JUDGMENT : Mr. Justice Jackson: TCC. 2nd February 2007

1. This judgment is in five parts, namely: Part 1 Introduction; Part 2 The Facts; Part 3 The Present Proceedings; Part 4 The Jurisdiction of this Court to Grant Permission to Appeal; Part 5 Decision.

Part 1. Introduction

2. This is an application for permission to appeal, which raises an important point concerning the jurisdiction of this court. In this judgment I shall refer to Multiplex Constructions (UK) Limited (the Claimant in this action) as "Multiplex". I shall refer to Honeywell Control Systems Limited (the Defendant in this action) as "Honeywell". I shall refer to Wembley National Stadium Limited as "WNSL". WNSL is the employer of Multiplex in relation to the construction project in issue in these proceedings.

3. After that brief introduction I shall now turn to the facts.

Part 2. The Facts

4. Multiplex is engaged upon constructing the new National Stadium at Wembley under the provisions of a main contract made between Multiplex and WNSL. Multiplex has entered into a number of sub-contracts with contractors for the design, installation and construction and so forth of numerous elements of the stadium. Honeywell is the Sub-Contractor for Systems and Communications at the stadium. The Sub-Contract between Multiplex and Honeywell contains provisions whereby Multiplex may issue directions to Honeywell or may issue variation instructions. Clause 4.2 of the Conditions of Sub-Contract deals with the power to issue directions. Clause 4.6 sets out the power of the Contractor to instruct variations. Clause 11 of the Sub-Contract sets out a mechanism for extending time for the Sub-Contractor to complete the works. Clause 11.10 of the Conditions of Sub-Contract lists a number of matters, defined as "Relevant Events", which entitle the Sub-Contractor to an extension of time in certain specified circumstances.

5. The construction of Wembley Stadium has been delayed by a number of events which are in dispute between Multiplex, Honeywell and many other organisations. Those disputes are the subject of litigation before this court in a number of actions. As delays to the project occurred Multiplex undertook some re-programming. During 2005 Multiplex issued three programmes to Honeywell. They were Programme CB7E issued on 10th February 2005, Programme FO15 issued on 18th July 2005, and Programme DC10 issued on 24th November 2005.

6. The legal consequences of issuing those programmes has been the subject of debate, dispute and adjudication. By a decision dated 13th January 2006 Mr. E.J. Mouzer issued an Adjudication Decision to the effect that each of the three programmes just mentioned was a direction by Multiplex given pursuant to Clause 4.2 of the Sub-Contract Conditions. Thus, said Mr. Mouzer, Honeywell was obliged to comply with those directions. Mr. Mouzer also held that each of those programmes constituted a variation instruction and he made a declaration to that effect.

7. There was a second adjudication between the parties, the terms and outcome of which are not material for present purposes.

8. There was then a third adjudication held before Mr. David Miles, a solicitor who has done a number of the adjudications concerning the stadium. Mr. Miles gave his decision on 6th July 2006. Mr. Miles held that a direction given by Multiplex under clause 4.2 of the Sub-Contract Conditions is not a relevant event for the purposes of clause 11.10 of the Sub-Contract Conditions. Mr. Miles went on to hold that there was no mechanism under clause 11 of the Sub-Contract Conditions for extending time in respect of the directions issuing the three programmes previously mentioned. Accordingly, Mr. Miles held that time was at large. Mr. Miles rejected a separate argument advanced by Honeywell to the effect that Multiplex's failure to issue further programmes since November 2005 was a separate matter setting time at large.

9. Multiplex was aggrieved by Mr. Miles' decision to the effect that time was at large. Accordingly, Multiplex commenced the present proceedings.

Part 3. The Present Proceedings

10. By a claim form issued on 18th July 2006 Multiplex sought to reverse the decision of Mr. Miles that time had been put at large. Multiplex contended in the Particulars of Claim following that claim form that Mr. Miles had erred in a number of respects in his interpretation of the contractual documents. Multiplex claimed a number of declarations, the gist of which was that time is not at large.

11. Honeywell's defence to these proceedings has two principal limbs. First, Honeywell contends that the Adjudicator was correct in his interpretation of the contractual provisions and therefore this court should give a decision upholding that decision and its reasoning. This limb of Honeywell's Defence is referred to as *"the construction point"*. The second limb of Honeywell's defence is this. It is that Multiplex has failed to operate and/or chosen not to operate the mechanism for extending time and has hindered or prevented Honeywell from making applications for extension of time so that the mechanism has broken down. Honeywell contends that on this ground (albeit one that was not accepted by the Adjudicator) also time is at large. This is referred to as *"the operational point"*. There is a third argument which Honeywell has added to its pleadings by way of amendment, which is referred to as "*the condition precedent point"* and that is in essence an argument based upon the decision in ***Gaymark Investments v. Walter Construction Group*** [1999] NTSC 143, an argument into the details of which I do not need to go for present purposes.

12. The trial of this action was fixed for 7th October 2006. On the morning of the first day of trial leading counsel for both parties told me that the parties were close to settlement and this court was asked to adjourn the trial, so that

their negotiations could be brought to what was anticipated to be a successful conclusion and this litigation could be resolved by a consent order. In the event the negotiations did not have the happy outcome which was anticipated and the litigation was resumed. There was a further case management conference and the trial of this action was refixed for 26th February 2007 with an estimated length of four days.

13. In the meantime other litigation has been proceeding in respect of the construction of the stadium. One of those actions was litigation between WNSL, the employer, and Multiplex. That litigation also had a hearing date fixed which was adjourned because of negotiations. Those negotiations resulted in a compromise agreement settling that litigation during the autumn of last year. The terms of the settlement under which that litigation was resolved were confidential, although they were the subject of comment and speculation in the Press. Honeywell, having read those Press cuttings, took the view that the terms of settlement between WNSL and Multiplex were relevant to the present litigation concerning time at large as between Multiplex and Honeywell. On 14th December 2006 Honeywell issued an application for specific disclosure of a number of documents. The documents sought included the following: (4) Multiplex's settlement agreement with Wembley; (5) all documents referred to in Multiplex's settlement agreement with Wembley; (6) any claim for extension of time made by Multiplex to Wembley which was settled in Multiplex's settlement agreement with Wembley; (7) any pleaded claim for delay damages made by Multiplex in the litigation with Cleveland Bridge which refers to or relies upon the settlement agreement with Wembley.

14. That application came on for hearing before this court on 24th January 2007. I heard detailed submissions made by leading counsel for Multiplex and detailed submissions made by leading counsel for Honeywell. I came to the conclusion that the terms of the settlement agreement between WNSL and Multiplex were not relevant to the issues in this litigation. Accordingly, I refused to order specific disclosure of the categories of documents enumerated as (4), (5), (6) and (7) in Honeywell's application. Following my ruling on that occasion, the hearing proceeded to deal with certain other matters and Honeywell made no application for permission to appeal against that ruling. Subsequently Honeywell and its advisers reflected upon the matter and formed a more robust view of the situation.

15. By a letter dated 1st February 2007 Messrs. Beale and Co., Honeywell's solicitors, wrote to this court with a copy to Multiplex's solicitors, Messrs. Fenwick Elliott. In that letter Beale and Co. stated that Honeywell on reflection considered that it had good prospects of successfully appealing the decision reached on 24th January and that this court still had jurisdiction to grant permission to appeal. Honeywell therefore requested that a further hearing be set up at which its application could be considered. Multiplex objected root and branch to the application foreshadowed by that letter. Multiplex's position was in essence twofold. First, it disputed that this court had jurisdiction to give permission to appeal at this late stage. Secondly, Multiplex contended that on the merits permission to appeal would be quite inappropriate. Today's hearing has been fixed to deal with those two matters.

16. I must first address the jurisdiction of this court. I must secondly address the merits of the application for permission to appeal, in the event that I hold that this court still does have jurisdiction.

Part 4. The Jurisdiction of This Court to Grant Permission to Appeal

17. Part 52.3(2) provides:
"An application for permission to appeal may be made --
(a) To the lower court at the hearing at which the decision to be appealed was made; or
(b) to the appeal court in an appeal notice."

18. Paragraph 4.3B of the Practice Direction, supplementing CPR Part 52, provides: *"Where no application for permission to appeal has been made in accordance with rule 52.3(2)(a) but a party requests further time to make such an application, the court may adjourn the hearing to give that party the opportunity to do so."*

19. The question which I have to address is whether this court has jurisdiction today to consider an application for permission to appeal in circumstances where there was no application for permission made on 24th January and where also there was no application made on 24th January for an adjournment pursuant to paragraph 4.3B of the Practice Direction.

20. Mr. Martin Bowdery QC, who represents Honeywell, submits that the rule and the Practice Direction must be construed as permitting this court to consider an application for permission to appeal at any time up to the moment when the order of the court giving effect to the decisions reached on 24th January is sealed. Mr. Bowdery submits that "the hearing" for the purposes of Rule 52.3(2) continues up until the moment when the order is sealed. Indeed at one point in his submissions he appeared to be arguing that the hearing was deemed to continue night and day for a matter of weeks until the order was drawn up and sealed. Mr. Bowdery submits that whatever may be the linguistic difficulties or tensions to which his argument gives rise, there is eminent good sense in that interpretation and it is consistent with the overriding objective. Mr. Bowdery also draws my attention to the decision of Neuberger J. in ***Charlesworth v. Relay Roads Ltd.*** [2000] 1 WLR 230.

21. Mr. Philip Boulding QC, on behalf of Multiplex, submits that this court simply has no jurisdiction now to entertain the application for permission to appeal. Mr. Boulding says that an unsuccessful litigant wishing to appeal has three options:
1. Apply for permission at the original hearing.
2. Apply at that hearing for more time in which to consider making such an application to the lower court.

3. Apply for permission to appeal to the appeal court.

22. Mr. Boulding points out that it is still open, there is still time for Honeywell to make its application for permission to the Court of Appeal. Therefore there is no need for this court to foist upon the rule or the Practice Direction a meaning which it does not have. The meaning is plain and there are only three routes open to a party wishing to appeal. The time for any application to this court has now elapsed. Mr. Boulding submits that the court's power under paragraph 4.3B of the Practice Direction only exists whilst the original hearing, at which the judgment under attack is given, is taking place. The jurisdiction of this court under paragraph 4.3B of the Practice Direction came to an end when the court rose on 24th January. Mr. Boulding draws attention to other provisions of the rule. He submits that there will be practical problems if this court is persuaded by Mr. Bowdery's submissions. There will be doubt as to when time starts to run for the purpose of appealing or seeking permission to appeal from the Court of Appeal. There will be doubts and practical difficulties concerning the effect and operation of rule 40.2 of the Civil Procedure Rules. Mr. Bowdery submits that *Charlesworth* was a totally different case on different facts and is of no relevance to the present application.

23. The rival submissions made by leading counsel on this application today are forceful and they touch on a matter of some importance. If there is any authority which is directly in point, neither counsel have succeeded in finding it (and I have every confidence in the thorough researches of leading counsel, junior counsel and solicitors on both sides). It therefore seems to me that there is no authority which is directly in point on this matter of procedure which arises for decision this morning. Having considered the respective submissions of counsel, it seems to me that the starting point is indeed the decision of Neuberger J. in ***Charlesworth v. Relay Roads Ltd.*** [2000] 1WLR 230. This decision refers to a number of earlier authorities and sets out applicable principles which are highly pertinent to the present problem. In ***Charlesworth*** the judge gave judgment. Subsequently there was new evidence produced and an application to amend the pleadings, and the question arose as to whether the court could and should accede to the application to amend. The court did allow the application in part. At pp. 233-234 Neuberger J. said this about the applicable principles:

"The first question to be addressed is whether the court has jurisdiction to accede to the defendants' present application. Mr. Mark Platts-Mills, who appears with Mr. Michael Tappin for the claimant, concedes that there is such jurisdiction. In my judgment, that concession is correct. There are a number of reported cases where it has been held that it is open to a judge who has given judgment to reconsider his conclusion and, in effect, to reverse his own decision, provided that the order recording his earlier decision has not been drawn up. Thus, in ***Preston Banking Co. v. William Allsup & Sons*** *[1895] 1 Ch. 141, 144-145, A.L. Smith L.J. said:*

> *'so long as the order has not been perfected, the judge has a power of reviewing the matter, but once the order has been completed the jurisdiction of the judge over it has come to an end.'*

The principle has been approved in subsequent decisions of the Court of Appeal: see, for instance, ***Millenstead v. Grosvenor House (Park Lane) Ltd.*** *[1937] 1 K.B. 717, 722, 726 and* ***In re Harrison's Share under a Settlement*** *[1955] Ch. 260, 276-277, 283-284 per Jenkins L.J., giving the judgment of the Court of Appeal. In the last of those passages, one finds this:*

> *'When a judge has pronounced judgment he retains control over the case until the order giving effect to his judgment is formally completed. This control must be used in accordance with his discretion exercised judicially and not capriciously.'*

Two more recent cases where the principle was approved by the Court of Appeal are Reg. v. Cripps, Ex parte Muldoon [1984] Q.B. 686, 695F, and ***Pittalis v. Sherefettin*** *[1986] Q.B. 868, 879A, 882C-D."*

I gratefully adopt that summary of the law set out by Neuberger J. in ***Charlesworth.***

24. It is clear that when the court gives judgment on a matter, the court's jurisdiction does not lapse in respect of that matter until the order giving effect to that judgment has been drawn up and sealed. It would be bizarre, as Mr. Bowdery has pointed out, if this court had power to revise its judgment, to come to a different decision or to adjust certain parts of its judgment but yet had no power to give permission to appeal. If this court can make substantive changes to a matter upon which it has adjudicated, it is surprising that this court, if it be the case, does not have jurisdiction to deal with ancillary matters. It also seems to me to be consistent with the overriding objective that the court should have jurisdiction to deal with an application for permission to appeal at any time between the giving of judgment and the sealing of the order. I say this because it is usually helpful for the Court of Appeal to know what are the views of the trial judge on an application for permission to appeal, whether the judge is inclined to grant that permission or to refuse it. There may be cases where the trial judge thinks that permission should be granted. It would be bizarre and unfortunate if the judge's lips were sealed and he could not grant such permission merely because, for example, the application for permission was made to him one day after the date when judgment was delivered. Clearly, after the time limit of twenty-one days has expired, even if the order of the court below has not been drawn up, there may be practical problems. There may well be jurisdictional problems about the judge at first instance giving permission to appeal at that stage. I do not go into that matter, because it does not arise in the present case.

25. It seems to me that I have got to interpret the provisions of Rule 52.3 and the provisions of the Practice Direction in a manner which is obviously consonant with the intentions of those who drafted these provisions. It will be noted that paragraph 4.3B of the Practice Direction begins with the words *"Where no application for permission to appeal has been made in accordance with rule 52.3.(2)(a)."* These words seem to me to contemplate a situation in

which the original hearing has ended and the losing party has not applied for permission to appeal. One then comes to the following words: "but a party requests further time to make such an application, the court may adjourn the hearing to give that party the opportunity to do so." It seems to me that when those words are read in context they must confer a power on the court after the end of the hearing at which judgment was given to make an order adjourning that hearing to some other appropriate date in order to hear the application for permission to appeal. Whether or not the court will exercise that jurisdiction is another matter altogether. There must be good reason to do so. There must be good reason for the court to reconvene to hear an application for permission which could perfectly well have been made on the occasion when judgment was handed down. I would have considerable doubts that the court would or possibly could exercise this power after the expiry of the twenty-one day time limit. However, it seems to me that this court does have power under paragraph 4.3B of the Practice Direction and under rule 52.3(2) of the Civil Procedure Rules to hold a continuation of the original hearing in order to deal with an application for permission to appeal in the period shortly following the date when the original judgment was given, provided that the order has not been drawn up.

26. Mr. Boulding conjures up the adverse consequences of such an interpretation of the Rules. Mr. Boulding's first point is that if the court could hear an application for permission to appeal at a later date than 24th January, then there is doubt as to when time runs for the purposes of the appeal notice. I am not persuaded by that submission. It seems to me that the rules are perfectly clear. The time limit for appealing to the Court of Appeal, which in default of any other direction is twenty-one days, starts to run on the date when judgment was given, namely in this case 24th January 2007. Mr. Boulding submitted that there may be some doubt about the time limit for applying for permission to appeal to the Court of Appeal if this court on a later occasion than at the original hearing refuses permission to appeal. I do not think there is any such doubt. If this court refuses permission to appeal the application to the appeal court must be made in the Appellant's Notice: see rule 52.4(1). The time for that application is twenty-one days from the date of the original hearing when judgment was given. Mr. Boulding next drew the court's attention to the provisions of rule 40.2. He submitted that there would be practical difficulties in operating the provisions of rule 40.2 of the Civil Procedure Rules, if there could be a later application to the first instance court for permission to appeal after the date upon which judgment was delivered. However, when Mr. Boulding's suggested practical difficulties arising from rule 40.2 were examined in argument, they melted away. In the course of his submissions Mr. Boulding very fairly conceded that he could not point to any practical problem which on analysis did not melt away. Mr. Boulding made the further point that, where there is a hearing at which one party wins and the other party makes no application for permission to appeal, the successful party can draw comfort from the fact that a valid and effective decision has been given and an application for permission to appeal has not been made. As Mr. Boulding put it graphically, the successful party (in this case Multiplex) can sleep easy in relation to that victory. I am not persuaded that this point has a great deal of force, because during the twenty-one day period there remains uncertainty as to whether or not the unsuccessful party will launch an application for permission to appeal to the Court of Appeal.

27. Let me now draw the threads together. I have carefully considered the submissions of both counsel on the jurisdiction question. I am satisfied that this court does have jurisdiction to hold an adjourned hearing from that which took place on 24th January, in order to deal with Honeywell's application for permission to appeal, if this court thinks fit to do so. Having heard the submissions of both counsel, it seems to me that it is appropriate for this court to entertain and rule upon the application for permission to appeal. It would be helpful to both parties now that they are here to get this court's decision on permission to appeal. Clearly, if this court refuses permission then Honeywell can still apply to the Court of Appeal. However, if this court refuses permission the judgment doing so may be of assistance to the Court of Appeal. If this court grants permission, then a great deal of time and costs would be saved by avoiding the need for a separate application to the Court of Appeal. Therefore, having reviewed all the circumstances, I decide that I do have jurisdiction to entertain the application and accordingly I do entertain that application for permission.

Part 5. Decision

28. The issue in this litigation is in essence whether time has been put at large under the subcontract between Multiplex and Honeywell. The final version of the declarations which Multiplex is claiming in its Re-Amended Particulars of Claim reads as follows:

> *"1. On a true construction of the Sub-Contract between Multiplex and Honeywell dated 27th May 2004 clause 11 provided a mechanism for extending the period for completion of the Sub-Contract Works in respect of any delay to completion caused by an instruction issued under clause 4.2 of the Sub-Contract.*
>
> *2. A direction issued by Multiplex to Honeywell under clause 4.2 of the Sub-Contract would not render time at large so as to relieve Honeywell of its obligation to complete the Sub-Contract Works within the period for completion set out in the Appendix, Part 4 as adjusted by clauses 4.6 and/or 11 and/or 38A and/or 38C.*
>
> *3. The Sub-Contract mechanism for extending the period for completion of the Sub-Contract Works remains in full force so that a specific period for completion of the Sub-Contract Works remains ascertainable."*

The declarations which Honeywell counterclaims for in its Re-Amended Defence and Counterclaim comprise certain declarations on the true construction of the Sub-Contract; alternatively, declarations that time is at large by reason of the breakdown of the Sub-Contract mechanism for extension of time.

29. At the hearing on 24th January I heard detailed submissions from leading counsel on both sides as to how the provisions of the Settlement Agreement between WNSL and Multiplex might impact upon the issues in the "time at large" litigation. I came to the conclusion that the terms of that settlement, whatever they may be, were not and are not relevant to the issues in the current litigation between Multiplex and Honeywell. I can quite understand that Honeywell may be interested in the terms of the Settlement Agreement for reasons extraneous to the present litigation. For example, the terms of the Settlement Agreement between WNSL and Multiplex would appear to be relevant to the quantification of damages which Multiplex will in due course seek to recover from Honeywell. There is also an issue between the parties as to whether, under the terms of the Sub-Contract, Honeywell has a contractual right to inspect the provisions of the Settlement Agreement. However, these are all issues for other occasions. I took the view on 24th January 2007 and I still firmly take the view that the terms of the Settlement Agreement in respect of the main contract are not relevant to the issues which have to be decided by this court in the "time at large" litigation. One party to litigation may be curious to see a particular document held by the other party. The party desirous of seeing such document cannot make that document both relevant and disclosable by referring to it in a pleading. Despite the fact that Honeywell has referred to the Settlement Agreement in its pleading by way of amendment, I remain firmly of the view that that is not a document the contents of which impact upon the issues in the present litigation.

30. Accordingly, I have come to the conclusion that the proposed appeal does not have a real prospect of success. Furthermore, there is no other compelling reason why permission to appeal should be granted. Therefore neither of the two threshold tests set out in rule 52.3(6) are satisfied and permission must be refused.

31. The fact that an application for permission to appeal has been made triggers the obligations of this court under paragraph 4.3A of the Practice Direction supplementing Part 52. Paragraph 4.3A requires the court to state four matters:

"(a) whether or not the judgment or order is final;
(b) whether an appeal lies from the judgment or order and, if so, to which appeal court;
(c) whether the court gives permission to appeal; and
(d) if not, the appropriate appeal court to which any further application for permission may be made."

32. My answer to question (a) is that the order which I made on 24th January is not a final order as defined by paragraph 2A.2 of the Practice Direction. My answer to question (b) is that appeal does lie from the ruling given on 24th January, namely to the Court of Appeal. My answer to question (c) is that this court does not give permission to appeal. My answer to question (d) is that the appropriate appeal court to which any further application for permission may be made is the Court of Appeal. No doubt the parties drawing up the order flowing from the hearing on 24th January and from today's continuation of that hearing will bear in mind rule 40.2(4) of the Civil Procedure Rules which requires those same four matters to be set out in the order of the court which is drawn up.

33. This judgment has been somewhat longer than usual because of the important jurisdictional issue raised by leading counsel on both sides. I express my gratitude to the solicitors for their efficient preparation of this case, and to counsel for their clear presentation of the arguments this morning.

34. For the reasons stated above, this application for permission to appeal is refused.

MR. PHILIP V. BOULDING QC and MR. MARC ROWLANDS (instructed by Messrs. Fenwick Elliott, London, WC2) appeared for the Claimant
MR. MARTIN BOWDERY QC and MR. ROBERT CLAY (instructed by Messrs. Beale and Co., London, WC2) appeared for the Defendant