CA on appeal from TCC (Mr Justice Jackson). Before May LJ, Smith LJ. 20th December 2006.

1. **LORD JUSTICE MAY:** The rebuilding of Wembley Stadium is a matter of some national importance. An important element of that is the steel structure, which was the subject of a major subcontract between Multiplex Constructions UK Limited, the contractor, and Cleveland Bridge Dorman Long Engineering Limited, the steel work subcontractor.

2. The prominent part of this steel structure is an arch spanning the main internal length of the stadium and now a prominent part of the Wembley skyline. The subcontract was dated 26 September 2002 and was for present purposes in an unremarkable form, based on JCT Domestic subcontract 2. Cleveland Bridge were to design, fabricate, supply, deliver and erect structural steel work. The subcontract sum was at £60 million, subject to adjustments in accordance with the terms of the subcontract.

3. I should interpose to say that this short judgment is given upon reading parts of voluminous paper and without expensive oral submission on behalf of Cleveland Bridge, and if there are inaccuracies those can be corrected at a later date.

4. The subcontract did not run smoothly. It got into difficulties of the kind all too familiar to those concerned with resolving construction contract disputes. There were delays, not least with the raising into position of the arch. Multiplex said that the delays and other troubles were the result of Cleveland Bridge's late and defective design or fabrication work. Cleveland Bridge said that the delays and other troubles were the result of a multitude of variations or the late supply of information by Multiplex or by the structural engineer, Mott MacDonald Limited.

5. Cleveland Bridge claimed additional payment for what they said were variations, delay and disruption. The additional payment which Cleveland Bridge eventually claimed was, I think, in excess of £25 million and they claimed to be entitled to extensions of time of the order of 51 weeks.

6. Multiplex resisted these claims. Factually and technically it was all immensely complicated. Relations between the parties had deteriorated and were poor in the winter of 2003/2004 and the first weeks of 2004. In this general context, the parties negotiated and entered into written Heads of Agreement dated 18 February 2004. The terms of this agreement are reproduced in paragraph 50 of the judgment of Jackson J, sitting in the Technology and Construction Court. The judgment was given on 5 June 2006.

7. The Heads of Agreement recited that Cleveland Bridge had made claims which Multiplex disputed, and that the parties had agreed to settle the claims. With some exceptions, Cleveland Bridge's contractual responsibilities were to remain untouched. The agreement expressed an intent that a supplemental agreement formally adjusting the contract should soon be concluded with an effective date of 15 February 2004 incorporating the points in the Heads of Agreement. There was to be a new fixed price of £12 million for the Cleveland Bridge's work from 15 February 2004, payments for site-related costs and offsite administration and overheads. Cleveland Bridge were to complete the works in accordance with a programme, which included raising the arch by 21 April 2004. If there was no agreement of the fixed price or programme at the end of three months, Cleveland Bridge were to agree an orderly handover and, importantly for present purposes, a valuation was to be compiled up to 15 February 2004. Multiplex were to pay Cleveland Bridge £4 million on the execution of the Heads of Agreement and an additional £1.25 million on the completion of the lifting of the arch.

8. On the face of it, therefore, the parties were to negotiate to agree what payment should be made for work up to 15 February 2004. Cleveland Bridge were to be paid a fixed price or prices for completing the subcontract works thereafter.

9. In the event, the arch was not lifted on 21 April 2004. The reasons for this further delay are in dispute. It was lifted in late June 2004. An adjudicator subsequently held that it had been lifted on 29 June 2004.

10. The parties set about trying to agree the value of work performed up to 15 February 2004. A quantity surveyor was instructed and produced two alternative figures in the order of £30 million. Both parties were dissatisfied. Multiplex were contending at one stage for approximately £25.5 million, Cleveland Bridge for approximately £34 million.

11. It was, and is, Cleveland Bridge's case that the valuation required by the Heads of Agreement for the subcontract work up to 15 February 2004 was orally agreed at a meeting between Mr Stagg of Multiplex and Messrs Grant, Regan and Child of Cleveland Bridge on 14 May 2004 as being £32.66 million. The nature of this agreement is at the heart of the factual dispute between the parties. In the round, Cleveland Bridge say that this amount was finally agreed as payable in compromise of their claims up to 15 February 2004. Multiplex say that the amount was agreed for interim valuation purposes only. This is a two-sentence summary only of a very complicated factual dispute.

12. The amount of £32.66 million featured in a subsequent interim certificate, number 35. On 16 June 2004, the parties entered into a written Supplemental Agreement. Its material terms are reproduced in paragraph 64 of Jackson J judgment. That paragraph occupies six A4 pages of single space type. For present purposes the most pertinent provisions are these. clause 2.1:

    "Subject to clause 2.2 the provisions of this Agreement are in full and final settlement of all disputes between the Contractor and the Sub-Contractor and all and any claims by the Sub-Contractor to the Contractor and by the Contractor to the Sub-Contractor existing on or before 15 February 2004 under or in connection with the Sub-Contract whether for extension of time, direct loss and/or expense, Variations, other adjustments to the Sub-Contract Sum, damages for breach of contract or otherwise or howsoever arising. Neither the Contractor nor the

Sub-Contractor shall be entitled or permitted to make or pursue any claims against the other for any matter arising from any event or circumstance occurring up to and including 15 February 2004 (whether or not known to the Sub-Contractor)."

clause 4:

"Save as may be subsequently adjusted in accordance with the terms of the Sub-Contract (any such adjustment being subject to clause 2.1 above), it is agreed that (taking account of all the matters referred to in clauses 2.1, 3.1 and 3.2) the adjusted Sub-Contract Sum (exclusive of Value Added Tax) shall be as specified in Schedule 1."

clause 7:

"The parties shall use reasonable endeavours to agree to re-programme the completion of the Sub-Contract Works and to agree a fixed lump sum and/or reimbursable Sub-Contract Sum for the completion of Sub-Contract Works…The said additional lump sum payment of £500,000 will be paid on execution of the further supplemental agreement described in this clause 7."

clause 8:

"In the event that the parties fail to reach such agreement in accordance with clause 7 on or before 29 June 2004 (or other such extended date as agreed in writing between the Contractor and the Sub-Contractor), the Contractor shall be entitled to give 28 days written notice (or other such extended notice period as agreed in writing between the Contractor and the Sub-Contractor) to the Sub-Contractor further varying the Sub-Contract Works to remove from the Sub-Contract the unperformed reimbursable cost items referred to in Schedule 1, paragraph (c). It is noted in this regard that the Sub-Contractor issued HR1 notices in respect of its Site employees on 30 April 2004."

clause 9.4:

"The adjusted period for the carrying out and completion of the whole of the Sub-Contract Works shall be 26 weeks commencing on 15 February 2004, as described in Schedule 4."

clause 10:

"The Sub-Contract shall be amended in accordance with the provisions of Schedule 2 and save as amended by this Agreement, the Sub-Contract shall continue in full force and effect."

Schedule 1(a) and the beginning of (b):

"The adjusted Sub-Contract Sum shall comprise:-

"(a) the gross valuation as a [sic] 15 February 2004 of work properly completed on Site and goods and materials brought onto the Site by the Sub-Contractor and Off-Site Materials in accordance with the provisions of the Sub-Contract, subject to the deduction of the Retention and other deductions permitted under the Sub-Contract; and

"(b) a fixed, lump sum of "12,000,000 for the completion of all remaining works, services and other obligations under the Sub-Contract (save for…)"

There were then payments for site related costs and two lump sum payments comparable with those in the equivalent clauses of the Heads of Agreement. Schedule 2 made certain specific amendments to the terms of the subcontract.

13. On 30 June 2004, the day after according to the adjudicator the arch was lifted, Multiplex gave Cleveland Bridge 28 days notice under clause 8 of the Supplemental Agreement to the effect that all remaining onsite erection work would be removed from Cleveland Bridge's subcontract. On 6 July 2004 Multiplex wrote saying that they were withholding payment of the £1.25 million bonus for lifting the arch. They gave reasons for doing this. On 16 July 2004 Multiplex issued certificate 37, which revalued Cleveland Bridge's work downwards by a very large sum. It gave a valuation as at 15 February 2004 of about £24 million. With other adjustments this certificate left Cleveland Bridge owing Multiplex approximately £12.5 million. There was a similar certificate 38 which valued Cleveland Bridge's work in the fortnight to 2 July at rather over £500,000.

14. On 23 July 2004 Cleveland Bridge wrote saying that Multiplex was in repudiatary breach of contract. They gave detailed grounds for this, which my brief summary narrative has to some extent anticipated, and which the judge reproduced in paragraph 87 of his judgment.

15. On 26 July solicitors for Multiplex wrote to Cleveland Bridge denying the alleged breaches of contract. On 2 August 2004 Cleveland Bridge wrote to Multiplex accepting what they regarded as Multiplex's repudiation. They stopped work that day. On 5 August 2004, Multiplex contended that it was Cleveland Bridge who had repudiated the subcontract. In the meantime, a Dutch steelworks subcontractor was engaged by Multiplex in place of Cleveland Bridge.

16. It was, and is, Cleveland Bridge's case that Multiplex had been planning for a substantial time before 16 June 2004 to get rid of Cleveland Bridge. The plan was referred to within Multiplex as "Armageddon". Cleveland Bridge maintains that Multiplex entered into the supplemental agreement dishonestly and in bad faith. This is part of their case that it was Multiplex that repudiated the subcontract.

16. In the proceedings before Jackson J in the Technology and Construction Court, the parties advanced their respective cases: Cleveland Bridge for payments under the subcontract as varied by the Supplemental Agreement and for damages, and Multiplex for damages. The central issue may be seen as which party repudiated the subcontract. A central part of that dispute is what was agreed on 14 May 2004 and its status.

17. This leads on to another substantial, and perhaps crucial, issue, which is what is the proper construction of the payment provisions of the supplemental agreement? Did that agreement on its true construction compromise Cleveland Bridge's claims in relation to work up to 15 February 2004, so as to entitle them to £32.66 million?

18. The judge heard and determined ten preliminary issues in a trial which lasted about a month, during which he heard a great deal of detailed oral evidence. He summarised the evidence in paragraphs 102 to 524 of his judgment. The judgment is in all 667 paragraphs long and occupies 106 pages or so of single spaced A4 paper. In the main, the judge decided the ten issues adversely to Cleveland Bridge. Cleveland Bridge have applied for permission to appeal against the judge's decisions on five of the ten issues but they have recently decided to reduce their application to four. Three of the issues (two now, one has been dropped) are issues of law and the other two of them are mainly issues of fact. Lord Justice Jonathan Parker refused permission to appeal on all these five issues, giving detailed written reasons for doing so. This is Cleveland Bridge's renewed application for permission to appeal on four of the five issues.

19. The central issue of fact was issue 6 which was expressed as follows: did Mr Matthew Stagg orally agree that the final valuation of the work undertaken by CBUK to 15 February 2004 would be £32.66 million? (the valuation agreement) If so, is the valuation agreement binding on Multiplex?

20. The judge, having considered a great deal of oral and written evidence, concluded that £32.66 million was agreed as a figure which Multiplex was prepared to pay in its regular valuation certificates but not as a final valuation for the purpose of Schedule 1(a) of the supplemental agreement. I interpose to say that on 14 May 2004 the Supplemental Agreement had not been entered in to. The judge reached his conclusion for eight reasons, the first of which was that he found Mr Stagg to be an honest and reliable witness. The eight reasons are in paragraph 580 of the judgment.

21. Cleveland Bridge apply for permission to appeal against this decision. It is an unpromising application which did not impress Jonathan Parker LJ, if only because findings of fact which depend upon a judge's assessment of one of the main witnesses who gave oral evidence as honest and reliable are rarely the subject of successful appeals. I shall return to this briefly later in this judgment.

22. The other factual issue which Cleveland Bridge want to have permission to appeal against is issue 8, which was which party was in repudiatary breach of contract. The issue was expressed as five sub-questions asking whether Multiplex were in repudiatary breach for a variety of refusals to pay sums of money, the first being their refusal to make payments based on what was said to have been the agreed valuation of £32.66 million. The judge had, of course, decided issue 6 against Cleveland Bridge, so that the valuation of £32.66 million was not a finally binding amount.

23. The judge decided that Multiplex, although they may in some respects have been in breach of contract, were not in repudiatary breach. He dealt with each of the five alleged breaches in detail. He said of the Armageddon plan at paragraph 608 of his judgment:

    "*Having studied the documents and considered the cross-examination of Messrs Muldoon, Stagg, McGregor, Cursley, Ong and van Rooijen, I have come to the conclusion through March, April and May the Armageddon plan remained an option which was under serious consideration, but no more than that.*"

    He concluded that Cleveland Bridge were not entitled to treat the subcontract as at an end.

24. This again is not a promising application. It did not impress Jonathan Parker LJ. The application made on behalf of Cleveland Bridge in relation to these two factual issues is supported by many many pages of detailed written submissions which I have read once without obviously being able to assimilate so as to understand all the detail. In the way that this application has gone, we have not heard oral submissions in support of it. The judge had a month in which to do this and he heard all the oral evidence. The burden of the submissions in this court is that the judge's factual decisions were (a) substantially, and perhaps fundamentally, against the weight of the evidence, and (b) insufficiently analytical in that he did not, it is said, sufficiently address component factual issues, nor give adequate reasons for his conclusion.

25. In the light of the view I have come to about other parts of this application, I express no concluded view on this part of the application. But I would be at risk of misleading Cleveland Bridge into over-optimism if I did not direct attention, as counsel has done, to paragraphs 19 to 32 of my judgment in ***Yorkshire Water Services Ltd v Taylor Woodrow Construction Northern Ltd*** [2005] EWCA Civ 894 and in particular to paragraph 27 and 32 and to express a first impression, which I emphasise is a first impression only, that in a case which is somewhat less complicated and technical than ***Yorkshire Water*** and not the subject of a great deal of technical expert evidence as was both Yorkshire Water and **Thomson v Christie Manson & Woods Limited and Others** [2005] EWCA Civ 555 referred to in paragraphs 31 and 32 of Yorkshire Water, Jackson J's judgment here is unlikely to be amenable to a factual appeal. I emphasise that that is a first impression, not a decision.

26. The main issue of law appears to have been issue 4. This was an issue of construction of the Supplemental Agreement, in particular clauses 2.1, 4 and Schedule 1(a). The original terms of the issue are in paragraph 101

of the judgment, where there is a series of questions. The issue changed somewhat in the course of the hearing as each party struggled, as I think, to make practical sense of the words. The heart of it was that Cleveland Bridge contended that Schedule 1(a) embraced the £32.66 million which they said had been agreed as the final valuation of work up to 15 February 2004.

27. Their case spilled over into issue 7, upon which Cleveland Bridge also want permission to appeal, which was whether what they said was the agreed valuation became part of the adjusted final sum, or whether an entire agreement clause 1.8.1 of the amended subcontract prevented Cleveland Bridge from saying that what was not in the written supplemental agreement was nevertheless contractually binding. Cleveland Bridge also contended Multiplex was estopped from relying on clause 1.8.1.

28. The judge decided that issue 7 did not arise because Cleveland Bridge had failed to establish factually their version of 14 May 2004 agreement, but he proceeded contingently to decide the entire agreement point against Cleveland Bridge. I am not clear of the extent to which he addressed the estoppel point.

29. As to issue 4, the judge did not give a yes or no answer to the question posed but decided that, insofar as variations were disputed, the costs of designing and fabricating the varied elements of the work after 15 February 2004 whether offsite or onsite were compromised by the terms of the Supplemental Agreement. This boldly stated is somewhat cryptic, but it arose out of the terms of the issue as formulated and the submissions of the parties relating to disputed variations.

30. Jonathan Parker LJ took the view that issues 4 and 7 were heavily coloured by the factual issue 6, upon which he was not persuaded to give permission to appeal. He refused permission on issues 4 and 7 as well. However, the supplemental agreement is a written agreement which needs to be construed, and which I presently think is capable of being construed independently of a decision on issue 6. So viewed, I do not think that the construction which emerges from the judge's judgment is unarguably correct.

31. The difficultly centres on the meaning of Schedule 1(a). If I have correctly understood the parties contentions, Cleveland Bridge say that the "gross valuation as at 15 February 2004" et cetera means that which had been agreed to be such gross valuation. Multiplex say that it does not, but that it means that Cleveland Bridge were to be entitled to be paid whatever was the proper gross valuation in accordance with the provisions of the subcontract, and that this is to be contrasted with Schedule 1(b) by which Cleveland Bridge were entitled to a fixed lump sum of £12 million for completing the remaining works. Cleveland Bridge, in support of their case, point to the terms of the Heads of Agreement and the intervening negotiations. Multiplex say that the entire contract provisions precludes much of this.

32. I presently think that this issue of construction is capable of being examined in this court without in the first instance having to address the very complicated factual questions raised by issue 6, for which the question of permission to appeal is to say the least problematic. The issue of construction can, I presently think, proceed on the basis that there are two clearly defined rival factual contentions as to what was agreed on 14 May 2004. I can see fairly obvious difficulties with Cleveland Bridge's construction case on the words of Schedule 1(a), but I do not presently think that Multiplex's case is without difficulty, and Multiplex are not here to argue their case.

33. In the result, in my judgment Cleveland Bridge should have permission to appeal on issue 4 and the first part of issue 7, excluding the estoppels part of it which is necessarily factual. I would adjourn the application for the rest of issue 7 and for issues 6 and 8. I would do this because:

    1. The issue of construction upon which I would give permission is important and relatively circumscribed. It should be possible to hear and determine it with reasonable economy.

    2. The court's decision on this issue is capable of either, in one outcome, disposing of the entire main issue or, in another outcome, of colouring without, I stress, deciding the question of whether permission to appeal should be given upon issue 6.

    3. If Cleveland Bridge do not succeed on the issue on construction their case on issue 8 looks weak.

    4. In the light of ***Yorkshire Water*** I would be disinclined to give permission on issues 6 and 8 upon submissions from Cleveland Bridge alone.

34. I would also have adjourned the application for permission to appeal on issue 9, but that is no longer pursued. If Smith LJ agrees with this, my case management plan will be that the court would hear and decide the construction issue at a hearing which should not take more than one and-a-half days and which should not be swamped with paper. Having decided that issue the court will then be able to give directions about whatever further hearing may or may not be needed.

35. **LORD JUSTICE SMITH:** I agree.

Order: Application granted on issue 4 and part of issue 7.

MR G BOMPAS QC (instructed by Messrs Reid Minty Llp) appeared on behalf of the Applicant.
THE RESPONDENT DID NOT APPEAR AND WAS NOT REPRESENTED.