertaken under the formal contract arrangements previously in place and on the same basis. I was informed by Mr Darling that very recently (in fact the day before the hearing) the claimants and the employer had entered into a further deed of variation which retrospectively extended the main contract from 31 March 2006 down to 31 March 2008. In his supplemental witness statement Mr Cooper explained that what was signed was an "outdated version" and that thus it had been withdrawn, to be replaced by a further version for agreement and signature. There is no reason to believe, however, that this will substantially alter the agreed position, which is that the deed will when executed retrospectively extend the main contract from 31 March 2006 down to 31 March 2008.

F. The respective contentions

27. Mr O'Reilly's primary case is that the expression "Main Contract Works" means works of the same type and geographical location, and for the same employer and contractor, and which follows in an uninterrupted succession from the main contract. Therefore, based on the evidence in the case, it is his argument that even now the main contract works are still being performed, and thus by definition are not yet practically completed. His alternative case is that the expression means only works which strictly fall under the initial scope of the main contract, i.e. were ordered prior to 4 October 2004. On this alternative case Mr O'Reilly accepts that the main contract works would have been completed some considerable time ago - accordingly the real issue on this hypothesis is whether or not practical completion of those works has been certified in accordance with the requirement of clause 15 of the sub-contract, properly construed.
28. Mr Darling's primary case is that the expression means "all work on all Contract Orders issued pursuant to the Main Contracts in respect of which work was ordered from [the defendant] under the terms of the Sub-Contract". His primary case therefore is that the expression "main contract works" does not mean all work undertaken under the main contract, but means individual elements of work carried out under the main contract pursuant to individual contract orders issued under the main contract, in respect of which the claimant placed contract orders with the defendant under the sub-contract. Therefore for the purposes of clause 15, if the dispute related only to one particular contract order, it could be litigated as soon as the work the subject of that order was certified practically complete whereas where, as here, the dispute relates to the whole relationship between the parties, it could be litigated as soon as the last work the subject of any contract order was certified practically complete.

29. Mr Darling's alternative case was that if the meaning of the expression is not limited as he suggests, then it can only mean "all work on all Contract Orders issued pursuant to the Main Contract". In order to cater for the circumstances in which the defendant continued to undertake work under the sub-contract after 4 October 2004 (i.e. the contractual termination date of the main contract pre-deeds of variation), he submitted that the expression should be limited to those contract orders on which the defendant accepted orders under the sub-contract, or alternatively (and if not limited in that way) limited to those contract orders which had been ordered under the main contract by the date of termination of the sub-contract.

G. The questions of construction – discussion & conclusions

30. Since the expression "Main Contract Works" is not defined in the sub-contract itself, but since the sub-contractor is deemed to have notice of the provisions of the main contract, the logical first step in my judgment is to look to the main contract to see how, if at all, the expression is defined there. Even though the terms of the main contract are not incorporated into the sub-contract, nonetheless it is apparent that because of the deeming effect of clause 1 of the sub-contract the terms of the main contract are an important part of the relevant factual matrix against which clause 15 must be construed. There one finds the 'Works' defined as meaning all or any of the projects to be performed under any contract order issued under the main contract (emphasis added). This therefore leaves open the possibility that the expression may be defined by reference to all projects undertaken under all contract orders, or by reference only to an individual project undertaken under an individual contract order. However, if one also considers what is meant by practical certification of the main contract works, then in my judgment the position become clearer. Again, since there is no definition of this in the sub-contract, one naturally looks to the main contract. There one finds no definition of, or provision for, certification of practical completion of all of the main contract works, only for certification of practical completion of the individual projects. When one considers the nature of the main contract as a term or period contract, i.e. a contract to undertake discrete individual items of work of a similar nature as and when ordered by the employer within the duration of the contract, as opposed to the more usual contract to undertake identified works for a specific project, it is apparent that the obvious way in which the main contract would be sensibly administered would be for each individual project to be treated as a mini-contract, so that the certification of practical completion would be limited to that particular project. Moreover, in such a contract there would be no obvious need or benefit for a provision for practical completion of the main contract works as a whole.
31. Mr Darling submitted that the absence of any express provision in clause 15 of the sub-contract to the effect that certification meant certification for the purposes of the main contract (in contrast to clauses 13.1 and 14.2, where such express word are found) meant that there was no justification for linking certification under the sub-contract with certification under the main contract, in order to bolster his later submission that the sub-contract permitted self-certification. I am unable to accept that submission. Given the deemed notice provision of clause 1 of the sub-contract, and given the absence of any express provision for certification under the sub-contract, it seems to me to be clear that the parties intended that what was required under clause 15 of the sub-contract was certification of the main contract works under the provisions of the main contract. Importantly, this involved the authorisation of a certificate by the Manager as a nominated representative of the employer, so that the authorisation would be by someone independent of the parties to the sub-contract.

32. It follows, in my judgment, that what was envisaged by clause 15 of the sub-contract was a certificate of project completion under the main contract, so that the certificate would relate only to a particular project, rather than to the whole of the main contract works. This is consistent with the terms of the sub-contract, specifically the General Requirements, which as already noted contain similar provision in relation to contract orders and projects.
33. In my judgment this conclusion is also consistent with what I regard as the obvious commercial purpose behind clause 15. It works so as to prevent the main contractor or the sub-contractor from litigating disputes in relation to a main contract project in respect of which some or all of the works have been sub-contracted to the defendant unless and until the project has been certified as practically complete under the main contract. It would also prevent the main contractor or the sub-contractor from litigating disputes covering more than one (or, as in this case, all) projects under the sub-contract until all such projects have been certified under the main contract as practically complete. It does not however prevent either party from litigating disputes where, even though the individual project is complete, or even though the sub-contract as a whole has come to an end (as have all main contract projects in respect of which works were performed under that sub-contract), the main contract continues with the main contractor performing all works himself or using new sub-contractors. Adopting this construction, clause 15 achieves the commercial purpose of preventing litigation in relation to specific projects whilst works are ongoing under the sub-contract and main contract in respect of those projects, whilst restricting no more than is necessary the parties' right of access to the courts. It also largely avoids the difficulty of working out how clause 15 is to be interpreted in circumstances, such as have happened here, where the main contractor and the employer have chosen to extend the main contract both formally and informally, both before and after the determination of the sub-contract, and both before and after the main contract completion date and indeed now subsequently but with retrospective effect.
34. It is still however necessary for me to decide how clause 15 applies where, as here, the parties to the sub-contract have continued to place orders and undertake work under the sub-contract even after the expiry of the main contract completion date. In my judgment the position is clear. If the parties to the main contract choose to extend the main contract, whether this is done by formal deed or written contract or even orally or informally by course of conduct, and if the parties to the sub-contract also choose to continue to perform the sub-contract, the main contractor by placing orders for, and the sub-contractor by undertaking, work the subject of main contract projects, then clause 15 continues to operate. It seems to me that even in the absence of a specific provision for extension of the main contract completion date in the main contract itself, the parties to the sub-contract must - objectively - have contemplated at least the possibility that the main contract completion date would be extended, either by formal amendment in compliance with clause 1.1.1 of the main contract or by the parties simply continuing to operate the main contract in accordance with its provisions without any formal extension to the contract completion date. In those circumstances, they cannot objectively have intended that clause 15 would simply cease to operate. That is not least because neither party to the sub-contract would be prejudiced by the main contract being extended in such circumstances; the contractor is not obliged to place the work with the sub-contractor and the sub-contractor is either not obliged to accept it or in any event has the right to terminate the sub-contract on written notice at any time. It follows in my judgment that in this case, where the dispute relates to the entirety of the projects undertaken under the sub-contract, the time bar in clause 15 operates until the date of certification under the main contract of the last project in respect of which work was issued to and undertaken by the defendant under the sub-contract, which appears on the evidence to have been sometime in late 2005 or early 2006.

35. Again, if clause 15 is construed so that it includes only those projects where the works are sub-contracted to the defendant, the difficulty of working out how the time bar should operate in circumstances of: (i) formal extension to the main contract; (ii) informal extension to the main contract; (iii) or even - as here - of formal extension followed by informal extension followed by retrospective formal extension, simply do not arise. Although one should be wary of using the process of reasoning back so as to resolve issues which would not necessarily have been within the contemplation of the parties at the time of contracting, nonetheless this is another reason in my judgment which supports my conclusion that Mr Darling's primary case is to be preferred.
36. In summary therefore, my answer to the 2 preliminary issues is as follows:
- (i) The expression 'Main Contract Works' in clause 15 of the sub-contract means work under any project performed by the claimant under a contract order issued under the main contract in respect of that project (and including for the avoidance of doubt work performed under a contract order issued under the main contract after the original main contract completion date whilst the main contract was still being operated, whether pursuant to a formal extension or an informal continuation) in respect of which work was also ordered by the claimant from the defendant under the terms of the sub-contract.
 - (ii) The certificate of substantial or practical completion of the Main Contract Works in clause 15 of the sub-contract means a project completion certificate (as defined in clause 1.3.33 of the Main Contract) under the Main Contract.

H. The factual issues

37. Although in his submissions Mr O'Reilly contended that what the claimant had to establish was that the main contract works were as a matter of fact substantially or practically complete and that there was sufficient certification of that completion, in my judgment that two-fold requirement is contrary to the express terms of clause 15, which only requires that the main contract works have been certified substantially or practically complete. In other words, if the main contract works had been certified practically complete, then it would not in my judgment be open to the defendant to rely on clause 15 by asserting and proving that in fact the main contract works were not practically complete, regardless of what had been certified.

Practical completion of the main contract works

38. In any event, in the light of my conclusions in relation to the meaning of the main contract works, it is apparent that the main contract works as relevant for the purposes of clause 15 must have been practically completed at or around the time that the defendant completed its last piece of work, which on the evidence was around the end of December 2005.
39. In that regard, I refer to paragraph 34 of the witness statement of Mr Dean Cooper, which stated as follows:
"Given my knowledge of this contract and the nature of the works and following a review of [the defendant's] database, I can confirm that all Projects carried out in or

around December 2005 and/or March 2006 (or any time before that) were completed, Project Completion Certificates were sent to [the employer] and payment was made by [the employer] evidencing [the employer's] authorisation of completion."

40. The defendant has not sought to challenge this evidence. In any event, it appears consistent with the undisputed fact that the sub-contract was terminated by notice by the defendant in December 2005 and, as I understand it, there was no ongoing relationship between the parties, or work undertaken by the defendant for the claimant, after that time.

Certification

41. However there is still a significant dispute between the parties in relation to certification. It is accepted by the claimant that it is not in a position to produce any individual document in relation to individual projects which has the appearance of a certificate issued under any of the standard forms of building or engineering contract. The claimant's evidence is that this is not the way in which the main contract was actually operated. Thus what Mr Cooper says is as follows:
- "26. The Main Contract does not prescribe a format for the Project Completion Certificate. Enterprise submitted various types of documents at different times to signify completion of Projects.
27. When appropriate, Enterprise submitted a Summary Sheet setting out details of the Project, a completion date and details of the documentation provided. The precise format of this Summary Sheet varied throughout the periods referred to above but a sample template is attached as Appendix 4.
28. The attached Summary Sheet sets out the other types of documents that work, depending on the nature of the job, submitted. A Track Sheet was always submitted along with a Job Card. Various other documents were sometimes necessary including Test Certificates and As-Laid Plans.
29. Of the documents sent to Fulcrum to signify completion of a Project, Enterprise only kept copies of the Track Sheets.
30. ... By way of example, I attach a Track Sheet relating to 47a Kenilworth Drive, Oadby, Leicestershire dated 23 December 2005 which was submitted to Fulcrum following completion of that Project (Appendix 5).
31. Fulcrum's authorisation that the above Project was completed was signified by its payment in respect of that Project on 1 February 2006 (the 'WR Number' on the Remittance Sheet matches the 'QS No' on the Track Sheet. Details of payments received have been removed for reasons of commercial sensitivity) (Appendix 6).
- ...
34. [Set out in paragraph 35 above]
- ...
36. I attach a letter received from Philip Jenkins of Fulcrum on 11 January 2008 (Appendix 9) which supports my understanding regarding completion, as set out above. Most importantly, he confirms in the second paragraph that "*Relevant Fulcrum officers check the completed documents and if satisfied authorise payment of the claimed charges ... authorisation of the Enterprise Track-sheet signifies that Fulcrum has accepted the individual project is complete and certifies this as such for all practicable purposes*". In this way, as stated above, Fulcrum payments made in relation to Projects completed in December 2005 and March 2006 evidences Fulcrum's authorisation of the Projects (and, therefore, the Contract Order) as being complete."

42. The letter referred to in paragraph 36 of Mr Cooper's witness statement is from Philip Jenkins, who describes himself as a Senior Manager for Fulcrum. Although some parts of that letter clearly comprise Mr Jenkins' opinion as to matters which are more properly the province of the court, it does also contain relevant factual evidence which, set out in full, is as follows:
"... Individual project instructions are contained within a project pack, which would include job cards for individual elements of the project. Individual projects are considered to be completed and certified as such when all works are satisfactorily completed and all relevant project pack documents are correctly completed and returned to Fulcrum.
Returned project packs would also be accompanied by a project track-sheet that details the actual works and quantities, completed for each project. Relevant Fulcrum Officers check the completed documents and if satisfied authorise payment of the claimed charges within the Enterprise track-sheet. Although there isn't a specific completion certificate, authorisation of the Enterprise Track-sheet signifies that Fulcrum has accepted the individual project is complete and certifies this as such for all practicable purposes."
43. The sample tracksheet attached to Mr Cooper's witness statement is a pro forma document produced by the claimant, each of which has its own unique tracksheet and QS number. It contains various boxes to be completed which, once completed, provide details as to the work done which appear to be sufficient to allow the employer to ascertain whether or not the job has been satisfactorily completed and to assess what payment is due for the work. It does not, however, contain a box for signature by a representative of the claimant to verify the information provided, a box for the assessed value of the work to be inserted, or a box for the employer's manager to certify that the work has been completed or that payment is due.
44. The remittance sheet attached to Mr Cooper's witness statement is a document entitled "Remittance, Credit and Payments Report" which relates specifically to the claimant. At the top it has a unique payment number and a reconciliation date (in this case 1 February 2006). The main body of the document comprises 7 vertical columns and over 2 pages of individual horizontal rows. The first column is for the invoice number, the second for the WR numbers (which according to Mr Cooper matches the QS number on the tracksheet), the third is for the net amount, the fourth for VAT and the fifth for the gross amount, the sixth is headed 'responsible manager'³ and the seventh is headed 'deferral reason'. Although Mr Cooper's evidence explains that the entries in columns 3, 4 and 5 have been redacted for commercial reasons, it was confirmed by Mr Darling on instructions that there were no entries in column 7 which have been redacted.

The respective arguments

45. Relying on this evidence, what Mr Darling submits is as follows:
- (i) What the main contract envisages is not the issue of a formal certificate, but the authorisation by the employer's manager of the project completion certificate which means the authorisation of the individual track-sheet.
 - (ii) There is no requirement under the main contract for the individual track-sheet to be signed by the employer's manager or returned signed to the contractor in order for it to stand as a certificate. Authorisation is all that is required, and this does not have to be written, or issued to the contractor.
 - (iii) Thus in this case, the evidence of authorisation of the track-sheets is proved by the evidence of payment against the invoice referable to the particular track-sheet and thus project where, I note, there is a column purporting to identify the 'responsible manager'.

³ In each case, the entry reads 'IH1'.

- (iv) Even if this did not amount to certification as strictly required, under the main contract, nonetheless by virtue of the practice adopted by the employer (namely that of passing the track-sheets for payment and paying the sums due in relation to each project, without standing on the strict requirement for issue of a certificate) then as between the employer and the main contractor any strict requirement for the issue of a certificate has in effect been waived, so that for the purposes of the main contract there has been certification, and that then suffices for the purposes of clause 15 as well.
46. Mr O'Reilly submits that:
- (i) What the claimant is required to establish by satisfactory evidence is that a certificate of practical completion of the main contract works has been issued by the duly nominated Manager.
 - (ii) Here, the claimant has failed to establish this requirement, in that it has failed to produce any relevant certificate(s), or to provide any satisfactory evidence that such were issued. The track-sheets are not, nor can they be regarded as, certificates.
 - (iii) Evidence of payment against submitted track-sheets is not sufficient for the purposes of clause 15 either in terms of evidencing the issue of a certificate or of evidencing the authorisation of a certificate. In particular he argues that: (a) evidence of the actual operation of the main contract in practice, if more relaxed than strictly required under the main contract, does not assist the claimant in demonstrating compliance with clause 15 of the sub-contract; (b) even if the procedure was relaxed by the subsequent amendments to the main contract, that cannot relax the requirement of certification for clause 15, which is not affected by any such amendments; (c) the argument based on waiver cannot succeed, because there is no evidence of waiver which complies with clause 1.1.5 of the main contract general conditions.
 - (iv) In any event, the evidence produced by the claimant is unsatisfactory, in that: (a) neither Mr Cooper nor Mr Jenkins confirm that they were involved in the administration of the main contract at the relevant times (i.e. up to circa end December 2005); (b) the letter from Mr Jenkins is particularly unsatisfactory in that it is unsigned, it does not state his source of knowledge, it offers a mix of fact and opinion evidence, and the letter to which it responds has not been exhibited.

Certification - conclusions

47. So far as the requirements of the main contract are concerned, it is clear from the definitions of project completion certificate and project completion date in clauses 1.3.33 and 1.3.34 first that no particular form of certificate is required, and second that the critical requirement is the authorisation by the Manager rather than the issue of the certificate. (Whilst I accept that there are some references in the main contract to the issue of the project completion certificate as well as the authorisation of the main contract certificate, in my judgment, read as a whole, it is apparent that it is the authorisation which is the critical requirement.) It is also clear from the definition of track sheet in clause 1.3.43 that this will be a document which in effect identifies the work done and thus the payment due under the main contract. Indeed, the latter is made explicit in the revised definition introduced by clause 7 of the second deed of variation. Although the track sheet is not specifically identified as a work document (because the definition of work documents in clause 1.3.47 leaves what is required by way of work document to the manager) nonetheless it would be surprising to say the least if the track sheet was not regarded in practice as the most significant work document required by the manager. Finally, it is clear from clause 7 that payment follows on from authorisation of the project completion certificate.

48. I am unable to accept Mr O'Reilly's submission that the certification requirements are set in stone as at the date of conclusion of the sub-contract. Given my decision as to what is required by way of certification for the purposes of clause 15, and given my conclusion that the parties to the sub-contract must – objectively – have contemplated amendments to the main contract, then they must – again objectively – be taken as accepting that what would be required would be certification under the terms of the main contract as in force at the relevant time, even if that involved a change in practice since the date of entry into the sub-contract. Otherwise, they would be taken to be contemplating a situation where the certification requirement would be impossible to achieve because it would require a type of certificate which was no longer being produced.
49. Further assistance is to be gained from section 9 of the General Requirements, because that expressly envisages (in clause 9.3.1) that in simple projects the job voucher or other instruction to carry out work will be the work document which following completion and authorisation will be regarded as the project completion certificate. In other words, it is expressly contemplated that authorisation equates to certification, so that the work document which is authorised is the certificate, without any need for more. The only evidence of certification therefore will be the payment by the employer against the authorised work document. Whilst I accept that this was not a main contract document as at the date the sub-contract was entered into, it had become a relevant contractual document by the time of the deed of variation of 14 June 2005 came into force and, moreover, it was a sub-contract document from the outset, but one which was clearly intended to regulate the relationship under the main contract, so that the defendant can scarcely contend that it was unforeseeable that the main contract might be operated in the manner contemplated by the General Requirements.
50. In my judgment, this analysis confirms that Mr Darling is correct in his primary submission, which is that what happened here in practice was consistent with the requirements of the main contract, in that what happened was that on completion of a project the claimant submitted relevant works documents, including and most importantly the track sheet, which Fulcrum's manager considered and, if satisfied that the project works had been practically (and properly) completed, authorised the track sheet as a certificate and passed it for payment. Payment was made against these authorised track sheets and notified to the claimant by the remittance, credit and payments report, which contained amongst other things the identification of the 'responsible manager' who had, by necessary implication, authorised the track sheet as a certificate of practical completion.
51. In my judgment there is nothing surprising or unusual in such an analysis. This situation is completely different to the situation under the more common standard forms involving a defined construction project, where there is a project administrator responsible for certification who is a construction professional and not an employee of the employer. Here there is every reason to understand why in a term contract, involving a large number of individual jobs, the certification process should have been intended to operate in a much more informal fashion than that envisaged in the situation referred to above. I therefore reject Mr O'Reilly's submission that in a case such as this more is required to satisfy the requirements of clause 15, whether by production of individual certificates or further evidence of individual specific authorisations.
52. Whilst I note the criticisms of the claimant's evidence made by Mr O'Reilly, in my judgment there is no compelling reason not to accept what is said by Mr Cooper and confirmed by Mr Jenkins' letter, which I have no reason to believe was not written and sent by him and represents the evidence he would give if asked.

53. If necessary, I would also have been prepared to find that the evidence before me demonstrates to a sufficient standard that both employer and main contractor had mutually waived any need for the physical issue of a document embodying a certificate in relation to each project, so that: (i) for the purposes of the main contract each individual project had been certified practically complete; (ii) for the purposes of clause 15 of the sub-contract, the same applied. I would have reached this conclusion notwithstanding the terms of clause 1.1.5 of the main contract, because: (a) I am not convinced that as a matter of interpretation of the main contract what has happened here amounts to a 'waiver of the Contract, in whole in part'; (b) even if it has, by – at the latest – the date of the deed of variation of 14 June 2005 there had been an agreed waiver, which was in writing and which was permitted under clause 1.1.1, either by the adoption of the General Requirements from the outset, or by their inclusion as a contract document by that date, or in any event in relation to each project by payment against authorised track sheets under the remittance, credit and payments report; (c) I consider that on the evidence the employer would be estopped from relying on clause 1.1.5 if he sought to rely on his own failure to procure the issue of a certificate in such circumstances.

I. Jurisdiction – conclusion

54. In my judgment the defendant has failed to make out its challenge to the jurisdiction under part 11, and that limb of the application must fail.

J. Strike out / summary judgment

55. The basis of the argument, as advanced by Mr O'Reilly by reference to the witness statement of Mr Hardy, is that non-compliance with clause 15 operates as a substantive defence as well as going to jurisdiction so that even if, for whatever reason, the court was satisfied that it had and should exercise jurisdiction notwithstanding non-compliance with clause 15 nonetheless the defendant was entitled to rely on that non-compliance as a substantive defence so that the claim has no reasonable prospect of success and should therefore be struck out or summary judgment should be entered for the defendant on the claim.
56. It is apparent therefore that this limb of the application was designed to overcome any difficulty which might be caused if the jurisdiction argument should fail due to some technical objection, so that if – as I have held – the challenge to the jurisdiction fails because I am satisfied on the evidence that the requirements of clause 15 have been satisfied, then this limb of the application also fails. Accordingly, I am satisfied having regard to the conclusions which I have reached that the claim does have a reasonable prospect of success and that it should not be struck out nor should the defendant have summary judgment on the claim, so that this limb of the application fails as well.

K. Subsidiary arguments

57. In paragraph 85 of his skeleton Mr O'Reilly submitted that if the court was to find that the main contract works came to an end in July 2002 or October 2004 than that would be inconsistent with the claimant's position taken in a previous adjudication relating to unpaid retention, and that in consequence there should be a stay of

proceedings until such time as the amount in dispute in that adjudication was paid. Given the conclusions which I have reached, this argument does not arise.

58. In paragraph 86 of his skeleton Mr O'Reilly submitted that even if the defendant lost its application it should still have its costs, because (in summary) the claimant failed to give proper notice of its intention to issue these proceedings, and that had it done so these matters should have been 'sorted out' in pre-action correspondence. Whilst I will decide any questions of costs once this draft judgment has been handed down, it may help the parties and save further costs if I indicate that my provisional view is that despite these points the usual rule should apply, i.e. the claimant as the successful party should recover its reasonable costs of defending the application. Specifically, my provisional view is that even if the claimant had given notice of its intention to commence these proceedings, given the stance displayed by the parties in the case so far there was no realistic prospect of this point being resolved by pre-action correspondence, so that the application would have come before the court in any event and no costs would have been saved. I stress that this is only a provisional view, and I will hear any argument on costs which either party wishes to put before me at the appropriate time.

.....

(His Honour Judge Stephen Davies)