JUDGMENT : JUDGE PETER COULSON QC: TCC. 3rd May 2007.

A. Introduction.

This case arises out of the development and construction of a hotel at 43 Christchurch Road in Bournemouth in 2003/2004, ("the property"). The developer was the defendant, CHG Holdings Limited ("CHG"). A considerable part of the design and construction work, including the timber frame, the windows and the internal joinery was carried out by the claimant, Sydenhams Timber Engineering Limited ("Sydenhams"). In these proceedings, Sydenhams claim from CHG the sum of £136,863.83 in respect of the unpaid element of their work at the property, together with interest. In response, CHG contend that there was never a direct contract between themselves and Sydenhams and that, in fact and in law, Sydenhams were subcontractors to the main contractors, Rybarn Limited ("Rybarn"). Thus, say CHG, it is Rybarn and not themselves who are liable to Sydenhams.

As is sadly all too common in the UK construction industry, Rybarn are in administration and are simply not in a position to make any payments to anybody. Thus the outcome of the dispute that has arisen between Sydenhams and CHG has potentially serious consequences for the losing party. If Sydenhams are right, and there was a direct contract or contracts between themselves and CHG, then CHG will be liable for the sums claimed, despite their suggestion that they have already paid these sums to Rybarn. And if CHG are right, and Sydenhams were only ever subcontractors to Rybarn, Sydenhams will not be paid for a major element of the work at the property which has long since been completed.

6. Accordingly, the principal issue with which I must deal is whether or not there was a direct contract or contracts between CHG and Sydenhams which gives rise to a liability on the part of CHG to pay to Sydenhams the sums sought in these proceedings. That, in turn, depends on my analysis of the factual background and, much more importantly, the documents relied on by Sydenhams as setting out the various contracts between the parties. In consequence I propose to set out below my assessment of the factual position up to the end of December 2003 (**section B**); from January to 23rd April 2004, (**section C**); and thereafter (**section D**). I then go on in **section E** of this Judgment to analyse the contractual disputes and set out my conclusions on those issues. At **section F** I deal with the issues that arise out of the deed of warranty. The remaining issues are then addressed in **section G** before a short summary of my conclusions at **section H** below.

7. Before embarking on this exercise, I should do two things. First I must acknowledge the considerable assistance I have received from both counsel, whose clear presentation of the many points that arise in this case has enabled me to give this oral Judgment the day after their closing submissions.

8. Secondly, I should make one general observation on the evidence which I heard on Monday and Tuesday of this week. Sydenhams called four witnesses: Mr Fairweather, their estimator; Miss Blamire, their office manager; Mr Orchard, their managing director; and Mr Pride, their finance director. I considered that each was a clear witness with a reasonably good recollection of the specific events with which they were concerned. CHG called two witnesses, Mr White of the architects, Trinick Warr, whose evidence was not of any particular relevance save on one point, and Mr Leslie Pink, a director of CHG. In the round I have concluded that Mr Pink's recollection was less reliable than those of the Sydenhams witnesses, doubtless because he was dealing with all aspects of the development of the property rather than the limited issues that arose out of the timber frame. In particular, as to the critical events between February and April 2004 (**section C** below), I am in no doubt that Mr Pride's recollection is to be preferred. I should also say that, on occasions during his cross-examination, I felt that Mr Pink was arguing his case, rather than answering the questions that were being put to him.

B. Factual Position up to end of December 2003.

9. CHG obtained conditional planning permission for the development of the property on 4th June 2001. In February 2002, Mr Pink met Mr Orchard and asked him to quote for the design, supply and erection of the timber frame for the property. The quotation was sent on 11th February 2002. Nothing further of any significance happened until October 2002, when Mr Pink provided Sydenhams with further information and sought an updated quotation. This was divided into a number of different work packages, including package 6, the external joinery, which included windows, doorframes and doors.

10. It was CHG's case that, from the outset of their dealings with Sydenhams in 2002 and thereafter, it was clear to Sydenhams that they would ultimately be engaged as a subcontractor employed by a main contractor, rather than being in a direct contractual relationship with CHG. When pressed on this in his cross-examination Mr Pink said that this was "common knowledge", and that "billing was always going to be through Rybarn because they were the main contractor". It was unclear if he could recall ever referring directly to this possibility. The difficulty with this case was that there was absolutely no indication of it in the contemporaneous documentation. Although Mr Pink's witness statement suggested that the main contractor/subcontractor point was made clear in a number of the documents to which he there made express reference, even a quick perusal of those references demonstrated that he was quite wrong, and that there was in truth no reference at all in those documents to the position for which he contended. As both Mr Fairweather and Mr Orchard observed in their own evidence, it was just as likely that Mr Pink would self-manage the development of the property and engage and pay Sydenhams direct. They denied that, at any time in 2002 or early 2003, any mention was made of a main contractor, much less that Mr Pink had said that the main contractor was going to be Rybarn.

11. I have concluded on the evidence that Mr Pink made no mention of the involvement of a main contractor, much less Rybarn, during 2002 and the first part of 2003. Had he done so, I am confident that there would have been a reference to such a possible arrangement in the contemporaneous documentation; there is not, as Mr Pink was

obliged to accept in cross-examination. In addition, for the reasons explained in paragraph 27 below, if Rybarn had been mentioned, then Sydenhams might have baulked at any further involvement in the development, given their longstanding concerns as to Rybarn's financial stability.

12. Turning back to the 28th November 2002 documentation, it is worth perhaps taking a moment to consider the component parts of that material. At that date, Sydenhams prepared four separate documents:

(a) A Quotation.
This was in letter form and sent to Mr Pink. It identified the total cost, in this case £507,014.06. Although Sydenhams' standard terms and conditions appeared on the back of the first page of the quotation, the second page of this quotation letter stated that the terms were "*to be agreed*".

(b) A Customer Schedule.
This document, enclosed with the quotation letter, set out what would be supplied under each package, and included specific comments about some of the materials. It also included what was called a standard erection specification.

(c) A Pricing Schedule.
This document, which was not sent to Mr Pink, was an internal record kept by Sydenhams to demonstrate the build-up of their various prices.

(d) An Order for Manufacture ("OFM").
This was designed to operate as a sort of standard form acceptance document. One copy was to be retained by the customer, the other was to be signed and sent back to Sydenhams. This particular OFM stated:

"I hereby instruct Sydenhams Timber Engineering to proceed with manufacture at the quoted prices."

The different packages, each with a price, were then set out in the OFM, which concluded with the words: "This quotation is not subject to any future main contractor's discounts".

13. Following a meeting in late November/early December 2002, Mr Pink completed the OFM by putting a tick against packages 1 to 4 and 8 and the erection price, and then signed and returned the OFM to Sydenhams. Under his signature he added the words "CHG Holdings Limited".

14. This was the first of a number of OFMs signed by Mr Pink between December 2002 and August 2003 which are not said by either party to give rise to (or evidence) a contract between CHG and Sydenhams. However, I regard the fact that Mr Pink was prepared to sign this and other similar documents on behalf of CHG as consistent with my earlier finding that, at least at this stage, there had been no mention of a main contractor or Sydenhams' possible role as a subcontractor. The legal significance, if any, of these earlier OFMs is dealt with in **section E2** (paragraphs 58-70) below.

17. During the early part of 2003 the design was developed, but on 24th April 2003 Mr Pink signed a second OFM entitled "Rev E". The document stated that the client was CHG Holdings Limited. Mr Pink ticked the prices for each package. By this stage, the quotation for package 6 was £94,200. Again the OFM instructed Sydenhams "to proceed with manufacture at the quoted prices".

18. It is CHG's case that they had selected Rybarn as their main contractor by late 2002. Again, there is no documentary evidence to support that assertion, which is a surprising omission given the importance of such a decision. At all events, I find that Sydenhams first became aware of Rybarn and their role as prospective main contractors in May 2003. On 12th May 2003, shortly after Rybarn had started work on site, there was a meeting between Mr Orchard and Mr Pink. Mr Orchard's contemporaneous note of that meeting reads: *"Bill through Rybarn may be required due to Customs & Excise. CHG Holdings will then pay Rybarn to pay us. Otherwise CHG will pay direct."*

19. It was Mr Orchard's evidence in cross-examination that he did not really understand what point Mr Pink was making about the Customs & Excise. He told me: *"At the time Mr Pink mentioned Customs & Excise and I really did not understand quite what he was getting at. But he used it as a reason for possibly -- and it was very much possibly at that stage -- having to go through Rybarn."*

Mr Orchard went on to say that the reference to payment through Rybarn was a suggestion, "*a brief comment in a much larger meeting*". He emphasised that he did not necessarily agree to it. He also said: *"I was concerned about Rybarn. Then it was suggested to me that it would not be a problem because there would be staged payments from CHG to Rybarn which would be passed directly on to ourselves, so channelled through Rybarn would be my understanding. That was given to me as a reassurance as much as anything else."*

It was clear from his cross-examination that Mr Pink had difficulty in recalling this meeting, although despite that he maintained that Mr Orchard's contemporaneous note was wrong, and that he had made it clear to Mr Orchard that Sydenhams would be a subcontractor to Rybarn. There was no other contemporaneous document of any relevance to this debate.

I find that, as recorded in Mr Orchard's contemporaneous note, Mr Pink's mention of Rybarn at this meeting, and their possible role in the proposed project, was vague and unspecific and related only to the possible payment machinery. It certainly did not amount to a statement that Sydenhams would be definitely paid through Rybarn. In any event, I find that the reference to Rybarn was limited to the question of the mechanics of payment; how CHG

might pay Sydenhams for their work. I find that there was no mention by Mr Pink of any possibility that Sydenhams would be a subcontractor, and/or that they would have no contractual relationship with CHG.

22. It does not appear to be suggested that the possibility of Sydenhams acting as a subcontractor to Rybarn was raised again between 12th May and 12th August 2003, when there was a meeting at Sydenhams' offices attended by Mr Orchard, Mr Pink, Mr Bradley of Rybarn and a number of others including Mr Fairweather of Sydenhams. It seems clear that, certainly by this stage, Sydenhams knew that Rybarn were acting as the main contractor for the development of the property and that it was an obvious assumption, as Mr Fairweather accepted in cross-examination, that Sydenhams might well become Rybarn's subcontractor. However, there was no discussion at this meeting to this effect, or that Sydenhams would cease to have any contractual link to CHG. Again consistent with the absence of any express suggestion that Rybarn would enter into a subcontract with Sydenhams, there were further direct discussions as to design and price between Mr Fairweather and Mr Pink, in which Rybarn played no part at all. These discussions led to a third OFM, signed by Mr Pink on 22nd August 2003 and described as Rev F. Mr Pink confirmed in his cross-examination that he did not sign this OFM until after he had negotiated the price contained on the front page.

23. There was a further meeting between the three parties on 29th August, at which design and programming issues were discussed. Again, it is not suggested by either side that there was any discussion at that meeting about the proposed contractual arrangements. Of greater concern were potential changes to the design. One of the causes of these potential changes were the terms of the planning permission. In this regard, minute 5 of the meeting said:

"Sydenhams (Nick) to have meeting with Jeldwin re windows. These need to be ordered asap. Les [Pink] agreed to order the GF windows and CHG Holdings would take the risk on cost if these were subsequently not used."

Mr Pink said in evidence that this change constituted "a variation to the original order of windows". He claimed that the minute was wrong, because it made no mention of the fact that the payment to which reference was made would actually be made through Rybarn. He said that that was discussed at the meeting. However, I am bound to reject that suggestion. There was no mention of such a payment arrangement in the minutes, which were accepted by everybody at the time as being accurate.

24. The second potential cause of specification/design changes resulted from CHG's decision to sell the property to Travelodge. Extensive changes to the specification were potentially required. These led to a further quotation, Rev G, which was sent by Sydenhams to CHG and dated 15th September 2003. This was promptly superseded by further design changes.

26. On 3rd October 2003, following a meeting with Mr Pink, Sydenhams provided what was described as a *"final revision"* of their quotation in the total sum of £574,000 plus VAT. This was in similar form to the documents referred to in paragraph 7 above. Package 6 was quoted at £100,000. For the first time, this final quotation indicated, under the heading *"Terms",* that these would be *"as per our standard terms and conditions"*. The quotation letter concluded with the words *"we trust that this quotation will meet with your approval and look forward to hearing from you"*. It went on to say that delivery to site would be "within three calendar months".

27. Sydenhams provided with the quotation a Customer Schedule and an OFM, also a *"final revision",* both in the same form as before. The OFM therefore included the express instruction to manufacture. The OFM was signed and dated by Mr Pink on 3rd October 2003. It is Sydenhams' case that these documents comprised and/or evidenced a contract between themselves and CHG. It is CHG's case that these documents merely signified their agreement to the figure quoted at that time, and that the OFM was no more than a letter of intent. I deal with that issue of law in **section E2**, paragraphs 58 to 70 below.

28. Although it appears that Rybarn were progressing with the work on site during this period, there was no main contract in place between themselves and CHG. Indeed, from the documents it appears that Rybarn did not provide a formal quotation for the main contract work for CHG to consider until 13th October 2003. Sydenhams played no role in the production of this extensive Rybarn quotation, nor did they have any involvement in the subsequent discussions between CHG and Rybarn, which eventually led to a main contract dated 12th January 2004. Indeed, I accept the evidence of the Sydenhams witnesses that they never at any time saw the main contract documentation.

29. Despite this, Rybarn's quotation and the eventual terms of the main contract appear to include the work to be carried out at the property by Sydenhams, although precise correlation between the two different sets of documents is not always easy. And whilst it was apparent that other parties involved on the CHG side, such as the funders, Barclays, and their advisers, Edward Symmons and Partners (ESP) assumed that Rybarn would *"take a liability for Sydenhams ... as his own domestic subcontractors"* [1] there was nothing in the evidence to suggest that this assumption was ever expressly shared with Sydenhams during the latter part of 2003.

30. Sydenhams' standard terms and conditions included payment provisions, at clause 4. Despite that, it was clear that both parties wanted to agree a bespoke payment schedule in respect of Sydenhams' work at the property. The evidence of Mr Fairweather, Miss Blamire and Mr Pride was that, whilst not every contract had a payment schedule, and the schedule often came some time after the OFM, such payment schedules were an important feature of most of Sydenhams' contracts. On 28th November 2003 Sydenhams wrote to CHG identifying various lump-sum stage payments and their payment dates. However, these stage payments related to only some of the

[1] See paragraph 8.02 of the Initial Construction Appraisal provided by ESP and dated 31/10/03

packages. The letter made clear that *"external joinery and internal joinery will be paid on account"*. Mr Fairweather explained that this part of the proposed work was to be treated differently from the packages that were the subject of the installment payment provisions, because this part of the work was going to be carried out by subcontractors, and Sydenhams therefore needed to be able to pay them promptly. Thus, he said, such payments needed to be paid on account by CHG: that way, Sydenhams could ensure that, once they were paid promptly by their own employer, they could be onwardly transmitted to their subcontractors.

Before the payment dates had been agreed on 5th December 2003, Sydenhams themselves started work on site. There was a meeting a few days later on 9th December which Sydenhams attended. I am in no doubt that the other parties present assumed that Sydenhams were there as Rybarn's subcontractors. The proposed payment dates were then discussed in detail at a meeting on 18th December 2003 attended by Mr Fairweather and Miss Blamire of Sydenhams, Mr Pink of CHG and Mr Bradley of Rybarn. It is worth noting that, as Mr Pink admitted in cross-examination, this was the very first time that Sydenhams had been involved in any discussions at all which were not solely with himself at CHG. As a consequence of these discussions, a tripartite agreement was reached which was recorded in Sydenhams' letter of 18th December 2003. I find that, at the request of Mr Pink the letter was addressed to Rybarn, and then signed by all three parties. The letter referred expressly to "your order dated 3rd October 2003". The letter read as follows:

"With reference to the above and your order dated 3rd October 2003.

Listed below are the packages accepted under the payment agreement.

It is agreed that the external joinery, additional floor joist zone and internal joinery will be paid subject to an approved account ..."

The letter then identified packages 1-4, 5, 7 and 8 in the total sum of £385,300 and then, over the page, identified the eight installment payments by which that sum would be paid.

The letter concluded: *"Failure to pay on the dates agreed will result in our erect team pulling off site and any costs incurred could be passed on to yourselves."*

33. It is Sydenhams' case that this letter simply varied the terms of their original contract of 3rd October 2003 with CHG, by providing that stage payments, but not the 'on account' payments, would be made through Rybarn. It is CHG's case that this letter constitutes the best evidence of Sydenhams' legal position as a subcontractor to Rybarn, rather than as a party in a direct contractual nexus with CHG. I deal with that issue of law in **section E3** paragraphs 71 to 78 below.

C. Factual position from January 2004 to 23rd April 2004.

34. Unhappily, Sydenhams suffered payment problems with Rybarn from the outset. This was particularly galling for them since, not only had they had no involvement in introducing or recommending Rybarn for the project, but they had also, through Mr Orchard, expressly warned Mr Pink that Rybarn were too small to undertake such a major development.[2] Mr Pride had the same concerns, describing Rybarn as an "unreliable customer" whom he suspected "would not be in business very long". That Sydenhams were right to be concerned about Rybarn's financial position was immediately borne out by the events on site.

35. Installment 1 should have been paid on 26th January 2004. It was in fact paid on 5th February, when the relevant cheque was postdated to 4th March 2004. Miss Blamire of Sydenhams had to drive to Rybarn's offices and get them to change the cheque.

34. Meanwhile there was a meeting on 6th February 2004 at Sydenhams at which various design changes were discussed by Sydenhams, Rybarn and ERMC, another of CHG's consultants. The minutes do not indicate that Sydenhams were receiving instructions from Rybarn on the usual main contractor/subcontractor basis. Just by way of an example, minute 6 reads: *"Sydenhams were asked on Friday 30th January by ERMC to lower the height of the roof. As Sydenhams have already designed the fourth floor and the roof we contacted Les Pink to let him know that there would be an increase in the price. This is because there would be considerable design costs involved in redesigning the roof structure. Les Pink asked Sydenhams not to change the roof until he had spoken to ERMC. THIS MATTER IS VERY URGENT TO AVOID ANY DELAYS AND WE CANNOT ORDER ANY MATERIAL UNTIL THIS HAS BEEN RESOLVED."*

It is difficult to read this as anything other than an example of direct (and in this case conflicting) instructions being given by Mr Pink and ERMC, on behalf of CHG, direct to Sydenhams. Rybarn appeared to have no role at all.

38. As a result of the fiasco over the payment of the first installment to Sydenhams, Mr Pride, the finance director, wrote to Rybarn on 11th February 2004 in the following terms:

"I was most concerned that the very first payment was delayed and, when made, the cheque was initially post-dated.

This caused considerable difficulties and could easily have resulted in delays to the project.

I understand that you have agreed with Mr Pink that he will make the second payment on your behalf.

We all want this project to go well and I assure you that Sydenhams are working hard to this end. I am however concerned about payment. In the light of recent experiences I am no longer able to offer you a credit limit of £60,000. Your new credit limit is £5,000.

[2] See paragraph 20 of his witness statement on which he was not challenged.

In order that this reduced limit should not affect the Bournemouth project I would like to propose that Les Pink makes all future payments against the payment plan and all other orders for the Bournemouth project are transferred to his account.

To achieve my proposals it will be necessary for you to amend the contract between yourself and Les Pink. I have therefore written separately to Mr Pink outlining my concerns and proposals and a copy of this letter is enclosed. I would be grateful for your confirmation that you accept these proposals."

The letter that was enclosed, and which was sent to Mr Pink on the same day, read as follows:

"As you know, we have agreed a payment schedule for the hotel with Rybarn Limited.

Unfortunately the first payment was not made in accordance with that schedule. As a result we have reviewed the credit facilities for that company and have reduced their credit limit.

In order that the Bournemouth hotel project is not affected by this change I should like to propose that a new account be opened in the name of Rybarn Limited Bournemouth Hotel. This account would be used solely for goods supplied to the hotel. Payment to this account would be made by yourself and subsequently reclaimed from payments that you make to Rybarn Limited.

It would be necessary for you or one of your companies to provide a guarantee in respect of this account and I would happy to forward one of our standard agreements for this.

Work on the project appears to be progressing satisfactorily and I do not want payment issues to affect matters. I believe that these arrangements will avoid this and I hope therefore that you will agree with my proposals."

In cross-examination, Mr Pride confirmed that, even at this stage, what he wanted was a guarantee from CHG in respect of the payments to Sydenhams.

40. Installment 2 was paid on 17th February, just two days late although, as indicated in the first of Mr Pride's letters of 11th February, it appears that this was only because CHG made out a cheque directly in favour of Sydenhams and then gave it to Rybarn for onward transmission to Sydenhams. That was certainly Mr Pink's evidence. Installment 3, which was due on 8th March, was again not paid on time. On 12th March, Sydenhams wrote to Rybarn in these terms:

"Due to non-payment this afternoon we have no option but to cancel all deliveries and labour on site for next week.

We currently have lorries loaded in our yard which will be charged for by our transport provider, the cost of which will be added to your account.

As discussed we require both cheques cleared before we will return to site."

The reference to both cheques was apparently a reference to Installment 3 and Installment 4 which was not in fact due for payment until 22nd March 2004.

41. That Sydenhams' suspension of work was due to their non-payment by Rybarn was well known to Mr Pink. Indeed on the very day Sydenhams suspended work, Mr Pink was, in his words, "actually talking to Rybarn about forwarding their authority for me to give payments directly to Sydenhams." The contemporaneous documents showed that Rybarn were content to grant CHG this consent, because there are a series of written consents relating to future stage payments signed by Rybarn and dated 12th March 2004. It is not clear why CHG did not simply adopt this course from then on, and tell Sydenhams that that is what they proposed to do. However, that did not happen.

42. On 16th March, there was a meeting between Sydenhams, CHG and Rybarn. At that meeting two options were discussed, both of which involved the making of direct payments by CHG to Sydenhams. One such option was accepted by Rybarn but, according to Mr Pink, they later reneged on their agreement. This is again not easy to follow on the evidence, given that on 19th March Rybarn again provided a series of written consents to the making of direct payments by CHG to Sydenhams. Again, it is unclear why these consents were not acted upon, although, as was the case with the consents of a week earlier, they related to stage payments due later in the spring.

43. On 18th March 2004, Sydenhams wrote to CHG, not Rybarn, to confirm their suspension of work. They said: *"As supplier and erectors of the timber frame package for the above project, it is with regret that we have to inform you of our decision to stop all works and deliveries for this project commencing from 15th March 2004. This is due to non-payment of stages 3 and 4, which were due on 8th March 2004 and 22nd March 2004, both totalling £102,499.66. We are currently up to stage 5 on site (third floor timber frame complete) therefore we would also require a further stage payment of £51,249.83 before we will consider returning to site."*

44. The suggestion that was put to Mr Pride in cross-examination was that, thereafter, Mr Pink tried to mediate between Rybarn and Sydenhams in order to broker a deal. Mr Pride rejected that suggestion.

"A: I did not refuse to talk to Mr Rybarn -- with Mr Bradley of Rybarn. All conversations regarding payment were with Mr Pink.

"Q: So you agree that Mr Pink was the one really basically mediating between Sydenhams and Rybarn?

"A: I would not use the term mediating, no.

"Q: Trying to broker a solution?

"A: No.

"Q: That he was trying to get some deal done whereby you would be paid and you would come back to site?

"A: The conversations that we had with Mr Pink involved schedules like this. He would say that he had paid Rybarn, could not understand why they had not paid us. When we spoke to Mr Bradley and indeed when Mr Bradley visited my offices, he said he had not been paid by Mr Pink. We were going round and round that circle."

In this, he was supported by the evidence of Mr Orchard at paragraph 35 of his statement, on which he was not challenged, to the effect that Mr Bradley of Rybarn told him that Mr Pink had not paid him so that he could not pay Sydenhams, whilst on the other hand Mr Pink was maintaining that he had paid Rybarn and that the fault therefore lay with them.

From the tone and terms of Mr Pink's subsequent e-mails and letters in the following days, he continued to maintain that the fault lay with Rybarn because, so he claimed, they had been paid by CHG but had failed to pass the money on to Sydenhams. His letter to Trinick Warr of 24th March 2004 complained about "the untenable position I am in". His letter to Rybarn of 30th March, 2004, appeared to put the blame fairly and squarely on them:

"The rejection by you of the mediated settlement I negotiated with Sydenhams for payment from stage 6 to allow work to continue is unacceptable. I feel Sydenhams' offer to return to site after the reneged promises of cheques by you was more than fair and reasonable."

46. However, Mr Pink's letter, which set out figures which purported to demonstrate that he had put Rybarn in sufficient funds to pay Sydenhams, was not entirely accurate, as he himself accepted in cross-examination. In particular, as he admitted, it overstated the sums that he had at that stage paid by way of direct payment to Sydenhams by at least £51,000-odd, the amount of the outstanding third installment. There was also at least the possibility that his payment of Sydenhams' second-stage payment was counted twice. Thus, even without hearing any evidence from Rybarn I was left with the strong impression that the arguments between CHG and Rybarn were not all in CHG's favour, and that Mr Bradley's reported complaints that he had not been paid by Mr Pink cannot be dismissed out of hand. Be that as it may, it is plain that the real disputes were between CHG and Rybarn (Had Rybarn been paid enough to pay Sydenhams?), and Sydenhams were simply caught in the middle.

47. On 30th March, Mr Pride of Sydenhams wrote to Rybarn. He said this:

"As you are aware, payment on the above project has not been in accordance with the payment plan agreed at the start. The payment plan was fundamental to our agreement to undertake this project due to the lack of working capital within your company ...

As a result of non-payment we have been forced to take our erection team off-site. I am concerned that a protracted delay may result in their obtaining alternative work. If this was to happen there would be a significant increase in cost and delay to the project and I would require compensation for any additional cost incurred should this happen."

48. It had been clear since mid-February 2004 that the only safe way out of the payment problems (and to get Sydenhams back to site) was for CHG to make direct payments to Sydenhams, and indeed this is what happened. On 7th April 2004 CHG paid £13,624.91 to Sydenhams directly, and a week later, on 14th April, they again paid directly another £51,249.83, the missing Instalment 3. However, Sydenhams indicated that they would not return to site without something more. As Mr Pride put it in cross-examination, during the weeks of the suspension:

"My view was hardening, and I was completely convinced that the only way forward was for Sydenhams to have a contract with CHG Holdings. We would not have gone forward on any other basis."

49. Mr Pink accepted that he knew that this was Mr Pride's position. During his cross-examination, there was this exchange:

"Q: Mr Pride says: 'At that meeting I made the company's position clear that we would only return to site upon CHG Holdings Limited being responsible for future payments and that Mr Pink would have to change whatever contractual arrangements he had with Rybarn to allow that to occur'. Agree or disagree?

"A: I will agree with that."

Mr Pink also agreed with the proposition that, since CHG were desperate for Sydenhams to recommence work, they were in a very powerful position commercially. As was put to him and he agreed, Sydenhams had CHG *"over a barrel"*.

50. There was then the meeting on 20th April between Mr Pride and Mr Pink. Mr Pink accepted that Mr Pride had said at the outset that Rybarn's payment performance was unacceptable and that he was not prepared to entertain any proposal where Rybarn were involved in payment. Following discussions, an agreement was reached between the two men and that agreement was recorded in an exchange of letters both dated 20th April. The first was from Mr Pink in the following terms:

"Further to our meeting at your Isle of Wight branch today, 20th April 2004, and the withdrawal of labour and materials by your company for the Bournemouth hotel project due to non-payment of accounts by the main contractor, Rybarn Limited.

My financiers have agreed that CHG Holdings Limited should self-project manage the financial administration of the JCT contract in line with the milestone stage payment in place.

This will enable the following payment structure to be implemented.

Prior to works to be recommenced, CHG will pay:

Stage 4, balance of second floor complete £29,992

Stage 5, third floor complete £43,616

£73,608

The balance of the remaining three-stage payments to be reduced by package 7 flooring £27,000 and package 8 insulation £38,000 which will give payments of:

Stage 6, fourth floor complete £21,950 w/c 10/5/04.

Stage 7, 50 % rooms £21,950 w/c 17/5/04.

Stage 8, timber frame complete £21,950 w/c 24/05/04~..."

The letter then went on to identify various sums which *"will be paid on delivery"*. These included "*windows A £50,000"* and *"windows B £50,000"*. It also included an amount of £10,337 which was said to relate to "outstanding account".

51. Mr Pride replied to Mr Pink's letter on the same day in the following terms:

"Thank you for your fax setting out payment proposals which I accept in principle subject to the following:

1. *We will return to site on Monday 26th April 2004 subject to the payment of £73,608 being received on Wednesday 21st April. In a brief conversation regarding their return, our erectors made no mention of compensation and I hope that this will not arise. In the event that it does, I will discuss the matter with you and will require the cost to be met by CHG.*
2. *There must be a legally binding agreement between CHG Holdings and Rybarn which will allow you to make the proposed payments.*
3. *The further payments referred to in your fax are of necessity round-sum figures and in some cases are still being influenced by design changes, eg windows. This may affect the final price.*
4. *The charge for extras to date of £9,000 should read £13,700. I understand that you asked Dean [Orchard] to look at the charge and he in turn has discussed the matter with me. As I hinted this morning, the actual additional cost incurred is much greater than the proposed charge and we are therefore unable to offer any reduction.*
5. *The retention payment of £19,265 will be paid by CHG Holdings on completion of the timber frame."*

Rybarn were not a party to the discussions on 20th April 2004, nor did they sign or even receive any of these letters.

52. It is Sydenhams' case that the agreement of 20th April 2004 constituted a new contract, pursuant to which it would be CHG who would be making payment direct to Sydenhams' with there being no question of any continuing contractual relationship between Sydenhams and Rybarn. CHG dispute this, contending that the main contract (and therefore the subcontract between Sydenhams and Rybarn) largely continued as before. I consider that this is the most important issue of law in this case, and I analyse it in **section E4**, paragraphs 79 to 90 below.

53. A few days later, on 23rd April, CHG and Rybarn came to a separate agreement. That agreement allowed CHG to make direct payment to Rybarn's subcontractors in accordance with a detailed mechanism set out in clause 2. That mechanism required Rybarn to demonstrate that they were able to pay any particular sum that might be due to the subcontractor, with the direct payment provisions being triggered if Rybarn were unable to provide the reasonable proof required.

54. There was a dispute as to whether this supplemental agreement between Rybarn and CHG was ever seen by Sydenhams. There was certainly no evidence that it was ever sent to Sydenhams by either CHG or Rybarn. Mr Pink's statement suggested that he had shown it to Mr Pride which was something that Mr Pride denied. In cross-examination, Mr Pink said that he had taken a copy to Mr Orchard's office and shown him. That new case, which was not put to Mr Orchard, was wholly unsupported by the contemporaneous documents, or indeed the witness statements, and I am therefore bound to reject it. I conclude that the agreement between CHG and Rybarn was never shown to Sydenhams.

55. Perhaps more importantly, I have been provided with no evidence at all of the 23rd April 2004 agreement in operation. I have seen nothing to demonstrate that either CHG or Rybarn ever complied with the terms of clause 2, or ever attempted to operate the direct payment machinery.

D. Factual position after 23rd April 2004.

56. After the agreements were reached on 20th and 23rd April 2004, a number of important things happened. First, and most importantly of all, Sydenhams returned to the site and completed the entirety of their work that had been the original subject of the OFM of 3rd October 2003, subject to the subsequent variations. Secondly, CHG made a direct payment of £73,608 to Sydenhams, the first installment due under the 20th April agreement. Thirdly, from this time onwards, Rybarn made no further payment to Sydenhams whatsoever. By contrast, CHG made a total of 32 separate payments direct to Sydenhams after 23rd April in the total sum of £291,722.03. This was apparently despite the fact that, for whatever reason, Sydenhams sent some invoices to Rybarn and others direct to CHG.

57. Once the work had recommenced, it became apparent that CHG wanted to make a few changes to the window specification. This eventually led to a further OFM signed by Mr Pink and dated 11th May 2004 and marked Rev H. This was in respect of package 6. Again the figure was £100,000, although certain works were now omitted. The OFM was in the same terms as the earlier documents, although it included these words in Mr Pink's handwriting:

"Ground floor. Front Christchurch Road elevation. Main front entrance and these front bar windows not included. Stairwell windows not glazed and painted."

58. It is Sydenhams' case that this was a confirmatory order in respect of the windows. Mr Fairweather said that he took it as an order. Mr Pink confirmed that it was a variation to the window order, which expressly confirmed the agreed exclusion of certain elements of the work. I address the significance of this OFM at **section E5** paragraph 91 below.

59. On 18th May, Sydenhams completed, at least in part, a performance warranty and sent it to CHG. This is a part of the case which CHG originally relied on quite heavily, although it has subsequently diminished in importance. I deal with the remaining issues arising out of the warranty in **section F** below.

60. The last issue of fact, at least at the outset of the case, concerned whether or not CHG had paid Rybarn all or any part of the £100,000 in respect of package 6. CHG originally indicated that they had made such payment because the total amount that they paid to Rybarn was very close to Rybarn's original contract sum, and must therefore have included the £100,000 in respect of the windows. By contrast, Sydenhams said that CHG did not pay Rybarn the £100,000 and they relied on the certificate for payment dated 6th July 2004, which included the following deduction for sums otherwise due from CHG to Rybarn:

"Less amount to be paid direct by CHG Holdings to subcontractors/suppliers on behalf of Rybarn:

"Sydenhams Timber Engineering £100,000."

61. In my judgment this dispute was really resolved by Mr White, the architect, who in his cross-examination admitted that the money in respect of the windows, the £100,000, was not paid to Rybarn. The exchange in full was as follows:

"Q: So according to this certificate, CHG or Mr Pink was at some future date to be paying £100,000 to Sydenhams in respect of windows?

"A: Correct.

"Q: More importantly, according to this certificate, no payment was made to Rybarn in respect of the windows?

"A: That is correct."

62. Thus I find as a fact that CHG did not pay the £100,000 to Rybarn. The certificate of payment, together with Mr White's clear oral evidence, is the best evidence that the sum was not paid to Rybarn, and was actually deducted from sums otherwise due to be paid to Rybarn. The mere fact that the total sum paid by CHG to Rybarn was close to their original contract sum does not begin to prove that the £100,000 was somehow paid, because such an equation ignores the extensive variations that increased the sums otherwise payable to Rybarn, but which would not have been included in the original contract sum.

63. It seems that the bulk of the windows were delivered in July and August 2004. There were defects in some of the windows and some had to be sent back. The replacement windows were not provided to site until November 2004. The relevant invoices in respect of the windows were dated July and October 2004. The difficulties with the windows gave rise to a cross-claim on the part of CHG against Sydenhams in these proceedings which was compromised on 9th February 2007 in the sum of £35,000 including interest.

64. Rybarn went into administration in November 2004. Mr Pink's witness statement indicated that he had been advised that, in consequence, he could no longer make payments direct to Sydenhams. This advice and the reasoning behind it was not disclosed or elaborated upon. It does not appear to be advice that Mr Pink relied on, because the evidence was clear that, after November 2004 and well into 2005, he continued to make direct payments to Sydenhams.

E. Analysis of the contractual situation.

E1 principles of law, Contract Formation and Contract Construction.

65. Happily, this is not a case in which the parties are separated by any great differences on the law. For the avoidance of doubt I have approached the issues as to contract formation or contract construction with the following passages in mind:

(a) A binding construction contract usually requires, as a minimum, agreement as to parties, price and work scope: see **Keating on Construction Contracts, Eighth edition, paragraph 2-018**. A failure to agree a completion date will usually not be fatal because the law will imply a term that completion must be within a reasonable time.

(b) There must be an intention to create legal relations. Such an intention is to be construed by reference to the factual background and the relevant documents: see **Edwards v Skyways** [1964] 1 WLR 349 and **Kleinwort Benson v Malaysian Mining** [1989] 1 WLR 379.

(c) "The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often be difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty or alternatively it may make it possible to treat a matter not finalised as inessential": Steyn LJ in **G Percy Trentham v Archital Luxfer** [1993] 1 Lloyds Report 27 CA.

(d) Any questions of construction must be considered against the backdrop of Lord Hoffman's five principles in **Investors Compensation Scheme v West Bromwich Building Society** [1998] 1 WLR 896, helpfully summarised by Longmore LJ in the recent case of **Absolom v TCRU Limited** [2006] 2 Lloyd's Rep 129, [2005] EWCA Civ 1586, as follows:

"(i) The aim of the exercise is to ascertain the meaning of the relevant contractual language in the context of the document and against the background to the document. The object of the inquiry is not necessarily to probe the real intention of the parties but to ascertain what the language they used in the document would signify to a properly informed observer.

(ii) The interpretive exercise must not be done in a vacuum but in the milieu of the admissible background material. That comprises anything that a reasonable man would have regarded as relevant in order to comprehend how the document should be understood, providing that the material was reasonably available to both parties at the time, i.e. up to the time of the creation of the document.

(iii) However, evidence of negotiations and subjective intent are not admissible for the purposes of this exercise.

*(iv) A commercial document must be interpreted so as to make business common sense in its context. But if 'a detailed semantic and syntactical analysis of a word in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense': See **Antaios Compania Naviera SA v Salan Rederierna AB** [1985] AC 191 per Lord Diplock".*

(e) The question is what meaning the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. It is therefore irrelevant to call evidence of how one party behaved after the event. That only sheds light on what that party subjectively thought that he had agreed: see ***Miller (James) & Partners v Whitworth Street Estates (Manchester) Limited*** [1970] AC 573.

(f) The principle at (e) applies to contracts in writing; it does not apply to an oral contract, because:

*"Determining the terms of an oral contract is a question of fact. Establishing the facts will usually, as here, depend upon the recollections of the parties and other witnesses. The accuracy of those recollections may be tested and elucidated by things said and done by the parties or witnesses after the agreement has been concluded": See Smith LJ in **Maggs v Marsh and another** [2006] EWCA Civ 1058; 2006 BLR 395.*

E2. Was there a binding contract between Sydenhams and CHG on or about 3rd October 2003?

66. In accordance with the principles noted above, it seems to me clear beyond doubt that the documents dated 3rd October 2003, particularly the OFM signed by Mr Pink, constitute a binding contract between CHG and Sydenhams. There was certainty as to the parties: both CHG and Sydenhams were referred to expressly in the quotation and the OFM. There was certainty as to work scope: it was set out in the quotation and the customer schedule and then summarised by reference to the various package numbers on the face of the OFM. Mr Pink confirmed in cross-examination that he knew what the proposed scope of the works ("the elements" he called them) would be. There was certainty as to price because the figure, the £574,300 plus VAT was broken down in the OFM. Mr Pink again confirmed that he knew what that price was and that it was the price that he had agreed for the stated work scope. There was even agreement as to a delivery date to site because of the agreement that this would be within three calendar months. There was therefore clear agreement on all of the basic elements required for a construction contract.

67. As I observed during argument, there was during the course of the trial a rather liberal use of the word 'contract', without there being any analysis of the different sorts of contracts that might eventuate in any given circumstance. Often on a construction project there might be a simple contract containing only the basic ingredients described above. On other occasions there will be a more complex type of contract, with detailed provisions setting out the specific apportionment of risk between the parties. For the reasons which I have given, I am in no doubt that, at the very least, a simple contract containing the basic contractual ingredients came into existence on 3rd October 2003. However, to the extent that it is relevant, it seems to me that the better view is that in truth a complex contract was created at that time. Why? Because the quotation of 3rd October 2003, which Mr Pink accepted by signing the OFM, provided expressly that the terms of the contract would be Sydenhams' standard terms and conditions. That was not challenged by Mr Pink at the time; nor did he qualify his acceptance of the OFM in any way. Thus, on a proper construction of the documents I am led inexorably to the conclusion that, not only was there agreement as to parties, work scope, price and the like, but there was also agreement as to the detailed provisions of the contract between Sydenhams and CHG as at 3rd October 2003.

68. In my judgment, the words in the OFM, in particular the instruction to Sydenhams to manufacture the frame etc, can only be construed as giving rise to a series of binding rights and responsibilities for both parties. For what it is worth, such a conclusion is consistent with the evidence of Mr Fairweather, who said that he would have taken the November 2002 OFM as "an order from my client to proceed with the works" and described it as "an order to proceed with the job" and who also said that the 3rd October 2003 OFM was "an order to proceed". Similarly, Mr Orchard said that the 3rd October 2003 OFM "could quite easily be the final contract".

69. CHG say that the document merely identified Mr Pink's agreement to the quoted price, which would then form part of Sydenhams' subcontract with the main contractor; that it was, in Mr Pink's words, no more than "an acknowledgment of the prices that we had received at that time". The suggestion was that therefore, at this stage,

there was no intention to create legal relations. However, there is nothing, either on the face of the OFM or in any other document, in which such critical qualifications are expressed, or even hinted at. In my judgment they are entirely negated by Mr Pink's express instruction to Sydenhams on the face of the OFM to manufacture the frame and windows. This can only be consistent with a binding contract having been agreed between Sydenhams and CHG. I have already found that, prior to 3rd October, CHG only referred on one occasion to the possibility that Rybarn might have a role to play in the payment of Sydenhams. That was at the meeting on 12th May. There had been no further reference to that possibility, and certainly no mention of Sydenhams acting as Rybarn's subcontractor. That is again consistent with the conclusion that the OFM of 3rd October was a direct contract between CHG and Sydenhams and no one else.

70. On behalf of CHG, Ms Lee endeavoured to draw an analogy with the well-known case of **British Steel v Cleveland Bridge** [1984] 1 All ER 504, where Robert Goff J, as he then was, concluded that there was no contract because, on the facts of the case a raft of fundamental matters such as price, delivery dates and the terms of the proposed contract, remained outstanding. But in my judgment that was nothing like the situation in the present case, where all those matters had been agreed by 3rd October, and recorded in the documents. On the true construction of the 3rd October documentation there was not a statement of a future intention to contract, but an express instruction to carry out work in the present.

71. CHG also argued that there was no essential difference between the OFM of 3rd October 2003 and the earlier OFMs that Mr Pink had signed, and that since Sydenhams were not alleging that a contract or contracts came into existence as a result of those earlier OFMs, they could not point to anything different about the OFM of 3rd October 2003 in support of their case that there was at that stage a contract. I consider that argument to be based on a false premise.

72. Merely because Sydenhams have not asserted that there was a contract at any earlier stage because, for example, such an argument is of no assistance to them, does not mean that there was no such contract. In any event, given that both parties were aware before October 2003 that design changes were ongoing, it might have been easier to say that, at any earlier stage, there was no certainty as to contract work scope. By 3rd October, the work scope was known, and that was confirmed by the use of the words "final revision" on both the quotation and the OFM. However, whatever the position prior to 3rd October 2003, I have to address the legal position at that stage, because that is when Sydenhams say the first contract came into existence. I have to do that by reference to the OFM and the other documentation of that date, when set against the factual background, and for the reasons that I have given, I conclude there was a contract between the parties at that date.

73. Furthermore, to the extent that the parties' treatment of other OFMs is of any relevance at all, I note that the OFM of 11th May 2004 was regarded by Mr Pink as being "a variation", a deliberate exclusion of certain elements of the originally agreed work scope, and that the OFM of 21st July 2004 was also treated by him as a variation, which he authorised by signing the OFM. That strongly suggests that Mr Pink himself considered that the signing of an OFM was intended to have a legal and contractual effect.

74. The final point taken by CHG is to say that until a payment schedule was agreed, there could be no contract. I reject that argument. There was nothing on the face of the OFM, and nothing raised in any of the contemporaneous meetings, to that effect. In any event, I find on the evidence that the discussions about the payment schedule represented fine-tuning of the detailed operation of a contract that had already been agreed. The detail of when and how interim payments might be made was not a matter that was so essential that, until it had been agreed, it could be said there was no contract at all.

75. In any event, as noted above, on 3rd October 2003 there were two alternative positions. Either the OFM evidenced a simple contract, in which case the absence of an agreement as to when staged payments would be made could not prevent the creation of a binding contract; alternatively the OFM evidenced a complex contract, incorporating Sydenhams' standard terms and conditions. If so, because clause 4 of those terms and conditions set out detailed provisions as to payment, a payment schedule might be regarded as redundant and unnecessary.

76. It is perhaps worth testing my conclusion that, as at 3rd October, there was a direct contract between Sydenhams and CHG, by considering what would have happened if, in December, CHG had said they were going ahead with a different timber frame contractor. Sydenhams would have incurred costs as a result of the instruction to manufacture the frame set out in the OFM of the 3rd October. In my judgment CHG would have had no defence to a claim for those costs by reference to the express terms of that OFM. Indeed, Ms Lee fairly accepted in argument that such costs would have been payable by CHG, although she put it by way of a quantum meruit, rather than a sum due under the contract. In my judgment, CHG would also have had no defence to a claim for damages by way of lost profit arising out of the cancellation of the contract.

77. Moreover, it would have been quite impossible for CHG to have argued that such costs or such damages were the responsibility of Rybarn. At that point, there was no contract between CHG and Rybarn, and Sydenhams had had no discussions whatsoever, let alone any contractual dealings, with Rybarn. Liability for Sydenhams' costs and losses must have rested with CHG. Indeed, it is important to note that by the end of trial, notwithstanding her pleaded position, Ms Lee properly accepted that she could not say that, as at October 2003, there was a binding subcontract between Rybarn and Sydenhams.

78. Accordingly, in my judgment it is clear that as at 3rd October 2003 there was a contract between CHG and Sydenhams pursuant to which Sydenhams would carry out the work summarised in the OFM of 3rd October 2003,

for the price of £574,300 plus VAT. It is equally clear that there was no contract of any sort between Rybarn and Sydenhams.

E3. What is the legal status and effect of the letter of 18th December 2003?

79. In my judgment the letter of 18th December 2003, evidencing a tripartite agreement, was unusual in certain respects. First, it plainly was a three-way agreement, reached between CHG, Rybarn and Sydenhams. Further, it varied the terms of the contract of 3rd October, as to how and when certain payments would be made to Sydenhams. It made plain that in respect of some of the packages listed in the letter, totalling £385,300, Sydenhams would be paid by way of the installments listed on the second page of the letter. Such payments would come from Rybarn, having originally been paid to Rybarn by CHG. The external and internal joinery, along with the additional floor joist zone, were not included in that arrangement.

80. These works, which included the windows, were the subject of a separate agreement: sums for this work would be paid by way of what was described as *"an approved account"*. This was expressly said to be outside the payment agreement contained in the rest of the letter, because it was only packages 1-4, 5, 7 and 9 which were said to be *"accepted under the payment agreement"*. Since the 'payment agreement' was varying the contract of 3rd October 2003, anything not within the *'payment agreement'* therefore continued to be subject to the contract of 3rd October 2003. Thus, as a matter of construction, I accept Sydenhams' case that the excluded work (which included packages 6 and 9) fell outside the 18/12/03 variation and remained the responsibility of CHG. Thus CHG had to make direct payment for this work in any event.

81. Such a construction of the tripartite agreement of 18th December 2003, that it excluded packages 6 and 9, is also consistent with one of the key elements of the factual background referred to in paragraphs 24 and 27 above, namely that because the package 6 work would be carried out by subcontractors to Sydenhams, who would then have to be paid promptly, Sydenhams had to ensure that there was in place a different and prompt payment mechanism as compared to those packages, like packages 1 to 4, which Sydenhams were doing themselves. Thus, it is not at all inconsistent for Sydenhams to agree that payment for the work they themselves would do would be via Rybarn, whereas payment for work which they would have to sublet to and pay subcontractors to carry out would remain the subject of a direct obligation on the part of CHG.

82. As to packages 1-4, 5, 7 and 8, I do not consider that the variation to the payment arrangements relating to those packages meant that the contract between CHG and Sydenhams of 3rd October 2003 had been cancelled or novated in favour of Rybarn. There was nothing in the letter of 18th December, or in the surrounding discussions, which could support any such analysis. Indeed, no mention was made, either in the letter or the discussions, of any such possibility. The change related to how the work scope agreed on 3rd October would be paid for: no more and no less. The letter made no mention of the work scope, contract price, delivery dates and the like, because these were all matters that were the subject of the agreement between CHG and Sydenhams of 3rd October, and which were unchanged by the December variation.

83. For the same reasons, I conclude there was nothing in the letter, or in the surrounding discussions, which supports the suggestion that at this point Sydenhams were somehow magically transformed into Rybarn's subcontractor. It would have been very easy, if that had been the intention, for the document to make that plain, or for CHG or Rybarn to write to Sydenhams stating that they intended that Sydenhams would be Rybarn's subcontractor. That never happened. There was no discussion, let alone agreement, between Sydenhams and Rybarn, about matters such as work scope, price or any of the other normal issues arising between main contractor and subcontractor. In my judgment it is wrong now to try and tease out of the tripartite letter such a fundamental shift in the parties' agreed rights and obligations.

84. Again, it is worth considering why there was no reference to an alleged subcontract in this letter and what Sydenhams would have said if there had been. I conclude that there could not have been a binding subcontract at that stage because, as at 18th December, Rybarn were not themselves in a position to engage Sydenhams as their subcontractors. At that time there was no main contract between CHG and Rybarn. Rybarn would therefore not have been in a position to take on a contractual liability for Sydenhams' work before CHG had taken on a liability for their own main contract work.

85. Furthermore, if a possible subcontract had been raised with Sydenhams, I consider that, on the balance of probabilities, they would not have entered into such a subcontract. For the reasons set out in paragraph 24 above, they had already raised their concerns about Rybarn's financial position with CHG, and that was when they thought such difficulties were ultimately for CHG to worry about. The likelihood must be that, if it had been suggested that Sydenhams themselves, would have to worry about such matters (because they would be in a direct contrast with Rybarn) they would have refused to be further involved at all.

86. For these reasons, I conclude that the letter of 18th December changed the payment arrangements as between CHG and Sydenhams and meant that certain payments to Sydenhams, but by no means all, would now be made through Rybarn. But I do not consider that this letter cancelled or novated the contract of 3rd October, which was in any event still the governing document for the packages that were excluded from the 'payment agreement' of 18th December and for all matters such as work scope, price and the like. And it certainly did not amount to, or even evidence, any sort of intention on the part of Sydenhams and Rybarn to enter into a subcontract.

E4. What is the legal effect and status of the agreement of 20th April 2004?

87. The parties are agreed that:

(a) They reached a binding agreement on April 2004.
(b) That agreement was evidenced in the two letters of that date.
(c) There was no part of the agreement of 20th April that was not recorded in writing.

Accordingly, in this section of the Judgment, I identify the relevant part of the background and then construe the agreement. For the reasons set out below, I am in no doubt at all that the principal effect of this agreement was that CHG promised to make direct payments to Sydenhams in respect of the remainder of the works at the property.

88. The factual background is set out in detail in 27 to 41 paragraphs above. I note in particular:
(a) As early as February Mr Pride believed the best solution for the payment difficulties was for CHG to pay Sydenhams direct.
(b) Mr Pink himself acknowledged that direct payment was the best solution because, in his separate dealings with Rybarn in March, he obtained their consent to a direct payment regime.
(c) By 20th April, CHG were desperate for Sydenhams to recommence work on site and Mr Pink was aware that they would only do so if CHG agreed to pay them direct.
(d) By 20th April, Mr Pride had made it plain that Sydenhams would not go back to site unless they had obtained a promise that CHG would pay Sydenhams direct.

89. As a matter of construction, the two letters of 20th April can only be read as confirming CHG's promise to Sydenhams to pay them directly for the work. As to the CHG letter:

(a) The first paragraph refers to the problem being "non-payment of accounts by the main contractor Rybarn Limited". The solution to that is set out in the second paragraph: that CHG "should self-project manage the financial administration of the JCT contract ... this will enable the following payment structure to be implemented." In other words, the problem was Rybarn's failure to pay, and the solution to the problem was that CHG would pay instead.

(b) Various sums were expressly identified in the letter as being sums that "CHG will pay". It is quite impossible to interpret those words in any other way than a promise of direct payment by CHG. All other payments identified in the letter and all other sums that *"will be paid"* can only properly be construed as being sums that would be paid direct by CHG to Sydenhams.

90. Were there any doubt about it, Mr Pride's reply makes the point crystal-clear. In particular:

(a) His first paragraph talks about possible disruption costs. If such costs arise, he says, he "will require the cost to be met by CHG". That must mean a direct payment, not a payment through Rybarn, who are not mentioned.

(b) Paragraph 2 refers to the need for a legally binding agreement between CHG and Rybarn. This is mentioned by Mr Pride, because, he says, "It will allow you [i.e. CHG] to make the proposed payments". Not only was that the clearest possible reference to the basic agreement that the payments would be made by CHG to Sydenhams, but it was also wholly contrary to any suggestion that the payments would be made by or through Rybarn. If they were to be made via Rybarn, there would have been no need for any new agreement between CHG and Rybarn.

(c) Paragraphs 3 and 4 are concerned with possible increases in price. They are only consistent with the fact of direct contractual negotiations between CHG and Sydenhams' without any involvement of Rybarn.

(d) Paragraph 5 refers to the retention of £19,265 which "will be paid by CHG Holdings on completion of the timber frame". Again, that is only consistent with the operation of a direct payment regime by CHG to Sydenhams. Again, it cannot be interpreted in any other way.

91. Accordingly, for these reasons, I am in no doubt that, on a true construction of the agreement of 20th April, CHG agreed to make all future payments direct to Sydenhams, in order to get Sydenhams back to the property. Thus, provided that Sydenhams can show that the claims in the present case arise under this agreement, CHG would be liable to pay any outstanding sums.

92. This conclusion also fits easily into my earlier findings, under **sections E2 and E3** above, that there was, at the 3rd October 2003, a contract between CHG and Sydenhams, with the only role for Rybarn being as a conduit for certain payments (which was introduced by the 18th December tripartite agreement). On one view, all that happened in April 2004 was a further variation to the underlying contract to cancel the 18th December 2003 arrangement and to revert to the original position, with CHG making direct payments to Sydenhams. But it seems to me that, whatever conclusions I had come to concerning the preceding contracts of 3rd October 2003 and 18th December 2003 (and even if I had concluded that there was no contract in October, or that the agreement of 18th December was a subcontract between Rybarn and Sydenhams) it could not affect my conclusion that, by reference to the agreement of 20th April, there was a new, freestanding, clear-cut agreement between the parties, to the effect that CHG would pay Sydenhams direct for the work that they undertook at the property.

93. During the course of her helpful submissions Ms Lee put a slightly different gloss on CHG's arguments in relation to the 20th April agreement. She said that, whilst the agreement may have given CHG the power to make direct payments, it did not require them to do so, and that ultimately it was a matter for CHG as to whether they made such direct payments to Sydenhams or not.

94. I cannot accept that submission. First, it is not what the words of the letters say. In my judgment, they make clear that there was a promise of direct payment, not just the possibility that there might be such direct payment. Secondly, if Ms Lee was right, it would mean that, following the conclusion of the agreement, Sydenhams were in no better position than they were when they suspended work six weeks earlier, and that they had agreed to give up entirely what Mr Pink said was a strong bargaining position to get nothing in return. I am bound to conclude that such a result would make no commercial sense whatsoever.

95. However, let us suppose, contrary to my view, that Ms Lee is right, and that CHG agreed merely to reserve to themselves the right to make direct payment to Sydenhams in accordance with the detailed provisions of the supplemental agreement with Rybarn of 23rd April. In my judgment, even if that were the position, it would still not create a defence to the claims now made. Take by way of example the principal claim, in respect of the windows. As we have seen, the architect certificated in early July 2004 that the £100,000 for the windows (which would have otherwise been paid to Rybarn for onward transmission to Sydenhams) had been expressly deducted from the certificate because it was being paid directly to Sydenhams by CHG. That seems to me, therefore, to be the best evidence that, in respect of the windows, CHG exercised their right to make direct payment to Sydenhams. But they have not done so, as Mr White confirmed. Their failure to do so therefore constituted a breach of the 20th April agreement, even if, which I do not accept, it only had the limited effect for which Ms Lee contended.

96. Presumably as a result of this potential difficulty, Ms Lee was obliged to take a related point to the effect that, once Rybarn had gone into administration, CHG were not permitted to make direct payments to Sydenhams in any event, and that therefore this was the reason why the monies in respect of the windows had not been paid. In support of this contention, she relied on **Mullan & Sons Contractors v John Ross and Malcolm London** [1998] 86 BNR 1. There, a main contractor had gone into liquidation and the main contract had been automatically determined. The Court of Appeal in Northern Ireland held that, following liquidation, the employers were not entitled to exercise the right of direct payments to the subcontractors, whose work was ongoing.

97. However, as I pointed out in argument, this is a completely different case. Here, there was an express agreement between -- to use these terms -- the employer, CHG, and the subcontractor, Sydenhams, pursuant to which the employer would pay the subcontractor direct. Moreover, that agreement predated by many months the administration of the main contractor. That agreement, at the very least, expressly permitted direct payments to be made. Moreover, again taking the windows as an example, the £100,000 was deducted from the July certificate, because CHG were going to pay that sum to Sydenhams and Rybarn did not, indeed could not, object to such a course. But for CHG's breach of contract in not making the promised payment at that point, the sums would and should have been paid. They therefore would and should have been paid before Rybarn went into administration. Manifestly,CHG cannot now rely on their own breach to give rise to a defence to the claims now made by Sydenhams. Thus, for all those reasons, I consider that the point in **Mullan** is of no application here, and does not give rise to a defence on the part of CHG. Further, and in any event, I consider that the argument is irrelevant on the facts, since the evidence demonstrated beyond doubt that CHG had made direct payments to Sydenhams long after Rybarn's administration: see paragraph 56 above.

98. For all these reasons, therefore, I consider that Sydenhams had a direct contract with CHG as at 20th April, and that pursuant to that contract Sydenhams were entitled to make a claim for the sums incurred in respect of the windows and the retention monies.

E5. What is the legal effect and status of the OFM of 11th May 2004?

99. In the light of my conclusions under **section E4** above, the argument about the OFM of 11th May is largely redundant. However, for completeness I conclude that the OFM of 11th May confirmed the new agreement of 20th April in respect of the windows and that there was a direct contractual relationship between Sydenhams and CHG in respect of this work. The document confirms that CHG accepted a total liability of £100,000 in respect of package 6 and records a particular variation which amounted to an omission of certain works in respect of that package. It plainly had contractual effect and it was treated by Mr Pink as having such effect, which is why he said he authorised the variation by signing the OFM.

F. The deed of warranty.

F1. Factual background.

100. As previously noted, the main contract between CHG and Rybarn was signed on 12th January 2004. That included a set of detailed employer's requirements. Section 1(g) of that document provided that the contractor would obtain collateral warranties from appropriate subcontractors.

101. At appendix 8 of the employer's requirements there was a draft of that warranty. It would be unnecessarily wearisome to set out the full terms of that draft warranty here. Suffice to say that there was a recitals section which included draft words that assumed the existence of both a main contract and a subcontract; a section described as 'operative provisions' whereby the beneficiary would pay £10 to the subcontractor for the warranty; a clause, clause 1, dealing with the standard of care; and a lengthy set of provisions at clause 5, under the heading of "Substitution", which appears to be concerned with determination and the possibility of the subcontractor being replaced by another subcontractor or receiving money direct from the beneficiary. It appears to have been the original intention that the beneficiary would be Travelcrest Services Limited, that the main contractor would be Rybarn, and that the warranty would be sent to Rybarn's subcontractors.

102. No copy of the warranty was provided to Sydenhams and they were not asked to complete it at any stage prior to the agreement of 20th April. Later in April 2004 Sydenhams were sent a copy of a draft warranty that was in slightly different terms. The version that they were sent had been completed to an extent, in that they were now named as a subcontractor and Rybarn were named as the contractor. However, no details of the alleged subcontract were identified in the draft that was sent. CHG was now said to be the beneficiary and the consideration had been reduced to £1. The date of the deed was not filled in.

104. On 18th May 2004, Mr Pride of Sydenhams signed and dated the deed. He did not complete the date of the subcontract in recital B. He returned the deed on or shortly after 18th May. At the same time he also completed another warranty in favour of Travelodge; again, he left the date of the alleged subcontract blank. Thereafter, and for the remainder of their time at the property, Sydenhams heard no more about either warranty. There was no evidence that the sum of £1 was paid in respect of either of the two warranties.

105. It appears that, thereafter, at different dates but prior to 4th April 2005, CHG or those acting on their behalf made various alterations to this deed of warranty. The date was amended in manuscript to 4th April 2005. Somebody filled in the date of 3rd October 2004 as being the operative date of the subcontract. Mr Pink signed it, although he could not remember when. A signature was also procured from Rybarn, although the signature was that of the joint administrator and after the words 'Rybarn Limited' were added "its joint administrator, acting as agents of the company and without personal liability". As I have indicated, this altered deed was never provided to Sydenhams.

F2. Issues.

106. At the outset of the trial it seemed that CHG placed considerable reliance on the issues that arose out of this warranty. They sought to rectify the terms; in particular, to correct the date of the subcontract to the 3rd October 2003 or 18th December 2003 -- not the 3rd October 2004 -- in order to strengthen their case that Sydenhams were estopped from denying that there was an effective subcontract between themselves and Rybarn. They also relied on the words of clause 5 of the warranty in support of their case that they were not obliged to make direct payments to Sydenhams.

108. By the end of the trial, however, Ms Lee realistically accepted that the arguments based on the warranty were not in the forefront of her case, particularly because when Sydenhams had signed and dated the deed they had not filled in any date for the alleged subcontract. In the light of her realistic assessment of CHG's position, I deal as swiftly as I can with the points that now arise out of the warranty.

F3. Rectification.

109. It was not clear to me what CHG's claim for rectification was or could be pursued. Whilst the date of 3rd October 2004 was plainly an erroneous attempt to refer to 3rd October 2003, I have already found that there was no subcontract at that date, nor could there have been. I also note that CHG did not ultimately contend to the contrary. There is nothing to suggest that CHG ever intended to refer to the 18/12/03 date, and even if they had had that intention, for the reasons set out above I have concluded that that was a tripartite agreement, and not a subcontract in the conventional sense. There is therefore no basis for rectifying the warranty to add in possible dates for the subcontract that, for the reasons I have reached, are unarguably wrong.

F4. Estoppel.

110. On behalf of Sydenhams, Mr Selby accepted that, although Sydenhams were bound by the terms of the warranty, as they completed it on 18th May 2004, that merely consisted of a standard reference to a subcontract, with no date or other details of the subcontract provided. In those circumstances, and it seems to me for obvious reasons, Ms Lee did not appear to pursue the estoppel argument with any real enthusiasm. In any event I have concluded that, to the extent the argument was maintained, it would be quite wrong to suggest that Sydenhams were estopped from making the arguments noted above, because of the reference in the standard words of the warranty to the existence of a subcontract, particularly in circumstances where no date or details have been (or could have been) filled in.

111. Moreover, as a matter of law I am satisfied that no question of an estopppel can arise. Ms Lee referred to **paragraph 1-091** of volume 1 of **Chitty On Contracts, 29th edition.** That states "'a party who executes a deed is estopped in a court of law from saying that the facts stated in the deed are not truly stated'. The principle has been extended to statements in recitals in a deed".[3] Ms Lee therefore argued that, given that there was a statement in the deed to the effect that there was a subcontract, Sydenhams were now estopped from denying the existence of a subcontract. However, it is important to read the rest of the paragraph in **Chitty**, because they go on to say:

"... the scope of the doctrine is extremely limited in modern law. First, it only applies between the parties to the deed and those claiming through them. Secondly, it only applies when an action is brought to enforce rights arising out of the deed and not collateral to it. Thirdly, it only applies if the statement is clear and unambiguous ... In view of these limitations there seems little point in preserving any separate category of estoppels by deed, since the basis of the estoppel appears now to be covered by estoppel by representation or by convention."

112. There are at least three reasons why in my judgment the estoppel argument could not apply to this deed. First, it seems clear that the reference to the subcontract was ambiguous since the standard form of words contained a

[3] The cases which are relied on in support of these propositions are set out in footnotes 467 and 468 of the relevant paragraph of Chitty. All of the cases date from the 19th century.

gap for the date to be filled in and that date was never completed. The deed therefore begs the question as to whether there was a subcontract at all. Secondly, this is not an action to enforce rights arising out of the deed. That is the only place where the estoppel argument could arise. Thirdly, if this estoppel is, as the learned editors suggest, akin to an estoppel by representation or by convention, then it would require the usual evidence of reliance and detriment, and there has been no such evidence. For all those reasons, therefore, it seems to me that the estoppel point is not available to CHG in this case.

F5. Clause 5 of the warranty.

Finally, there is an argument that clause 5 of the warranty indicated that CMG would not make direct payments to Sydenhams, and that this somehow took precedence over the terms of the 20th April agreement. Again, it is unclear the extent, if at all, to which this argument is still pursued by CHG, but to the extent it is, I again reject it. The non-payment provisions of the warranty are specific to the express circumstances of substitution envisaged under the warranty, and not otherwise. They have no application to the situation which arose in the present case, where there was a separate agreement based on the promise to make direct payment. Moreover, if there is any conflict between clause 5 of the warranty and the terms of the 20th April agreement (which I do not believe there to be), then the latter must prevail. The agreement of 20th April was a specific agreement expressly negotiated between the parties, as opposed to the words of clause 5, which were simply in a standard form of words and incomplete. For the rule that a specific agreement must override a standard form provision, see ***Homburg Houtimport BV v Agrosin Private Limited*** [2003] 2 WLR 711 House of Lords.

F6. Summary.

114. Accordingly, I do not accept the proposition that the terms of the warranty, as completed by Sydenhams, made or can make any difference to my clear conclusion that there was, by 20th April 2004 (if not before), a direct contract between CHG and Sydenhams, pursuant to which CHG would make direct payments to Sydenhams for their works at the property.

G. The Other Issues.

G1. The £90,000 plus VAT for windows.

115. It is common ground that the windows were included in package 6. On the basis set out in **section E** above, I have concluded that, throughout, CHG agreed to pay Sydenhams £100,000 plus VAT for package 6. That was part of the agreement of 3rd October 2003. It was unaffected by the variation of the 18th December 2003 and it was expressly recorded in the agreement of 20th April 2004 and the OFM of 11th May 2004. The unchallenged evidence from Mr Orchard[4] was that Sydenhams had received £10,000 plus VAT in respect of this claim and that £90,000 plus VAT was outstanding.

116. In cross-examination CHG suggested that, even if there was a direct contractual link between Sydenhams and themselves Sydenhams had failed to discharge the necessary burden of proof in respect of the £90,000. I do not accept that proposition. Sydenhams had demonstrated an entitlement in law to £100,000 plus VAT for package 6. All that then matters is to see whether or not that work has been completed -- and it is not disputed that the windows have been delivered -- and what sums have been paid on account. There is no evidence that more than £10,000 has been paid, thus entitling Sydenhams to the balance of £90,000 plus VAT. It is quite unnecessary for Sydenhams to demonstrate how the £100,000 or £90,000 was made up and/or justified. The whole point of a lump sum agreement like this is that, if the work is done, the lump sum is due without further argument.

For these reasons I find that CHG are liable to pay Sydenhams £90,000 plus VAT, a total of £105,750, in respect of the windows.

G2. The £19,625 plus VAT (retention monies)

118. I can deal with this issue even more shortly. Sydenhams' letter of 20th April 2004 stated in terms that "the retention payment of £19,625 plus VAT will be paid by CHG Holdings on completion of the timber frame." The timber frame was completed on 6th July 2004. The retention monies have therefore been due since a short time after the 6th July (to allow for an invoice to be raised and a certain period for payment). Thus since, say, 1st August 2004, there can have been no defence to the claim for retention monies.

119. Thus I find that CHG are liable to Sydenhams in the total sum of £22,636.38 in respect of retention.

G3 The £528 plus VAT for structural calculations.

120. This claim was originally advanced on the basis that, because there were an excessive number of changes in specification and design, Sydenhams had to undertake structural calculations over and above the normal level. The claim was made on 20th September 2004. In the evidence, it was suggested that this claim arose because calculations had to be done on the structural effects of the balconies and canopies which were not part of Sydenhams' works. There was some rather unclear evidence about an oral instruction which is not reflected in the contemporaneous documents.

121. I reject this claim on the facts. There is insufficient evidence before me to justify the conclusion that the changes were so excessive in number that an additional charge for calculations was justified. Moreover, there is no clear evidence of any instruction to carry out additional calculations because of the balconies. Neither is there an explanation as to why Sydenhams would not have had to do those calculations in any event. It seems to me that,

[4] Paragraph 45 of his witness statement

given they were designing the timber frame, they would have to do these calculations whether or not they were separately responsible for the provision of the balconies. I therefore reject this head of claim.

G4 Trade Account. £1,982.05.

114. There was a good deal of confused evidence as to how the trade account was operated, what was charged against it, how it could be said to be CHG's responsibility, and how and why it could be said to relate to this project. The high point of Sydenhams' case was that it was covered by the 20th April agreement and that the words "outstanding account £10,337" there covered this particular head of claim. However, there was nothing to say that this was a reference to the particular trade account in question and no evidence that any earlier payments had been made against it.

115. In those circumstances, I am unable to say that Sydenhams have demonstrated an entitlement to be paid this sum by CHG. I do not consider that this claim has been made out and I reject it.

G5 Cross-Claim for defects.

116. The parties have agreed that CHG's cross-claim for defects which was compromised in the sum of £35,000 inclusive of interest falls to be deducted and set off against the sums otherwise due to Sydenhams. Mr Selby submits that this deduction should be carried out once interest has been added to the sums due to Sydenhams, otherwise CHG would receive interest twice on this cross-claim. Subject to the caveat that the deduction should be done as at 9th February 2007, which was when judgment on the cross-claim was entered, I accept that submission.

G6 Interest.

117. Interest is due under the **Late Payment of Commercial Debts (Interest) Act** 1998 at 8 per cent over base. I consider that interest is due on the £105,750 in respect of the windows from 1st November 2004. That is a date which reflects the dates of the two invoices, and the problems with the windows which meant that not all the windows were properly delivered to the site until about that date. Interest will be due on the £22,636.38 retention monies from 1st August 2004, being about 21 days after the completion of the timber frame.

G7 Reconciliation.

118. CHG are therefore liable to Sydenhams for the following:
(a) £105,750 (**section G1** above).
(b) Interest on that sum at 8 per cent over base from 1st November 2004.
(c) £22,636.38 (**section G2** above);
(d) Interest on that sum at 8 per cent over base from 1st August 2004.

119. In order to take proper account of the £35,000 the parties must calculate the sum due to Sydenhams including interest as at 9th February 2007. From that figure they should then deduct the £35,000. That will then give rise to a net figure due to Sydenhams. Interest should then be calculated on that net figure from 9th February 2007 up until today's date. I reject the submission that a different rate of interest should somehow apply after 9th February 2007.

H Conclusions.

120. There was a direct contract between CHG and Sydenhams on 3rd October 2003. That contract was varied on 18th December 2003 but only in respect of the mechanism of payment for some, not all, of the work. There was never a conventional subcontract between Rybarn and Sydenhams.

121. Even if both of those conclusions were wrong, the agreement of 20th April 2004 constituted a new and freestanding agreement between CHG and Sydenhams, pursuant to which CHG agreed to make direct payments to Sydenhams in respect of the work at the property.

120. Sydenhams' claims in respect of the windows and the retention monies arise expressly under the agreement of 20th April and therefore CHG can have no defence to those claims. Sydenhams' claims in respect of the additional calculations and the unpaid trade account have not been made out on the evidence and they fail.

122. Sydenhams are entitled to £105,750 together with interest from 1st November 2004 and £22,636.38 together with interest from 1st August 2004. A deduction of £35,000 must be made to reflect the sum agreed in respect of CHG's cross-claim. On this basis, the parties can calculate the final sum inclusive of interest due to Sydenhams.