CA on appeal from TCC (HHJ Seymour Q.C.) before Rix LJ; Tuckey LJ; Jonathan Parker LJ. 19th December 2003.

JUDGMENT : Lord Justice Tuckey:. This is the judgment of the court to which we have all contributed.

Introduction

1. In April 2000 Co-operative Retail Service Limited (CRS) which owned about 460 retail grocery stores merged its business with that of Co-operative Wholesale Society Limited (we will call it CWS before and after merger) which owned about 650 stores. In these proceedings CWS claimed damages against ICL of about £11m. for repudiatory breach of contract and misrepresentation arising out of a project in which it was contended that ICL had agreed to supply a software system to integrate the IT systems in the CRS stores with those in the CWS stores. After a 20 day trial in the Technology and Construction Court His Honour Richard Judge Seymour Q.C. decided that there was no contract between CWS and ICL, but if there had been a contract it had not been breached or repudiated by ICL. The misrepresentation claim failed because there was no contract, but if there had been a contract it had not been induced by any representation made by ICL. He also held that the damages claim had been substantially overstated; on the most generous assessment it did not justify the cost of pursuing the claim. In short, CWS suffered a comprehensive defeat.

2. CWS' main ground of appeal is that the trial was unfair because in his judgment the judge made adverse findings about the motives of CWS' senior managers, the credibility of its witnesses and the competence of its advisors which were unfair, unjustified and not suggested by ICL. These findings tainted the whole of his judgment. The injustice to CWS can only be remedied by ordering a re-trial, however regrettable that may be. Alternatively CWS say that the judge's conclusion that there was no contract was wrong.

3. ICL does not seek to support some of the judge's findings. Nevertheless it says that those findings do not taint the judge's key findings of fact which are fatal to CWS' claim. There will therefore be no point in having a re-trial. The judge's finding that there was no contract can be supported for the reasons he gave, but even if he was wrong it makes no difference to the result because of the terms of the contract which CWS now accepts.

4. We remind ourselves at the outset, that the allegation of unfairness is a very serious one. ***In Inner West London Coroner ex. p. Dallaglio*** [1994] 4 AER 139 Sir Thomas Bingham, Master of the Rolls said (at 162a):

   It not infrequently happens that judges find themselves called upon to criticise, sometimes in strong terms, parties or witnesses appearing before them. The subject of such criticisms are apt to complain that the judge was prejudiced or biased against them. But such criticisms will carry no weight for the appellate court provided the criticisms were based on material properly before the judge in that case and were not, in the light of that material, inappropriate. In such a case there is no element of extraneous prejudice or predilection and hence, in the eyes of the law, no question of bias.

   More recently in ***Cairnstores Limited v Hassle*** [2002] EWCA Civ. 1504 this court said that the correct question was whether the losing party could establish that it did not receive a fair trial, not whether, as a disappointed litigant, it believes that the trial was unfair.

Outline facts and issues

5. Fairness is a "big picture" issue. To understand the substance of the criticism of the judge it is first necessary to give an outline of the facts leading to the dispute and the issues.

6. ICL needs no introduction. In mid-2000 it made an assessment that CWS was one of its top five retail accounts world-wide which had generated revenue of more than £25m. in the previous year.

7. CRS was an existing customer of ICL when in June 1999 it entered into an agreement (the CRS agreement) to harmonize the IT in its stores. This agreement did not anticipate the merger but was expressed to cover all types of business transactions with ICL in connection with the overall CRS IT strategy. It was subject to ICL's contract conditions which contained a number of exclusion and limitation of liability clauses. It incorporated a binding contract for the installation of ICL's ISS 400 EPoS system by a fixed date followed by the delivery and development of a stock management programme in three further phases. EPoS means electronic point of sale (the till). The stock management programme is part of the in-store back office system. This system receives information from the till and communicates with the retailer's central system. The CRS agreement contemplated that the back office system would be developed from ICL's Globalstore. Globalstore was a basic application which had to be customised, but ICL claimed that it could be more easily adapted to a customer's requirements than other applications. Under the CRS agreement CRS was to pay discounted prices for the installation, but if the agreement was terminated before all four phases of the binding contract had been completed it would be liable to pay enhanced prices (penalty). In the event the first phase of this contract was completed on time and the second phase was underway at the time of the merger. If the agreement was terminated before the remainder of the work had been carried out penalty of about £1m. would become payable. In the event the judge gave judgment for this amount against CWS on ICL's counterclaim.

8. CWS was also an existing customer of ICL. Its stores were served by an ICL ISS 300 EPoS system and a back-office system called Vision (the product of a company called PCMS) which was connected to CWS' central system. There were other contracts between CWS and ICL including one relating to CWS' funeral business, but the detail of such contracts was not explored at trial.

9. Planning for the merger began in the latter half of 1999. Integration of the IT systems in the CRS and CWS stores was obviously required so that the stores could offer the same facilities, be managed through the same central system and economies of scale could be achieved. CWS ran a loyalty scheme which gave customers discounts

(dividend) on certain purchases. CWS' systems kept the dividend account for each customer and also provided in-store banking facilities. Such facilities (functionality) were not available in the CRS stores. The intention was that they should be.

10. ICL and PCMS made presentations to CWS as to how integration could best be achieved. Two options emerged: the first, involving PCMS but still with considerable ICL content, was to install ISS 300 and Vision in the CRS stores; the second was to extend the development of Globalstore with ISS 400 already installed in the CRS stores so that these systems would provide the same functionality (including dividend) as those available in the CWS stores. ICL said that this system could be ready for installation in the CRS stores within 5 months of sign-off by CWS of its functionality requirements specification (FRS). It would cost approximately £12m.

11. In March 2000 CWS opted for ICL's Globalstore solution. In the meantime ICL had agreed that if the merger went ahead the CRS agreement would be cancelled without penalty provided a new contract could be negotiated to reflect the new project.

12. Work on the new project started however before any new contract had been agreed. CWS paid ICL approximately £2m. for the work which they did. There were contract negotiations between March and September but terms were never agreed. The main sticking point was CWS' insistence upon liquidated damages for delay and ICL's refusal to agree any such term. Nevertheless at trial CWS' primary case was that one could spell out an entirely new contract (the CWS agreement) made in March or April 2000 from the conduct of the parties. This was an ambitious contention since the evidence filed on behalf of CWS showed that the contract negotiations were inconclusive. ICL's primary case on the other hand was that work on the new project was done under the CRS agreement.

13. Work on the new project continued until 29th January 2001 when CWS wrote to ICL saying "ICL's repeated failure over the best part of a year to deliver on time to spec product" had led CWS to lose confidence in ICL "to the point that the limited time we have at our disposal will not be best spent in giving ICL further opportunities to rescue the Globalstore project from its present low point". CWS reverted to the PCMS solution and installed ISS 300 with Vision in the CRS stores. These proceedings followed in which CWS alleged that ICL had repudiated the CWS agreement which it had been induced to enter by misrepresentations as to Globalstore's suitability for the project.

14. We have been taken through a very limited amount of the voluminous documentation (we are told there are fifty lever arch files) created in the course of this major project. It obviously gives scope for each party to say (as they did, and as is usually the case in IT disputes) that what went wrong was the fault of the other party. ICL's short answer to CWS' allegation of repeated failure to provide software on time and to specification was that CWS had failed to provide it with the information necessary for it to do so and was then over-critical of its product. Much of the delay was of CWS' making. It is not necessary for us to examine these issues in any detail at this stage except to note a few important events.

15. By the end of March 2000 Globalstore was projected to be ready for piloting in one store by the end of August. By May however this projected date had slipped by six weeks. Mr Brydon, CWS' general manager retail IT, was concerned. ICL suggested a Globalstore/ISS 300 solution "as a possible remedy to the difficulties in specifying in detail the technical requirements for dividend for ISS 400". CWS accepted this solution on terms that it would not increase the cost of the project. This solution provided that the software would be released for validation in three "drops", the last of which was due on the 14th August.

16. Drop 1 was released on 27th June. CWS rejected it. ICL said that CWS had misunderstood what it was it was to receive and that the rejection was unjustified and caused considerable delay. By this time Mr Melmoth, the chief executive and Mr Hepworth, the retail controller, of CWS had become involved and had taken up CWS' concerns with ICL's chief executive. These concerns were not confined to the Globalstore project, but included problems with the development of the system for the funeral business and matters related to other contracts.

17. As a result of what had happened with drop 1 and CWS pressure for ICL to give firm assurances on the delivery of quality software, ICL proposed a single drop of fully validated software on 10th October. This drop took place on 17th October, but CWS contended that it contained an unacceptable number of bugs. ICL disputed this, but up to 29th January 2001 the parties were engaged in trying to eliminate bugs from the software. The delivery of bug-free software fit for use in a pilot had been promised for the 29th January. However at a meeting on 19th January this was revised to a "cast-iron guarantee" of delivery on 5th February 2001. CWS did not wait to see whether this guarantee would be met. It was ICL's case at trial that it would have been and that CWS terminated because ICL refused to agree to pay liquidated damages.

The hearing

18. Both parties produced substantial written openings for the trial. CWS' opening recognised that the contractual situation was not clear-cut. It identified the two candidates as the CWS agreement and the CRS agreement. In its defence ICL admitted that the work had been done under the CRS agreement but had pleaded in the alternative that if that was not so, which was denied, there was no contract at all: in that case the work had been done and CWS had been paid on a quantum meruit. This alternative was not however advanced in ICL's written opening.

19. Counsel for CWS at trial was Mr Richard Mawrey Q.C. When the judge came into court his first words were:

    Yes Mr Mawrey. Offer and acceptance.

There followed a discussion between the judge and Mr Mawrey in which the judge made it clear that he was having difficulty seeing that there was any contract between the parties. Mr Mawrey responded by saying that it was common ground that there was a contract; the only question was which contract. Mr Henry Carr Q.C., counsel for ICL then as now, maintained ICL's primary case but reminded the judge of the quantum meruit alternative pleaded in the defence.

20. We do not think the judge can be criticised for the way in which he raised his concern about the contract or the way in which he pursued it in the course of Mr Mawrey's opening. But from his judgment it is clear that the way in which Mr Mawrey dealt with it irritated him, as did the fact that CWS had advanced a case for the CWS agreement at all. What he said was:

39. .... I asked Mr Mawrey whether he was intending to refer me to authority during his opening which supported the approach which he was urging me to adopt. He indicated that, at that time, he was not. I was left with the impression that he felt that I was just being difficult and that if I tried harder I would surely see the contract for which CWS contended. I have to say that I did not find that approach at all helpful. By the conclusion of the trial Mr Mawrey had come to the view that some reference of authority might be of assistance. I consider relevant authority in the next section of this judgment.

21. After his consideration of a number of authorities the judge said:

51. ... it is plain in my judgment that the analysis set out in the particulars of claim and amplified in the further information is wholly unsustainable. I find it difficult to understand how it could ever seriously have been put forward.

*52. On the first day of the trial I mentioned to Mr Mawrey as possibly being relevant to the issues which I have to decide the cases of **Gibson v Manchester City Council, Butler Machine Tool Co. Ltd. v Ex – Cell – O Corporation (England) Ltd.** and **Pagnan SpA v Feed Products Ltd.** Mr Mawrey did not seem to find that of assistance. Nor did he think it appropriate at that time to seek to help me in relation to the possible significance of these decisions. A couple of days later after I had had an opportunity of reading the witness statements served on behalf of CWS, I suggested that Mr Mawrey might like to consider further, sooner rather than later, the passage from the judgment of Lloyd L.J. in **Pagnan ...** in the context of a number of paragraphs of the witness statements .... I cannot say whether he did so, but the trial did not thereafter take a course which indicated that he had. By the end of the trial Mr Mawrey had still not thought to grapple with the statement of principles set out in the judgment of Lloyd L.J. ...*

53. It was in my mind at the close of Mr Mawrey's opening to consider whether it was appropriate to exercise my management powers to seek to deal in a summary way with the issue of the contract for which Mr Mawrey contended. Mr Mawrey reminded me that the action was listed for trial of all issues and that it had not seemed to anyone, including the judge who had the responsibility for managing the case up to that point, that a trial of any issue preliminary to any other was appropriate. Mr Henry Carr did not suggest that any course should be taken other than that all issues should be tried. I was conscious that ICL had an interest in vindicating, if it could, its commercial reputation in relation to serious allegations of almost a professional negligence character which had been made against it by CWS. In the end I decided to let the trial run its course. However it is clearly necessary to consider what should be the costs consequences of claims being advanced on behalf of CWS against ICL which were, from a legal point of view, doomed from the start, and those claims being persisted in notwithstanding a transparent indication from me on more than one occasion at the beginning of the trial what the difficulties were.

In the event however at the end of the trial the judge declined to make an order for indemnity costs against CWS.

22. No criticism can be made of the judge's conduct of the hearing. He asked virtually no questions. He allowed both parties to develop their cases as they liked and there is nothing from the transcripts which show that he displayed any hostility to CWS' case. But again it is clear from his judgment that he was irritated by the way in which CWS' case had been conducted. For example at the beginning of the section of his judgment dealing with repudiation the judge said:

140. The formulation of the case of CWS in this action does not seem to have benefited from any real legal analysis. This comment does not apply only to the failure to consider the application to the facts as to the course of negotiations as to which CWS' own witnesses of fact spoke of the English law of contract formation, but also to the formulation of the alleged breach of contract which was said to amount to a repudiatory breach and thus to have justified CWS treating the contract for which it contended as at an end.

Later when dealing with damages the judge said:

*292. It is well known that the modern basis upon which damages are recoverable for breach of contract was first expounded by Alderson B. in **Hadley v Baxendale** ... The decision is much mentioned, but relatively rarely does anyone take the trouble to remind himself or herself of what Alderson B actually said. It is particularly unfortunate that those formulating the claims of CWS in this action did not trouble to remind themselves of the passage in question for the failure to do so seems to have led to claims being advanced which cannot succeed on any view.*

23. Counsel prepared lengthy written closing submissions after the evidence. Mr Henry Carr's submissions dealt in detail with the case against ICL. Where there were issues of fact he naturally urged the court to accept the

evidence of ICL's witnesses but he did not suggest that CWS had presented its case in bad faith. Of Mr Brydon, however, he said:

"Mr Brydon was not a man concerned with detail". He suggested that it would have been inappropriate for him to have found out about the nature of Globalstore since it would have been usurping the function of others in his team. … However he did have his own agenda in relation to this project. Before ICL had delivered any code [software] he informed the CWS team working on Globalstore [in May 2000] that there was "a complete distrust of ICL at senior levels in CWS". He suggested that "we take a very sceptical view of ICL's abilities to deliver quality product on time". He also stated that Graham Melmoth was "intent on getting his pound of flesh from ICL". When he believed that ICL was not succeeding on the project he expressed his satisfaction, and when he heard ICL was making good progress he expressed his dissatisfaction. He had already decided to throw ICL out by 11th December, at a time when it was being reported to him that the quality of the software was OK. His main concern appeared to be ICL's future and ability to support Globalstore once it had been installed, rather than the quality of the code, in which he was not interested.

24. The judge heard short oral submissions on 12th December 2002 after he had had time to consider the written closing submissions. The judge gave no indication during this hearing of the findings he was likely to make.

The judgment

25. The judgment was handed down on 13th January 2003. It is nearly 200 pages long and runs to 371 paragraphs. It contains a wealth of detail and must have taken much time and effort to prepare.

26. After an introduction the judge considered CWS' pleaded case for the CWS contract and reached the conclusion to which we have already referred that it was wholly unsustainable. He then went on to reject ICL's case for the CRS agreement for exactly the same reasons. In other words he said that because the parties had not agreed the terms of a new contract they could not have agreed terms of any variation to the CRS agreement. In rejecting ICL's case for the CRS agreement the judge used none of the language he deployed when rejecting CWS' case for the CWS agreement.

27. The judge went on to consider the case in misrepresentation. After reciting Mr Mawrey's arguments he pointed out that:

58. … None of this was of any relevance if it were not found that the contract contended for had been concluded.

Its relevance was to the position if there was no contract. Here Mr Mawrey submitted that CWS would have a claim for negligent mis-statement or a restitution claim which the judge said was:

59. … A rather desperate attempt to salvage something from the anticipated wreckage of CWS' case as to a contract. It itself contained a number of illogicalities and misconceptions.

In the event the judge rejected these claims on the ground that they had not been pleaded.

28. Having dealt with CWS' pleaded claims in this way the judge said that his conclusion as to contract was reinforced by a consideration of the evidence as to the negotiations. He dealt with this in paras. 69 – 139. In para. 74 the judge noted that Mr Brydon was in charge of the negotiations, although he only dealt with matters of principle. "However, the ultimate strategic direction of negotiations and focus of decision on matters of principle" appeared to have resided with Mr Hepworth and Mr Melmoth. He continued:

75. Before embarking upon a narrative of the principal relevant incidents during the negotiations between the parties it is necessary to record two important circumstances which conditioned the course of the negotiations and the aims and objectives of CWS in them. The first was that, …. Mr Brydon was aware of the provisions of the CRS agreement for [penalty] …. in the event that the CRS agreement did not run its full course. …. Having heard the evidence of Mr Brydon and in the light of a number of references in contemporaneous communications to which I refer later in this judgment, I am entirely satisfied that CWS was a reluctant participant in the negotiations with ICL and that it was induced to enter into those negotiations, and, indeed to deal with ICL at all only because of the perceived need to avoid CWS having to pay the increased sums for which the CRS agreement provided if no new agreement was made. Hence the identification by Mr Brydon as early as December 1999 in his contact with Mr Pickett of ICL of the issue of what was to happen to the CRS agreement.

76. The second circumstance the malevolent influence of which hung over the dealings of CWS and ICL in relation to the Globalstore project was the perception of Mr Melmoth, and, it seems, of Mr Brydon, that a grievous wrong had been done to CWS by ICL over some project concerning the funerals side of the business of CWS, and that ICL's performance under other arrangements between CWS and ICL had been less than satisfactory. This factor is obviously linked to the circumstances to which I have referred in the preceding paragraph, as it would have increased the reluctance of CWS to deal further with ICL. Exactly what the perceived injustice in relation to the funerals side of the business was did not emerge during the course of the trial before me. Mr Hepworth told me in cross-examination that he had heard about it, but he denied that the issue influenced his own actions. I accept that evidence, but, for the reasons which will appear as I consider the course of contemporaneous communications later in this judgment, I am satisfied that the funerals issue did colour the approach of Mr Brydon, and the terms of his reports to Mr Hepworth, who, of course acted on the terms of those reports in good faith. To put it bluntly, I am satisfied that, in the light of whatever it was that was considered to have happened in relation to the funerals side of the business of CRS, Mr Melmoth and Mr Brydon would not willingly have had further dealings with ICL, but felt that they had little choice commercially because of the sums which CWS would have to pay by way of price revisions under the CRS agreement if CWS was not able to negotiate a discharge of that agreement. Had it been

necessary to do so, I should have found that CWS was in fact wholly uninfluenced by the alleged representations of ICL which were said to have induced CWS to enter into the contract for which it contended. It was the consideration to which I have referred which was the determining factor in CWS dealing with ICL at all.

77. Having been dragged reluctantly into dealing with ICL at all, there was then a concern on the part of Mr Brydon, and it seems, Mr Melmoth, either to extricate CWS from its dealing with ICL in relation to the Globalstore project, if that could be done without exposing CWS to risk under the CRS agreement or at least to seek to use any opportunity presented by the course of the Globalstore project to exact revenge for what was considered to have happened on the funerals project. Either way, Mr Brydon and Mr Melmoth were looking for trouble, given the slightest pretext. As I shall demonstrate, the feeling of Mr Brydon that a very firm line should be taken with ICL was communicated to his subordinates and influenced their own approach to ICL. While it seems that the festering issue of the problem over the funerals project was the main grievance of Mr Melmoth and Mr Brydon, they also felt aggrieved over the quality of the service which ICL had provided to CWS in relation to what were called "break fix arrangements" and in respect of some other system development, as well as "kit refurbishment". The detail of these other occasions of resentment did not emerge during the trial before me. "Break fix arrangements" were, in general terms, support and maintenance arrangements for ICL for ICL equipment installed in the existing CWS stores. The issue so far as they were concerned seemed to be a perception on the part of Mr Brydon that the service was not provided as quickly as he felt it should be.

29. The judge then reviewed the history of the negotiations for the new contract and at para. 100 returned to the theme which appears in paras. *75 –77*. Again he said his findings were supported by a number of indications in contemporaneous documents to which he would refer later. He does not identify these documents later in the judgment but there is no reference to any document before May 2000 which could possibly support the judge's view. By May 2000, as we have said, the projected date for the first pilot had slipped by six weeks. In an internal e-mail of 10th May entitled "Are we losing the plot?" Mr Brydon expressed his concern and exalted his team to stem the problems before they escalated further. On 29th May Mr Brydon e-mailed Mr Goodby, CWS' head of IT services, saying that he had told Mr Pickett of ICL:

To escalate the issues to [the chief executive of ICL] who, can u believe it, is currently unaware of the issues we are having! Graham Melmoth is intent on getting his pound of flesh from ICL so watch this space.

30. On 8th June Mr Brydon reported on a meeting he had had with Mr Melmoth at which it was agreed that he would meet with the chief executive of ICL, when they would discuss, amongst other things, ICL accepting penalty clauses and CWS suing for "the funerals fiasco". Following the chief executive's meeting Mr Melmoth wrote to ICL's chief executive on 28th June saying:

On the matter of the funerals system and where we go from here, Keith Brydon will be following this up in conjunction with the general manager funeral services group.

The judge records the fact that Mr Melmoth did not give evidence. In fact CWS did not take proceedings against ICL in relation to the funeral business and there are no later references to this business in the judgment.

31. The judge does not specifically relate Mr Brydon's e-mails and Mr Melmoth's letter to his findings in paras. *75 – 77* but we have set out in the preceding paragraphs the only references we can find upon which these findings could be based.

32. At para. 140 the judge turned to the question of repudiatory breach. He concluded that even if CWS had made out a contract he would have held that as a matter of law ICL had not repudiated it. We examine his reasons for this conclusion later in this judgment.

33. The next section of the judgment (paras. 148 – 276) was headed "The progress of the Globalstore project". Here the judge examined CWS' complaints about quality and delay and rejected them. It is this part of the judgment which ICL principally relies upon as containing findings of fact which are not tainted by the judge's earlier findings

34. The final section of the judgment (paras. 275 – 368) dealt with damages.

35. The Judge summarised his conclusion on the merits of CWS' claim as follows:

369. This action fails in its entirety and is dismissed. For the reason which I have set out in this judgment, it seems to me that the claims made in this action were ill-considered and misconceived. In the absence of a contract between CWS and ICL there could be no question of ICL being in breach of contract or of CWS having been induced to enter into a contract by misrepresentation. The formidable problems of showing a contract seem never to have been seriously addressed before the trial of this action, and even at the trial Mr Mawrey showed no enthusiasm for grappling with them. The whole focus of CWS' case was how outrageous it was that ICL could have conducted itself as it did, as if indignation would carry the claims forward past the legal and factual difficulties. No attention appears to have been given to the issue whether, assuming that the contract for which CWS contended was made out, CWS was in law justified in treating that contract as having been repudiated at the time the decision to proceed no further with the Globalstore project was taken. No one even seems to have looked at CWS' own evidence as to the ground upon which it was actually decided to proceed no further nor to have wondered whether that ground could seriously be presented as acceptance of some repudiation of the contract contended for. In the formulation of the claims for damages elementary principles as to quantification, foreseeability and the circumstances in which allegedly wasted costs can be claimed were disregarded. The approach to considering the quality of the evidence as to causation of alleged loss of profits

was in my judgment so far deficient as to involve a wholesale suspension of disbelief The result is that there was not merely a fatal flaw in CWS' case from the outset, but that that flaw was compounded rather than mitigated by looking at other parts of the case. Making the most generous assessment of the totality of the evidence CWS' case was not worth anything like the sum which it needed to be worth to justify the cost incurred in the litigation.

Assessment

36. Mr Christopher Carr Q.C. for CWS submits that the whole of the judgment is tainted by the findings (which he described as the "*judge's conspiracy theory*") made in paras. *75 – 77* which are unfair and unjustified. He submits that it is apparent from an examination of the judgment as a whole that these findings, which the judge himself described as important, were central to the judge's whole approach to the case and pervaded every aspect of his judgment. So it is impossible to isolate particular findings as discrete in the sense that they can safely be treated as untainted by the judge's conspiracy theory. Whether the conspiracy theory was the source of the judge's apparent antipathy towards CWS' claim or whether it was the product of it matters not; either way, the result is a judgment which is manifestly unfair to CWS. In the circumstances there is no alternative to a re-trial of the entire action.

37. We start by considering paras. *75 – 77* of the judgment. In these paragraphs the judge concludes that CWS only dealt with ICL at all because of the perceived need to avoid having to pay penalty under the CRS agreement and that it was wholly uninfluenced by anything ICL may have said about the merits of Globalstore. Having been reluctantly dragged into dealing with ICL in this way Mr Melmoth and Mr Brydon were looking for trouble on any pretext so as to extricate themselves from the project without cost and to find an opportunity to exact revenge for the grievous wrong they felt ICL had perpetrated on CWS' funeral business and for other unrelated matters. So the judge found that CWS' actions were driven, at the highest level and from the very beginning, by a festering grievance to exact revenge from ICL, that CWS as a result dealt with ICL only with reluctance and indeed antipathy, and had from the very first been looking for a way to cause a complete break-down in their relationship.

38. This was not ICL's case. It was not put to the witnesses. Mr Melmoth did not even give evidence because it was not thought he had anything relevant to say. The judge gave no indication that he was proposing to make such findings. Put bluntly the judge's findings are obviously unfair. CWS never had an opportunity of considering, (with the assistance of its legal advisors) or answering a case of dishonesty which had never been put. It is however not only unfair because of that. It is an essential safeguard of our judicial process that the judge should "hear the other side" (audi alteram partem). Where a judge acts, without warning, on his own view of an extended case of bad faith as providing a critical explanation of events (in this judge's own words "two important considerations which conditioned the course of the negotiations and the aims and objectives of CWS in them"), it is a matter of fundamental fairness that the judge's concern should be broached to the parties, above all to the party prejudiced by his view of things. Without that safeguard, the judge is likely to fall into error not only on the matter which is causing him particular concern, but also on other ramifications of the case. He simply has not heard what the party most affected has to say about what concerns him.

39. The judge's scenario is also highly improbable. Integration of the CRS and CWS systems was self-evidently necessary, important and urgent. Why would CWS commit itself to a project which on any view would take months to complete and cost about £12m. for the sole purpose of avoiding a potential liability of about £1m. and exacting revenge for some past grievance? A strategy of entering into the Globalstore project with a view to terminating it on grounds of breach by ICL would, in our view, have been so risky and speculative that no-one in their right mind would have seriously considered it. The judge's view makes no commercial sense whatsoever. It does not appear from his judgment that he tested his view against the probabilities. Mr Henry Carr did not feel able to support it. We think it is unsupportable.

40. We are concerned that the judge may have been side-tracked by the lesser case on the part of ICL, developed in its closing submissions to which we have referred, which sought to emphasise that CWS had reasons, other than inadequate performance by ICL, for terminating the project. Be that as it may, we are satisfied that the judge's finding of what amounted to a malevolent conspiracy, from beginning to end, to manufacture and then present a false case went far beyond any fair or legitimate view of CWS' case.

41. The crucial question then is where does this leave the rest of the judge's judgment? Mr Henry Carr submits that the judge's other findings can stand. He says we can and should say that he was wrong to make the findings he did in paras. *75 - 77* but this does not mean that a re-trial is justified. The crucial issue was whether ICL repudiated the contract. CWS' motivation for entering into it was irrelevant to this question. The judge's finding about repudiation was supported by the detailed findings which he made about the progress of the project and in particular the reasons for the initial delay and the change from ISS 400 to ISS 300, the rejection of drop 1 and events after the validated drop on October 17th. These findings he submits were not dependent on or tainted by those parts of the judgment which are open to criticism. They were justified by the documents and oral evidence which the judge accepted.

42. So the essential element in Mr Henry Carr's submission that the judge's ultimate solution to the litigation was sound, whatever errors of judgment or objectivity he may have committed along the way, was the examination of his reasoning concerning repudiation. If, as the judge found, CWS had no case in repudiation in any event, then it did not matter that he may have erred in finding that CWS' motivation from the first had been in bad faith to destroy

the relationship, contractual or otherwise, between the parties, or in finding that there was never any contract which covered the Globalstore project anyway. It was for this purpose that Mr Carr took us to the detail. This was designed to support the over-arching submission that the judge was entitled to reject CWS' case of repudiatory breach and that he did so in terms which were sound and wholly independent of and untainted by his errors elsewhere. In this connection, the passage in his judgment which expressed his conclusion on repudiation naturally and properly came in for particular attention, and it is to that passage that we now turn.

43. The critical passage occurs at para. 146 of the judgment. It is clear from the context that the judge considered and rejected CWS' case in repudiation, on the assumption that it had succeeded in setting up a contract in the first place.

44. In para. 145 the judge had set out an extract from a discussion between him and Mr Mawrey during the latter's opening in which Mr Mawrey had explained that his case in repudiatory breach was premised on a contractual deadline, alternatively on the giving of a *Charles Rickards Ltd v. Oppenheim* [1950] 1 KB 616 notice to make time of the essence as of 29th January 2001, as of which date ICL had in December 2000 promised to deliver the next important stage of its software release (ECR2, the vital preliminary to the pilot scheme) and CWS had made clear its attitude that the maintenance of that date was critical to it. In its particulars of claim CWS had pleaded that it was an essential term of the contract for the project that "The system would be ready for a pilot scheme in August 2000 and would be rolled out to all former CRS stores in September 2000". Of course, those dates had slipped, and there was a large dispute between the parties as to why they had slipped and whose fault it was. The judge, in this section of his judgment, did not mention the pleaded contractual dates, but he did remark that the alternative case had not been pleaded.

45. It is now necessary for us to set out para. 146 of the judge's judgment, numbering its sentences to make discussion of it easier:

> (1) The way in which Mr Mawrey explained the nature of the case in the passage quoted in the preceding paragraph was a considerable departure from the pleaded case. (2) It was also wholly unsupported by any evidence. (3) I have already set out the passage from the witness statement of Mr Hepworth in which he dealt with the making of the decision to cease going forward with ICL. (4) I have also quoted the letter dated 29 January 2001 written by Mr Hepworth to Mr Christou. (5) What seems plain from those two pieces of evidence is that at the meeting with Mr Christou on 26 January 2001 the question of whether ICL was prepared to agree to pay liquidated damages was raised. Mr Christou indicated that ICL was not prepared to agree to pay such damages. (6) On the CWS side the possibility of a cessation of relationships was then brought up. (7) Mr Christou indicated that ICL would be prepared to accept a termination of its association with CWS in relation to the Globalstore project, if that was the wish of CWS, in which event ICL would co-operate in an orderly process of disengagement. (8) In the letter dated 29 January 2001 Mr Hepworth recorded that it was the wish of CWS to proceed no further with ICL. (9) In the result, therefore, any contract between ICL and CWS in relation to the Globalstore project was either terminated by consent or by reason of the failure of ICL to agree to vary it so as to include a provision for liquidated damages. (10) While Mr Hepworth in his letter professed a lack of confidence on the part of CWS in ICL, neither in his witness statement nor in his letter dated 29 January 2001 did he indicate that the reason for termination of any contract was that ICL had failed to do by a particular date something which it had promised to do by that date. (11) Although Mr Hepworth's letter to Mr Christou was dated 29 January 2001, it would seem that the decision to proceed no further with ICL was in fact taken immediately after the meeting on 26 January 2001 in the light of the refusal of Mr Christou to offer that ICL would agree to pay liquidated damages. (12) Consequently, whatever Mr Mawrey now says, it does not appear that in fact ICL doing something by 29 January 2001 was actually critical to CWS at all. (13) Thus even if I had been persuaded that CWS had made out the contract for which it contends, I should have held that ICL had not, as a matter of law, repudiated that contract, because it had not, as at the date the contract came to an end, been in breach of a term of such significance as to indicate that it did not intend to be bound by its contract. (14) Further and in any event, even if I had found that ICL had been in repudiatory breach of a contract, I should have held that CWS had not accepted such repudiation as bringing the contract to an end. (15) Rather the contract was terminated either by mutual agreement or by CWS in breach of contract on account of the failure of ICL to agree to a variation which CWS wanted, namely the introduction of a provision that ICL should pay liquidated damages. (16) For these reasons also, therefore, the claims of CWS in this action fail.

46. We set out the two pieces of evidence which the judge identified and relied on in this paragraph. In his witness statement Mr Hepworth said this (cited by the judge at para. 129 of his judgment):

> *A further meeting took place between Keith Brydon, myself and Richard Christou of ICL on 26/01/2001. Mr Christou was not prepared to commit to penalties for late delivery. It was felt that ICL could not be trusted to deliver Globalstore and that it would be necessary for tCG [ie CWS] to look elsewhere for an IT solution for the historic CRS stores. Keith Brydon prepared a briefing note confirming this position…*

47. In his letter dated 29th January 2001 (cited by the judge at para 130 and summarised in our para. 13) Mr Hepworth said:

> *This has, as ICL has known, always been a time critical project and, in terms of delivery of the Society's retail business plan, time is now at an absolute premium. Accordingly, and despite your offer of personal involvement, I must tell you*

that we have lost confidence in ICL to the point that the limited time we have at our disposal will not be best spent in giving ICL further opportunities to rescue the Global Store project from its present low point.

You said that, if the Society's decision was to proceed no further with ICL, then we should turn the focus of our working relationship to an orderly disengagement process, and I would now wish to receive ICL's proposals for this. However, you should understand that, as I do not see our respective organisations as having been equally culpable, I do anticipate the wind-down arrangements involving some compensation for the Society…

48. We next address some general points about para 146. It nowhere considers the factual merits of CWS' complaints that ICL had produced poor software or had failed to meet contractual deadlines or was unable to complete the project in less than a repudiatory time-scale. These matters are dealt with in the subsequent section of the judgment, but on the basis that CWS' claim in repudiation "*as a matter of law*" (see sentence 13) had already failed. Secondly, to the extent that para. 146 is concerned with facts, its primary concern is with the motivation which led CWS to terminate the project on 29th January 2001. The paragraph as a whole is shot through with reference to such motivation. One strand of that motivation is that what led to CWS' decision to terminate was ICL's continued unwillingness to agree to a liquidated damages provision: see sentences (2), (3), (4), (5), (9), (11), (15) and (16). That motivation is contrasted with what is suggested to be the lack of importance or subsidiary importance of any concern on the part of CWS that ICL should have done anything by that date: see sentences (10) and (12). The judge goes on to say that termination on the ground of ICL's unwillingness to agree a liquidated damages provision amounted to a repudiatory breach by CWS (sentence (15)). The other strand of that motivation is that CWS did not even purport to accept ICL's repudiation but rather withdrew consensually from the project (at sentences (7), (8), (9) and (15)).

49. Mr Henry Carr in his oral submissions accepted that the judge had erred in the two reasons which he had put forward in the last three sentences of para 146, and he made it clear that he did not rely on them. He acknowledged that the concept of a purely consensual termination could not be supported: the language of Mr Hepworth's letter merely reflected a diplomatic response to a situation where the project had come to grief in circumstances the rights and wrongs of which were for further discussion, and where the parties consequently needed to organise a sensible disengagement. He also acknowledged that the fact that ICL's unwillingness to concede agreement on a liquidated damages provision was highlighted at the meeting of 26th January and in Mr Hepworth's witness statement was beside the point. As is well established, a repudiation may be supported on any (valid) ground, and the fact that at the time of the repudiation's acceptance the accepting party puts forward an invalid ground or no ground at all is no answer if there was a valid ground for terminating the contract. However, the present case goes beyond that rule, for if CWS was right to say that ICL's performance was repudiatory, the fact that it may have been willing to continue with the contract provided only that ICL entered into a liquidated damages provision but was otherwise unwilling to continue, so that ICL's refusal to meet that ultimatum became the critical final issue for discussion, would be neither here nor there.

50. In our judgment Mr Henry Carr was right to make the concessions he did regarding the final sentences of para 146. It follows, however, that the use of these two same grounds at an earlier stage of the judge's analysis (from sentence (2) onwards) is equally damaging to his conclusions. Moreover, it is plain from the terms of Mr Hepworth's letter itself (as far as that goes) that time was of critical importance to CWS' decision, at any rate as it was there explained to ICL. That, however, was not the first time that CWS had explained itself to ICL in these terms, and one example will suffice. At a meeting of 19 January 2001, the full minutes of which are quoted at length at para. 254 of the judgment, the following passage appears:

1.52 KB [Mr Brydon] said that he had no faith in the delivery guarantee. JH [Mr Hepworth] reiterated this point.

1.53. BD [Barbara Dixon of ICL] said that on the back of the previous meeting ICL went away and reviewed the plans, and decided that the guarantee of 29 January 2001 could not be achieved. Hence there is a one week slip in the revised plan.

1.54. KB asked if ICL understood the implications of last week's meeting including the potential penalties.

1.55. DC [Mr Christou] replied "Yes".

51. It is plain from that extract, as well as from Mr Hepworth's subsequent letter, that rightly or wrongly CWS was complaining to ICL about the length of time that ICL was taking to deliver good quality software and was emphasising the importance of timing questions for the success of its merger and the project.

52. We would also make the following points, some of them admittedly of less importance, about para. 146. Sentence (1) is possibly accurate so far as the *Rickards v. Oppenheim* alternative is concerned, but overlooks the facts that the pleaded case was also maintained and that the alternative case was not so much a departure as a development of the pleaded case in circumstances where the project had already dragged on for longer than was originally intended. Sentence (2) is not in our view accurate: there would no doubt be much to argue about in terms of CWS' alternative case, as Mr Henry Carr's written and oral submissions have demonstrated, but that it was not "wholly unsupported by any evidence" is clear for instance from Mr Brydon's e-mail to Mr Pickett dated 3rd January 2001, cited at para 246 of the judgment, which contains the remark: "*By lunch time tomorrow (Thursday 4th Jan) you will confirm that a pilot date of 29th Jan 2001 is achievable as stated at our meeting on 18th December 2000…*" Sentence (10) is not, we think, a fair reflection of Mr Hepworth's letter, which spoke in terms of "a time critical project" and time being "now at an absolute premium" and this in a letter written on a day which had previously been identified as a day for delivery of important software. The judge then in sentences (11) and

(12) uses his error concerning the relevance of ICL's refusal to agree a liquidated damages provision in effect to reject Mr Hepworth's statement in his letter that time was "critical". Sentence (13) is perhaps of some importance, for it is the sentence in which the judge concludes that "even if I had been persuaded that CWS had made out the contract for which it contends", it would have failed on its case of repudiation. It follows that the judge is there contemplating that a contract would have been established in which time limits had been agreed as essential terms of the contract. The reason given by the judge for rejecting a case in repudiation on that hypothesis is that *"ICL, had not, as a matter of law, repudiated that contract, because it had not, as at the date the contract came to an end, been in breach of a term of such significance as to indicate that it did not intend to be bound by its contract"*. It is hard to see what in the previous reasoning supports that conclusion. It is hard to know whether the judge is talking about the absence of conditions and fundamental terms of contract, or the absence of facts constituting a repudiatory breach. His language suggests the former, but unless he also intends to cover the latter it is not apparent how he can exclude repudiation as a matter of law. He had just reminded himself (at para. 142) that CWS' pleaded case was a broad one, namely that *"By the end of January 2001, it had become clear to CWS that…ICL was not capable of delivering a working system…was not capable of and had no intention of meeting any deadline of CWS however vital to CWS…In the premises, ICL had evinced an intention not to be bound by and repudiated the CWS agreement."*

53. Our intention is not to enter into the merits of the debate concerning CWS' case on repudiation, but rather to make in particular two points which go to the heart of Mr Henry Carr's defence of selected parts of the judgment and his submission that a re-trial could have only one possible result, namely in ICL's favour. The first is that the critical paragraph 146 where the judgment seeks to deal with CWS' repudiation case is in itself flawed. The second is that the judge's conclusions on repudiation are here, as elsewhere, shown to be inextricably intertwined with his overall views as to CWS' motivation. It is hard to avoid the conclusion that the reason why he concentrated with such dubious legal relevance on CWS' motivation at this point of his judgment is because he saw the case as a seamless web in which CWS' bad faith and professions contrary to its true hostility and malevolence to ICL provided an answer to its case at every turn.

54. Looking more generally at the judgment the conspiracy theory finds expression at many points, and the expression of it is frequently framed in stark, if not extreme, terms. For example:

- In para. 78 the judge refers to the reluctance of Mr Brydon to deal with ICL "at all", and to his "antipathy towards ICL as a result of the real or imagined grievances" to which he had earlier referred.
- In para. 100 the judge in effect repeats the finding made in para. 75, expressing himself as entirely satisfied:

  that the determining factor influencing him [Mr Brydon] and CWS in deciding to proceed with ICL and Globalstore was the desire to mitigate the effects of the fact that CWS would, on the transfer of the engagements of CRS, inherit the liabilities of CRS under the CRS Agreement.
- Later in para. 100 the judge describes Mr Brydon as "antipathetic towards ICL", as "dealing with ICL with reluctance", and as being "on the look-out for any serious opportunity for CWS to terminate its connection with ICL". He goes on to find that:

  .... [t]he rigid insistence of Mr Brydon and other senior executives of CWS upon the agreement of ICL to pay liquidated damages was .... largely a reflection of this *animosity*. (Our emphasis)
- In para. 104 the judge finds that Mr Brydon's "real view" was that the change from ISS400 to ISS300 in order to deliver dividend functionality:

  .... might provide *the chink in the ICL corporate armour for which he was looking* in order to justify putting an end to all further dealings with ICL without thereby exposing CWS to liability under the CRS Agreement. (Our emphasis)
- In para. 112, referring to Mr Brydon's e-mail dated 8 June 2000 to (among others) Mr Goodby, in which Mr Brydon referred to suing ICL for the "Funerals fiasco", the judge concludes that the reference to the "Funerals fiasco":

  .... only serves to highlight how large in the thinking and attitude of Mr Melmoth and Mr Brydon so far as ICL was concerned that episode, whatever it was, loomed.
- In para. 119 the judge returns once again to the finding which he made in paragraph 75, saying:

  It is plain, in my judgment, that by this stage [June/July 2000] Mr Brydon was looking to ICL to slip up in a way which could be used as a justification for terminating all further involvement with it without exposing CWS to the need to pay any compensation for the termination of the CRS Agreement.
- In para. 121 the judge finds that:

  .... from about the beginning of December 2000 Mr Brydon was plotting the downfall of ICL and its replacement by PCMS.
- Later in para. 121, the judge says:

  It seems to me that the reality is that far from it being the anticipated failure of ICL to deliver software of satisfactory quality that prompted the drafting of [the letter referred to in Mr Brydon's covering e-mail of 8 December 2000 as ["the go away letter"], it was exactly the opposite fear, that the software would be of

satisfactory quality, that prompted the drafting of the letter. By this stage, in my judgment, Mr Brydon, at least, had decided to use the Globalstore project *as a means of seeking revenge against ICL* for the grievances real or imagined to which I have already referred. (Our emphasis)

(It is to be noted that although in paras. 119 and 121 the judge uses the words "by this stage" – referring, in para. 119, to June/July 2000, and in para. 121 to early December 2000 – his finding in paras. 75 and 76 is that *from the outset of the negotiations* this was CWS' *only* motivation.)

- In para. 148 the judge finds that Mr Brydon was "always astute to find fault with ICL if he could". He goes on:

  It suited his purposes for Mr Young to overlook a vital aspect of equipping ICL to progress the Globalstore development work so that Mr Brydon could be able [sic] to criticise ICL for failing to meet its estimated dates for completion of various activities.

- In para. 210, the judge concludes that a report may have come as a disappointment to Mr Brydon:

  .... in the context of his aim of ridding himself and CWS of ICL as long as he could at the same time rid CWS of the obligations accepted by CRS under the CRS Agreement.

- In para. 220, in the context of the issue as to the quality of the software delivered on 17 October 2000, the judge says:

  .... it is difficult to resist the conclusion that it was convenient to Mr Brydon to be able to assert to Mr Christou that there had been a rejection in order to manoeuvre for advantage in his *continuing campaign* to relieve CWS of the need to deal with ICL without incurring any additional liability under the CRS Agreement

- In para. 233, in the context of the process of UAT (user acceptance testing) in November 2000, the judge repeats his finding in paragraph 121 that Mr Brydon was:

  .... plainly continuing to manoeuvre to get rid of ICL, preparing a 'go away' letter as early as 8 December 2000.

- In para. 249, the judge describes Mr Brydon's letter to Mr Christou dated 5 January 2001 as "designed to engineer what proved to be a showdown between ICL and CWS", and as "deliberately drafted with a view to upsetting Mr Christou."

- In para. 255, referring to the meeting on 19 January 2001, the judge says:

  In fact, unknown to Mr Brouwer at the time, CWS, or at least Mr Brydon and Mr Melmoth, had been plotting what they conceived to be the downfall of ICL for months previously.

- In para. 258, the judge, referring to conversations between Mr Brydon and Mr Brouwer, says:

  It seems to me that Mr Brydon heard what he wanted to hear, and what it suited his purpose of justifying terminating relationships with ICL to hear ....

55. These examples demonstrate, in our judgment, that the conspiracy theory is a thread which runs right through the history of the project, as the judge viewed it. Indeed it is hard to see how it could be otherwise, given that the conspiracy theory amounts to finding that from start to finish CWS (acting by Mr Brydon and Mr Melmoth) was acting in bad faith. Their purpose was not to achieve a successful outcome to the Globalstore project but the very opposite, viz. to use the project to trap ICL into a position where CWS could sever all its commercial links with ICL without having to pay a penalty under the CRS agreement. If the conspiracy theory was correct every action which the senior management of CWS took with reference to the Globalstore project throughout its entire history must have been tainted by the motivation which the judge found they possessed.

56. Furthermore the view which the judge took as to the reliability of the oral evidence of the CWS witnesses is entirely consistent with the judge having adopted such an approach.

57. Turning first to Mr Brydon, the judge (in para. 95) rejects his evidence that CWS relied on ICL's representation that Globalstore, could be rolled out within five months after sign-off. The fact that he gives no specific reasons for so doing strongly suggests to us that he had in mind his earlier finding (in para. 76) that CWS was "wholly uninfluenced" by any representations made by ICL, and that he rejected the evidence because it was inconsistent with that finding.

58. In para. 112 the judge finds that at no stage did Mr Brydon believe that the CRS Agreement was at an end. This again is wholly consistent with the conspiracy theory. For good measure, he goes on to say:

Further, I do not accept that Mr Brydon or any of the witnesses on behalf of CWS, whatever they now say, ever considered that a fresh agreement had been concluded between CWS and ICL. (Our emphasis)

59. This somewhat sweeping finding of mendacity on the part of CWS' witnesses clearly implies, as we read it, that CWS' entire case was a false case, in support of which representatives of CWS were prepared to perjure themselves. Once again, this is a finding which is wholly consistent with the judge's approach to the detailed evidence about the history of the project being coloured by the conspiracy theory.

60. In the same vein, in para. 120 the judge finds that Mr Brydon:

.... understood perfectly well during the course of the negotiations that no agreement had been reached.

61. Dealing with the draft "go away letter to ICL" attached to an e-mail of 8th December, Mr Brydon said that by this stage CWS was convinced that ICL would not be able to deliver quality code. However if software which was due to be delivered in early January proved he was wrong there would be no need to send the letter. At para. 121 the judge said:

    Once more I regret to say that I just cannot accept the evidence of Mr Brydon …. No sane and sensible person, and certainly not a person with the duties and responsibilities of Mr Brydon would, one month before it was anticipated that the need to send it might arise, spend time not only drafting, but also seeking comments upon and legal advice in relation to, a letter which might not need to be sent.

    This conclusion overlooks the fact that the draft letter contemplated that it would be sent "*next week*". We would in any event question whether "*no sane or sensible person*" would prepare in advance for the possible failure of a contract.

62. In para. 122 the judge describes as "*wholly implausible*" Mr Brydon's denial, in the course of his cross-examination, that by December 2000 he had been hoping for a progress report on the Globalstore project which would justify CWS in terminating the project. On the face of the transcript, there appears to be nothing implausible about that denial. However, for the judge to have accepted it would have destroyed the conspiracy theory.

63. In para. 172 the judge quotes extensively from Mr Brydon's e-mail dated 10 May 2000 to (among others) Mr Goodby, in which Mr Brydon describes ICL's performance as "unacceptable" and its reliance on the fact that the FRS had not as yet been signed off as an explanation for the delay which had occurred as "ridiculous". The judge continues:

    That [e-mail] I find was a wholly disingenuous communication. It misrepresented what the problem in fact was, suggesting that what was presented as the problem was simply an excuse. I find that Mr Brydon knew perfectly well what the nature of the problem was and that it was a genuine problem for ICL.

64. The judge's finding that Mr Brydon misrepresented *to his colleagues within* CWS the true nature of the problem which ICL had encountered seems to us to be consistent only with the conspiracy theory. Absent the conspiracy theory, we can see no rational basis for such a finding.

65. We turn next to the evidence of Mr Young. In addition to concluding that on one particular issue Mr Young had given lying evidence, the judge expressed a number of extremely harsh criticisms of his ability and his performance as project manager for CWS. For example:

    - In para. 148 the judge describes Mr Young as being:

      completely out of his depth as project manager of the Globalstore project on the CWS side.

    - In para. 167, when referring to a progress report by Mr Young dated 14 April 2000, the judge says:

      That form of words .... seems to me to be merely indicative of Mr Young's command of 'management speak' being regarded by CWS as a sufficient qualification for his role as project manager of an extremely important project and his own lack of the appropriate drive and initiative for the role which he was supposed to be carrying out.

    - In para. 170 the judge refers to Mr Young's:

      supine attitude to problems in the project which he was supposed to be managing.

    - In para. 171 the judge concludes that:

      .... Mr Young's general approach to any problem seems to have been simply to have a meeting.

    - Later in para. 171 the judge, having given a lengthy explanation of the importance of information as to the operation of dividend, comments (with evident sarcasm) that:

      [a]ll of this appears to have eluded Mr Young.

    - In para. 176 the judge refers to what he describes as:

      .... the inability of Mr Young to assess properly and resolve firmly the problems which were encountered with the project which he was supposed to be managing.

66. In para. 181 the judge concludes that, on the issue as to whether it had been agreed in June 2000 that drop 1 was not to be the subject of validation by ICL prior to release to CWS, Mr Young was:

    .... simply telling lies in order to try to support CWS' case that ICL's performance in relation to the Globalstore project was lamentable.

67. Although the judge does not find that Mr Young was party to any conspiracy, this last finding is (to put it at its lowest) consistent with CWS presenting a false case to the court, and hence with the conspiracy theory.

68. As to the judge's other criticisms of Mr Young, the manner in which Mr Young discharged his duties as project manager was plainly relevant to the history of the project, and it was for the judge to assess his performance *in that context*. That said, we regard it as regrettable that the judge should have thought it necessary to frame his criticisms of Mr Young's performance in such wide-ranging and harsh terms.

69. We turn next to the evidence of Mr Goodby. In para. 106, the judge quotes extensively from an e-mail dated 29th May 2000 which Mr Goodby sent to Mr Brydon about the project. The e-mail makes clear Mr Goodby's view that, in its dealings with ICL, CWS must adopt a tough attitude: to use his words, CWS must "go in hard". The judge continues:

The terms of the e-mail do seem quite extraordinarily belligerent in the context of what should have been a civilised commercial negotiation. It is difficult to resist the conclusion that what Mr Goodby had in mind was provoking a crisis in the negotiations which would be likely to lead to a breakdown.

70. In that passage, the judge appears to be adding Mr Goodby's name to the list of conspirators. At all events, absent the conspiracy theory, the conclusion which the judge found difficult to resist would, as it seems to us, make no sense at all.

71. We turn next to Mr Cook's evidence. As the judge records in para. 194, Mr Cook was not an employee of CWS. He was employed by an agency. In para 195 the judge describes Mr Cook's evidence as to the testing of drop 1 as "pure invention". He also rejects Mr Cook's evidence about the testing of the software delivered in October 2000. The judge's rejection of this evidence is based on time sheets which were put to Mr Cook in cross-examination and which purported to show that he was on holiday at times when, according to his evidence, he recollected testing taking place. When confronted with the time-sheets, Mr Cook continued to maintain that he recollected being present on the occasions in question. However, the judge found that:

It is impossible to resist the conclusion that Mr Cook was prepared to support the case of CWS for reasons of his own with evidence which I am satisfied he knew to be false.

72. Lastly, so far as the CWS witnesses are concerned, we note para. 196 of the judgment, where the judge says:

It is a worrying feature of this case that significant evidence, in particular in relation to the issue whether Mr Young appreciated that drop 1 would not have been subject to validation by ICL and as to the testing on behalf of CWS of software delivered by ICL, has been led on behalf of CWS which the witnesses giving it must know to be false.

73. Now it was undoubtedly open to the judge to find, based on the time-sheets, that Mr Cook had given perjured evidence. However, it is an extreme finding to make, and it is a finding which is, to put it no higher, consistent with the conspiracy theory being an underlying theme throughout the judgment. The same considerations apply to the judge's observations in para. 196.

74. The judge's treatment of the CWS witnesses is in marked contrast to his treatment of the ICL witnesses. In general, he treated inaccuracies in the evidence of the ICL witnesses as lapses of memory or the result of an innocent mistake. Further, he had no difficulty in accepting evidence from ICL witnesses which appeared to contradict the contemporary documentation.

75. As an example of this, we refer to Mr Ogston's evidence about the quality of the drop 1 software. In para. 188, the judge quotes extensively from an e-mail from Mr Jennings (of ICL) to Mr Ogston (ICL's project manager), containing what the judge describes as a "rather depressing message in relation to that drop". We would regard that description as something of an understatement. The e-mail states that ICL has been "struggling over the past few days – mostly with design type issues (basically there is no structured design for CWS Interim)". It refers to the release (i.e. drop 1) as "a very poor quality release". The e-mail continues:

I also suspect that the functionality we have developed will be a poor fit to CWS's requirements/expectations ..... Please be prepared for the shit to hit the fan.

The e-mail concludes:

So, I think the crisis is on us.

Mr Jennings copied the e-mail to Mr Murphy (of ICL), who agreed that the software was:

.... not in a fit state to be released to the customer.

76. Not surprisingly in the circumstances, Mr Mawrey QC put it to both Mr Jennings and Mr Ogston in cross-examination that the software comprised in drop 1 was not in a fit state to be released to CWS. However, the judge was critical of this line of cross-examination. In paragraph 193 he says this:

Mr Mawrey thought it appropriate to cross-examine both Mr Jennings and Mr Ogston along the lines, "How did ICL come to deliver such poor quality software in drop 1?" In fact he was inclined to use the word "rubbish" to describe the quality of the software. I do not know what answer he was expecting to his questions. I doubt that he was expecting any of the ICL witnesses to say that a drop known to be defective was consciously sent to CWS in order to cause vexation. Perhaps he was expecting someone to say, "All right, Guv, it's a fair cop". If that was his expectation, he was disappointed.

77. The judge goes on to accept Mr Ogston's evidence as to the efforts which ICL had made to deliver software of appropriate quality. He continues (in para. 193):

I am satisfied that ICL did indeed make considerable efforts to produce a drop 1 in useful condition, albeit not validated, and that the decision of Mr Hevican [of CWS] to reject the drop was based on a misunderstanding as to what had been contemplated and discussed.

78. The judge went on to reject "*resoundingly*" Mr Mawrey's suggestion in cross-examination that Mr Ogston was telling lies. The judge returns to this aspect in para. 200, saying:

In all the circumstances, and in particular given that it was not supposed to be validated, it does not seem to me that there is any proper criticism which can be made of the performance of ICL in relation to the quality of the software delivered in drop 1.

79. This last finding appears to be directly contrary to the views which Mr Jennings and Mr Murphy had expressed at the time as to the quality of the software in drop 1. Plainly it was open to the judge to make that finding. On the other hand, in the context of the judgment as a whole it does seem to us to raise a question as to whether the severity of his assessment of the CWS witnesses, as compared with his assessment of the ICL witnesses, may not be in some degree attributable to the conspiracy theory.

80. There is a further example of this. ICL disclosed at least two internal reports prepared after termination of the contract which contained criticisms of its performance. One was based on a report by Mr Carlin, ICL's project director, supplemented by interviews with a number of the ICL personnel concerned with the project. The judge did not deal with this report. He did deal with what was described as a Root Cause Analysis Report. This report had been prepared by Mr McFall. It identified the fact that Globalstore was more of a concept than a product in early 2000, lack of skilled resources to integrate dividend into ISS 400 and incorporation of inappropriate Microsoft routines into the software as causes of the problems with CWS. The judge was very dismissive of Mr McFall who did not give evidence and whom none of the ICL witnesses appeared to have met. He said that Mr McFall had been misinformed about the Microsoft part of the software and continued:

> *274. …His opinion that in early 2000 Globalstore was more of a concept than the product was not shared by any of the ICL witnesses who were asked about it. His conclusion that the reason for changing from ISS 400 to ISS 300 was a lack of appropriately skilled resources, although part of the picture was a long way from being the whole of it. It is diffuclt to resist the conclusion that the Root Cause Analysis was a superficial undertaking which reached glib conclusions for a number of which there was little basis in fact., At all events I do not find that the report was of any assistance to me in making the findings which I felt I should make as to the progress of the Globalstore project.*

81. From this analysis we think one can deduce that CWS' witnesses were repeatedly not believed, not so much because the documents or probabilities were inherently against them, but because the judge was always viewing their evidence through the prism of CWS' malevolence. The findings of false evidence and/or bad faith against CWS' witnesses standing by themselves appear to be disproportionate, but viewed in the round are explicable on the basis that it was the judge's view that CWS was conducting the whole project on a basis of bad faith.

82. We are also concerned that the judge's findings in paras. *75 - 77* are not unconnected with his attitude to matters of law. In para. *76* the judge concluded that, *"[h]ad it been necessary to do so, I should have found that CWS was in fact wholly uninfluenced by the alleged misrepresentations of ICL".* That is an extraordinarily unlikely conclusion to arrive at as a matter of fact, and demonstrates how fundamentally the judge's views of the motives of CWS have affected his way of looking at the case. Since it was, on his own view, unnecessary for him to make such a finding, why did he do so? It was unnecessary because he had already decided that there was no case on misrepresentation for him to consider on the merits. That was because of his view that the only form of misrepresentation that had been pleaded was a claim under the Misrepresentation Act, and he rejected the submission that the pleaded reference to ICL's negligence amounted to a claim in negligence. Since a claim under the Misrepresentation Act requires the entering into of a contract and since he found that CWS had not entered into any contract with ICL for the Globalstore project, he was therefore in a position to deal with CWS' misrepresentation case summarily. He did not deal with it on its merits, save in this one allusion in para. 76. Why, however, did he make this allusion? One possibility is that it was a way for him to emphasise how completely divorced from commercial reality CWS' approach to this project was. Another possibility is that it buttressed his summary view that the misrepresentation claim carried the dispute no further than CWS' claim in contract. However, either possibility undermines our confidence that the judge was dealing with this claim with the necessary objectivity.

83. The relationship of fact and law is also in our view demonstrated in the judge's approach to the question of whether there was a contract for the project. CWS' secondary case and ICL's primary case was that the project fell contractually under the umbrella of the CRS agreement. In its pleadings ICL admitted CWS' secondary case. There was thus no dispute or issue between the parties to this extent. ICL's witnesses gave evidence that they considered that they were dealing with CWS under the CRS agreement; indeed Mr Pickett's evidence (quoted at para. 132 of the judgment) was to the effect that both parties were dealing with one another on that basis, which gives to his evidence a degree of legitimate objectivity. The judge rejected CWS' primary case that an entirely new agreement quite separate from the CRS agreement had been entered into for the project, and Mr Christopher Carr now accepts that he was right to do so, if only because the parties could not agree on the question of liquidated damages. However, the judge then went on to reject what was common ground between the parties and to do so summarily *"as a matter of law"* (see paras. 135 and 136) on no basis other than that they had not made an entirely new agreement from scratch. In reaching this conclusion the judge did not appear to stop to weigh the different considerations which may arise where parties already in contractual relations with one another under an umbrella agreement which itself contemplates further work under it then proceed to extend or vary the work to be performed. Nor did the judge appear to consider or give any weight to the consideration

that much work had been performed and paid for in respect of the Globalstore project. Why did the judge not go on to consider such questions which had been canvassed before him in Mr Mawrey's closing submissions, both on the facts and by reference to authorities such as ***G Percy Trentham Ltd v. Archital Luxfer Ltd*** [1993] 1 Lloyd's Rep 25 and ***Mamidoil-Jetoil Greek Petroleum Co SA v. Okta Crude Oil Refinery AD*** [2001] 2 All ER (Comm) 193? The judge referred at least to the former in his discussion of the authorities (see at paras 40/53), but he never sought to bring that discussion home to CWS' alternative and admitted case. It is impossible to know for certain why the judge adopted that position to the question of contract, but again it is difficult not to feel considerable concern that his underlying attitude to CWS' motivation, namely that it was more interested in destroying rather than in continuing its relationship with ICL, again affected his objectivity. Otherwise it is difficult to understand why he dealt so abruptly with CWS' case in contract, describing it at one point as "from a legal point of view, doomed from the start" (at para. 53). It is indeed hard to understand why an admitted alternative case was doomed from the start.

Conclusions

84. In these circumstances we have concluded, much to our regret, that we have no alternative but to recognise that the judge has erred so fundamentally in his approach to this trial as to have lost, or at least given the appearance of losing, his ability to try CWS' claim with an objective judicial mind (*cf* ***Locabail (UK) Ltd v. Bayfield Properties Ltd*** [2000] QB 451 at 480F/G). It is not that he has come to the trial with any preconceived prejudice or predilection or bias: but that over the course of it he has demonstrated an inability to grapple objectively with the issues of fact and law presented to him. In the result the trial was unfair

85. Our conclusion is not predicated on the considerations that the judge has shown a consistent preference to rely on the evidence of ICL while finding the principal witnesses of CWS to have lied or to have acted in bad faith; or that he has consistently decided hotly disputed points of fact and law against CWS. It must often be the melancholy duty of a judge to conclude that the truth, and the legal merits too, lie on only one side of the dispute; and to say so in necessarily clear and strong terms. In the present case, however, what is so troubling is that the judge has made findings of bad faith and false evidence, against CWS and its principal witness, Mr Brydon, and against Mr Melmoth who was not even a witness when no bad faith had been pleaded or suggested, and then has inevitably been drawn, consciously or unconsciously, into utilising his conclusions about CWS' or its employees' bad faith for the purpose of deciding other disputed issues of fact and law. In this way the focus of the judge's objective vision was distorted.

86. Reluctant as we are to reach these conclusions and mindful as we have been throughout this appeal of the damaging and inherently undesirable consequences of the parties having to face a re-trial, we nevertheless have decided that there is no alternative to allowing this appeal and ordering a re-trial. There is no other way to ensure that justice and fairness are seen to be done.

87. We should make it clear that in reaching this conclusion we have not formed any view of our own about the merits of CWS' claim. Our concern has been solely with the process by which it was dismissed at the trial before Judge Seymour Q.C. A re-trial may produce the same result, but CWS is entitled to a trial in which that result is reached fairly.

88. Finally, we have not said anything about the wounding and sarcastic comments which the judge made about Mr Mawrey and CWS' other legal advisors. We cannot help feeling that these comments were informed by the same unfair view which the judge took of CWS' case. If the allegation of bad faith had been pleaded and put in issue during the hearing, counsel and solicitors would have been able to address it and would have been open to criticism if they had not done so. As it was we think that the judge's comments about them were unfair.

Order: Appeal allowed; costs reserved to the trial Judge; further orders in term of the agreed draft minute of order; application for permission to appeal to the House of Lords refused. (Order does not form part of the approved judgment)