VHE Construction Plc v. Alfred McAlpine Construction Ltd [1997] EWHC TCC 370

JUDGMENT HIS HONOUR JUDGE BOWSHER Q.C. High Court of Justice, Official referees business. 14th April 1997

1. ISSUES

1. This is a trial of a preliminary issue: ***"Was there a contract between the parties, and if so what were its terms?"***

2. It is remarkable that this question is probably the most frequent issue raised in the construction industry. On projects involving thousands and sometimes millions of pounds, when a dispute arises about payment, the first issue very often is to decide whether there was a contract and if so what were the terms of the contract, if any. So it is here. The plaintiffs have done work and there is no complaint about the quality of their work. Are they to be paid pursuant to a contract, and if so what contract, or are they to be paid on a quantum meruit? In money terms there is a considerable difference between the parties.

2. BACKGROUND

3. The parties are civil engineering contractors.

4. The story begins with a contractor named A.F. Budge Contractors Limited (Budge). In 1982, Budge obtained a contract from Black Country Development Corporation for a land reclamation scheme to be carried out at Swan Village, West Bromwich. Budge got into financial difficulties and they went into receivership. On 4 January, 1993, the administrative receiver arranged that the contract with Black Country Development Corporation was novated to the defendants in this action. By then, the contractual start date for the project was overdue and there was great urgency to get things moving on site so that the project would not be lost for the defendants.

5. The defendants sent out tenders to sub-contractors, but it was no doubt a great boon to them that they were approached by the plaintiffs who had previously tendered to other main contractors (Kier Construction Limited) for earthworks on the site. Because it was necessary for the defendants to show that work was being done on the site, they persuaded the plaintiffs to start work before a contract had been agreed. No doubt the plaintiffs were agreeable to that course because by that means they ensured that they got the job.

6. Work was started on 8 January, 1993 and has been completed.

7. What I have so far recited is unremarkable and fairly normal in the construction industry. What follows in the evidence is a recitation of telephone calls which are denied to have been made and meetings disputed, some as to dates, the identity of people attending, and what was said. Even the witnesses for one party do not agree amongst themselves on all details. I do not find it necessary to consider or decide all of the very many disputes of fact put before me. Most of the time taken at the trial has concerned disputes of minute detail going to credibility of witnesses rather than factual issues central to the trial. I take that evidence into consideration in assessing credibility, but I do not think that it would be helpful in this judgment to consider all the minute grains of sand which have been examined in this case.

8. It is not at all unusual for a contractor or sub-contractor to start work before the terms of the contract or sub-contract have been settled. Equally, it is not at all unusual for the party doing the work to receive a letter of intent often accompanied by a copy of the proposed contract signed by the other party and to continue doing the work without signing the counterpart and returning it. In those circumstances, it is a matter of construction of the communications between the parties and consideration of all the circumstances which will lead to a decision whether a contract has been made between the parties or not: ***British Steel Corporation v. Cleveland Bridge*** 24 BLR 94 at 119. See also ***Trollope and Colls Limited v. Atomic Power constructions Limited*** [1963] 1 WLR 333. Very often, by starting work or continuing work without demurring from contractual documents received, a party may be inferred to have accepted those documents as the contractual basis for the work

3. FACTS

9. After the main contract was novated to the defendants by the administrative Receiver on 4 January, 1993, there followed a meeting between representatives of the plaintiffs and the defendants on 7 January, 1993. The parties are agreed that no contract was made on that day, but it was agreed that the plaintiffs would establish a presence on site the following day. Because the parties are agreed that no contract was made on that day, it is not necessary to unravel all the conflicts of evidence about the events of that day even though there was a reference in the later letter of intent to discussions of the previous day.

10. It is however clear that at least by 7 January, 1993 the parties contemplated that they would be entering into a contract on the terms of the Federation of Civil Engineering Contractors Standard Terms and Conditions ("the FCEC conditions", or more familiarly "the Blue Form"). Those conditions dealt with, for example retention money, but many other terms had to be resolved. Among matters discussed at that meeting were discounts and frequency of payment. Mr. Clarke and Mr. Paul Booth on behalf of the plaintiffs both indicated strongly that the plaintiffs would require fortnightly payments, which they eventually got. I should say at this point that I found Mr. Booth's evidence honest and reliable but his participation in the real points at issue in this action was limited, apart perhaps from the matter of dayworks, another matter discussed in negotiations.

11. The following day, 8 January, 1993, the plaintiffs did establish a presence on site and started work. On the same day, the defendants gave the plaintiffs a letter of intent expressing an intention to enter into a contract with the plaintiffs. The parties again are agreed that no contract was made on 8 January by the plaintiffs starting work with the letter of intent in their hands.

12. Counsel for the plaintiffs submitted that all that followed the letter of intent was as consistent with a mere expectation that a sub-contract would be concluded as that a contract had been concluded. Parts of the evidence

adduced on behalf of the plaintiffs would, if accepted, support that proposition, but on the view that I take of the evidence as a whole, I reject it.

13. There are inconsistencies and shifting of ground in the cases put forward by both parties, but as regards the most essential matters, I prefer the evidence of the defendants.

14. The letter of intent dated 8 January, 1993 was in the following terms:

"It is our intention to enter into a subcontract with you to carry out earthworks operations on the above scheme. The price will be based on earthworks operations on the above scheme. The price will be based on your quotation of 17 December, 1992 and discussions at our Retford office with your Messrs. Clarke/Booth on Thursday 7th January, 1993.

Programme, as discussed at the meeting, is to commence with stripping of vegetation on Friday 8th January 1993 and be completed in line with our attached programme C9248-1.

Full documentation will follow in due course."

15. On 14 January, 1993, Mr. Booth sent to Mr. Learey the plaintiffs' proposals for rates for domestic dayworks. Mr. Learey contacted Mr. Booth to discuss various amendments he considered necessary to the schedule. The dayworks schedule was the plaintiffs' standard schedule and Mr. Learey felt that it included a number of items not relevant to the Main Contract and that those items should be removed. Mr. Booth did not disagree with any of the proposed amendments but felt that he could not agree them on behalf of the plaintiffs without the approval of Mr. Clarke. Then Mr. Learey tried to get hold of Mr. Clarke but was unable to do so. He had no reason to believe that Mr. Clarke would raise any objection.

16. On 19 January, 1993, Mr. Simon Learey, the defendants' Managing Surveyor, sent to Mr. Ian Clarke, the plaintiffs' Contracts Manager responsible for the project, a copy of pages 140 to 149 of the Bill of Quantities (B/Q) and a summary page containing provision for 22% discount for the defendants. There was later discussion about the discount, which was later agreed in a different form. Apart from the discount, the B/Q were used in dealings between the plaintiffs and the defendants. It was said on behalf of the plaintiffs that they were used only provisionally and because they wanted to get some payment from the defendants, but I am satisfied that that was never made plain to the defendants: nor was it disclosed to an independent surveyor employed to make claims on behalf of the plaintiffs. On any objective test, the B/Q were agreed between the parties.

17. On 15 January, 1993, Mr. Learey had faxed to Mr. Paul Booth of the plaintiffs some revised B/Q rates under a fax cover sheet as follows: *"Revised bill rates as discussed. Please contact me on Monday (Retford office) to confirm."*

18. Mr. Booth discussed those rates with Mr. Clarke and they were not happy with them. Accordingly, Mr. Clarke telephoned Mr. Learey on the same day and told him that the rates in his fax were not satisfactory and also gave him the reasons. Two contemporary documents corroborate the fact of Mr. Clarke's telephone call of 15 January, 1993, though not the whole of the terms of the call alleged by Mr. Clarke: first, Mr. Clarke kept notes of the call; second, Mr. Learey's next fax on the subject was in consequence of the telephone call addressed to Mr. Clarke.

19. On 19 January, 1993, Mr. Learey faxed to Mr. Clarke further rates under a fax cover sheet in the following terms:

"Revised bill rates as recently discussed between Tim [Tim Brown - the Commercial Director of the defendants] and Brian [Brian Thomson - the Managing Director of the plaintiffs] together with the proposed payment schedule.

Will contact you tomorrow to finalise."

20. It was put to Mr. Thomson that on the following day, Mr. Brian Thomson telephoned Mr. Brown on 20 January, 1993 and confirmed that the revised B/Q rates sent the previous day were agreed. That was vehemently denied by Mr. Brian Thomson in evidence who said that he would not get involved in such matters. He heard about the fax dated 19 January, 1993 when he was shown a copy of it by Mr. Clarke. He says he told Mr. Clarke that there had been no such discussions as alleged in the fax between himself and Mr. Brown. He says that he returned from a skiing holiday on Friday 15 January, 1993 and did not go into work until Monday 18 January, 1993. He did not speak with Mr. Brown over the weekend as Mr. Brown alleged.

21. If there had been no agreement between the two chief executives of the two companies at about that time it is overwhelmingly likely that the conflict was so important that Mr. Brian Thomson, who is a forceful person, would have made sure that a written denial was put on record in vivid terms straightaway. No such denial was placed on record either by Mr. Brian Thomson or by Mr. Clarke to whom he says he spoke about the matter. Mr. Clarke says that he passed on the denial orally to Mr. Brown but I do not accept that he did. However, Mr. Brown in cross-examination very frankly accepted that while he still maintained that he spoke to Mr. Brian Thomson over the weekend 16/17 January, 1993, he did not go into details of rates with him, though in his view there were some details of rates outside Mr. Clarke's authority. He said that on 18th January, 1993 he did agree 22% discount and retention money, and he did not agree fortnightly payments and did not agree the payment schedule with Brian Thomson on or around 19 January, 1993. The discount was related to two matters. The eventual agreement (though not the initial proposal) was that the 22% was divided as to 12% for mobilisation fee and 1% for fortnightly payments. Time for payment was a matter for serious negotiation between the parties.

In simple terms, the plaintiffs were wanting to receive payment before the defendants would receive payment from the main contractor.

22. Mr. Brown may well be mistaken about having spoken to Mr. Brian Thomson over the weekend, but I accept his evidence as to reaching agreement on the matters he mentioned on 18 or 19 January, 1993. Important terms were still unresolved.

23. Mr. Clarke said in evidence that after speaking to Mr. Brian Thomson he telephoned Mr. Learey and passed on Mr. Brian Thomson's denial of any contact with Mr. Brown and also explained why the rates now put forward in the fax of 19 January were unacceptable. I do not accept that Mr. Clarke did make that telephone call. Mr. Clarke was generally an unreliable witness and in one respect to which I shall refer later acted in a very odd fashion. Mr. Clarke has no notes of any telephone call on or about 19 January, 1993. He says he expected Mr. Learey to get back to him, but when Mr. Learey did not get back to him he made no effort to chase him up. Moreover, within days, Mr. Clarke sent the fax of 19 January, 1993 without comment to a surveyor employed by the plaintiffs. The allegation that there was such a telephone call was made for the first time in the Reply to the Defence served on 2 October, 1996. On 2 April, 1996 it had been ordered that that Reply should be served by 30 April, 1996. Mr. Learey denies that there was such a telephone call.

24. In the light of Mr. Brown's evidence at the trial, counsel for the defendants in his closing speech abandoned the case set out in paragraph 18(b) of the Defence and paragraph 12 of the defendants' written opening that a binding agreement was reached on or about 20 January, 1993. Strong comment was, of course, made about that abandonment of the defendants' primary case.

25. On 27 January, 1993, Mr. Ian Pennington of Ian Pennington Associates, a surveyor in private practice, was appointed by the plaintiffs to make claims for periodic payments based on periodic valuations and to prepare the Final Account. To do his work he needed information as to the basis of valuation. On 28 January, 1993, he wrote by fax to Ian Clarke: *"[I] would like to value work done to the end of this week but currently need confirmation as to which documents apply and sub-contract terms and conditions/method statements agreed with Budge".*

On the same day, Mr. Clarke replied by fax: *"Further to your fax of this morning please find attached fax received from Budge. Method statement etc should be produced by Tony".*

With that fax was enclosed the fax received from Mr. Learey dated 19 January, 1993 to which I have referred. There was no statement that those rates were not agreed nor that they should only be used provisionally. Mr. Pennington said in cross-examination and I accept, that he believed those rates were agreed.

26. On 6 February, 1993, Mr. Pennington asked Mr. Clarke by fax whether the plaintiffs had agreed plant/labour hourly rates with the defendants and asked whether other agreements had been reached affecting the Blue Form.

27. The defendants then sent to the plaintiffs a most important document headed "Sub-contract order". The typed date on the document is 9 February, 1993. The signature on the document is dated 11 February, 1993. The document is stamped as having been received by Mr. Clarke on behalf of the plaintiffs on 22 February, 1993. The plaintiffs never signed it or returned it and never signed the form of sub-contract enclosed with it.

28. The Sub-Contract Order began:

"Further to our recent discussions, we are pleased to confirm our willingness to enter into a formal Sub-Contract with you for the above. We have accordingly prepared formal sub-contract documents incorporating the terms and conditions upon which we are prepared to enter into contract.

We enclose for your perusal, the following documents:

A) Two copies of the form of sub-contract duly completed and signed by us.

B) Two copies of the priced Bill of Quantities referred to in the Third Schedule signed by us.

The above documents together with this letter, form the basis of a formal contract. ...."

29. There then followed in the letter a number of detailed terms in numbered paragraphs.

Paragraphs 1 - 12 were standard items so far as the defendants were concerned.

Paragraph 14 provided for *"Start up payment"* or preliminaries amounting to ,100,000 payable as to ,75,000 on 14 February and as to ,25,000 on 14 March. [That payment had been the subject of intense negotiation.]

Paragraph 15 provided: *"The rates contained in the attached Bill are deemed to be in full compliance with the requirements of the contract specification, and are inclusive of the provision of imported materials where required."*

Paragraph 16 was as follows: *"The attached Bill included the works required for the construction of the landfill gas vent trench. These works are to be treated as provisional until confirmed otherwise in writing by our agent."*

Both imported materials and the vent trench have been the subject of debate at the trial.

30. On the last page of the Order it was written:

"You are deemed to have full knowledge of the provisions of the Main Contract in accordance with the provisions of Clause 3 of the sub-contract. The documents referred to in the Second Schedule (A)1 are available for inspection, by arrangement with our Site Agent at any reasonable time during normal office hours.

4. .....

We would be pleased to receive the duly dated and countersigned sub-contract and priced Bill of Quantities from you within the next seven days and advise that payment will be subject to the return of the completed sub-contract form."

31. In view of the deeming provision with regard to knowledge of the terms of the main contract, and the provision for its inspection, I see no need to examine detailed evidence as to whether a copy of the main contract was in fact laid before the plaintiffs by the defendants. It must have been clear to the plaintiffs that they needed knowledge of at least some of its terms and it was up to them to ensure that they acquired actual knowledge of those terms.

32. It has been submitted that the final paragraph of the Order which I have quoted above was a provision that there would be no contract unless the sub-contract form was returned completed within 7 days. That is not what the paragraph says. It says that payment will be subject to the return of the completed sub-contract form. The defendants did make payments and thereby waived the requirement of that paragraph.

33. The pages following that letter made detailed provisions for daywork rates, miscellaneous works including "drainage arisings" [the subject of much debate at the trial], and the Blue Form with blanks in the schedules filled in. The total price was stated as ,2,007,559.41 /measure and value

"All as per the attached priced Bill of Quantities.

All works subject to progressive remeasurement in accordance with the provisions of the Main Contract, and be valued on a twice monthly basis.

All works subject to 2.5 % discount."

The provision for valuation on a twice monthly basis was an important provision which the plaintiffs had been seeking, though they usually expressed it as valuation fortnightly.

34. By letter dated Thursday, 11 February, 1993, received by Mr. Clarke on Monday 15 February, 1993, Mr. Brown sent to the defendants copies of pages 140 to 149 *"which were omitted from your Sub-contract order no. 9248/JSM/5005 dated 9 February, 1993"*. Mr. Clarke said that he was puzzled by this since he had not received any contract order at that date.

35. Mr. Clarke said that on 15 February, he telephoned, not Mr. Brown the writer of the letter of 11 February, but Mr. Learey. Mr. Clarke says that he told Mr. Learey that he was baffled by the letter he had just received because he had not received any sub-contract order. He says that he went on to say that the rates in the document enclosed with the letter were the same rates which he claimed to have rejected in the telephone conversation with Mr. Learey on 19 January, 1993. Mr. Learey denies that there was such a conversation and I accept his denial.

36. The conduct of the parties both before and after 15 February, 1993 is inconsistent with the parties maintaining a rejection of the rates.

37. At the beginning of February, 1993, Mr. Pennington submitted the first payment application on behalf of the plaintiffs. That application was not qualified by Mr. Pennington in any way because it was based on documents given to him by Mr. Clarke which he thought were agreed. Normal practice would have been to qualify the applications if the rates were not agreed. It is no criticism of Mr. Pennington that he did not qualify that or subsequent applications: the instructions to him did not require him to do so. Mr. Learey said that the application repeated more or less word for word pages 140 to 144 of the Contract B/Q; it was made at the time envisaged by the payment schedule sent by Mr. Learey to Mr. Clarke; it included the agreed initial payment of ,75,000; the remainder of the application had the claimed quantities inserted against the various individual items; the claim provided for retention as set out in the blue form, and for the deduction of discount at the rate of 22% as had eventually been agreed in negotiations.

38. In the circumstances, Mr. Learey felt that he could confidently go forward and prepare the blue form with its accompanying documents. He had had difficulty in contacting Mr. Clarke to finalise daywork rates, but he had a schedule of daywork rates which he had agreed with Mr. Booth on 15 January, 1993, subject to Mr. Clarke's approval, but it was likely that Mr. Clarke would approve Mr. Booth's agreement and he felt justified in going ahead with preparation of documents.

39. On 16 February, 1993, the day after the alleged telephone call of 15 February, 1993, the plaintiffs submitted their second application for payment. It was in similar format to Application No. 1. By then, the plaintiffs had accepted ,69,468.75, being the first instalment of ,75,000 for mobilisation less discount at 22% and retention at 5% a in the Blue Form, all as agreed between the parties.

40. On 23 February, 1993, there was a site meeting between Mr. Ian Clarke, Mr. Tony Thomson, and Paul Booth on behalf of the plaintiffs with Mr. Tony Dunks and Mr. David McDonald on behalf of the defendants. Notes of that meeting were kept by the defendants. There is no note of Mr. Clarke rejecting or querying the contractual documents he had received at the latest by the previous day. The only note which might refer to a contractual terms the note at paragraph 5.5: *"Payment Schedule - Chase S.M. Learey/ T.Brown re next payment urgent."*

It has been suggested that that note shows some questioning of the payment schedule. By contrast it suggests to me that it was thought that the payment schedule should be complied with and was not being complied with and should be enforced. However, if that matter was disputed, the difference of view about the payment schedule was resolved by agreement between Mr. Brown and Mr. Thomson on 2 March, 1993 to which I shall later refer.

41. Mr. Clarke not only did not dispute the contractual documents at the meeting on 23 February, 1993, he did not write any letter disputing them. His behaviour in relation to those documents, on his account of it, was bizarre and completely uncommercial. He says that he put the documents in the boot of his car to prevent anyone else signing them and returning them. On two later occasions colleagues in the plaintiff company asked him whether he had any contractual documents and he affected not to know anything about any contractual documents.

42. I heard evidence from Mr. Ian Burnell which related to this matter. Mr. Burnell is now the Commercial Manager for the plaintiffs. In May, 1993, as a self employed person he began working mainly for the plaintiffs and after a meeting with Mr. Brian Thomson was asked by him to concern himself mainly with the Swan Village project. He was asked to familiarise himself with the Swan Village project not because there were any particular problems there but Mr. Brian Thomson asked him to take charge of it. He said in evidence that in order to familiarise himself with the project, he spoke to Messrs Ian Clarke, Philip Murdoch and Paul Booth *"all of whom had been involved in the initial negotiations for the contract and/or pricing the same*" and also spoke to the plaintiffs' site manager, asking each of them *"where the contract documents were*". None of them admitted to knowing where they were, but apparently none alleged that there was no contract. Then, on 25 May, 1993, Mr. Burnell rang Mr. Simon Learey of the defendants, whom he knew. Mr. Burnell asked Mr. Learey if a formal sub-contract blue form had been sent to the plaintiffs. Mr. Learey, according to Mr. Burnell said he was confident that it had been sent and furthermore it was signed and *"everything was sorted*" and that all the documentation was completed. So when a newcomer came on the scene in May, 1993, the defendants asserted that there was a formally completed contract and the employees of the plaintiffs who were in a position to know at least did not assert that there was not a contract. So the defendants thought wrongly that the formalities were complete and the plaintiffs' employees did not know where the papers were, but no one suggested that there was no contract and the general impression was that there was a contract. I am sure that if Mr. Brian Thomson had thought that there was any problem about the terms of the contract he would, in his introductory discussion with Mr. Burnell have told him to get the matter clarified as soon as possible.

43. Meanwhile, before the order documents came out of the boot of Mr. Clarke's car in May, 1993, the plaintiffs had on 2 March, 1993 submitted a third application for payment for work carried out to 28 February. The application was in the same format as before, and by then the plaintiffs had accepted a total of ,115,807.19 calculated consistently with the documents put forward by the defendants.

44. At that time there was another disputed telephone call. Mr. Brown said in evidence that he had further telephone conversations with Mr. Brian Thomson at the end of February culminating in a telephone conversation on 2 March, 1993. Mr. Brian Thomson, according to Mr. Brown, said nothing to challenge rates of payment, but he did assert that payment was being made on dates later than they had envisaged. The trouble arose from a difference of opinion as to what was meant by "*twice monthly*" or "*14 day"* valuations. Mr. Thomson asserted in evidence that that was understood in the trade to mean payment 14 days after valuation, whereas there was a contrary view that it meant 35 days after valuation, which would still result in fortnightly payments. There is written confirmation that the timing of payments was in the air on 2 March, 1993. On that day, Mr. Pennington faxed to Mr. Learey as follows:

"I understand Ian Clarke (VHE) has had some discussion with Tim Brown re payments/timing etc earlier this a.m.

Ian has requested that I fax a copy of the current application to you at Retford and this follows accordingly."

45. Mr. Brown says that he agreed with Mr. Thomson that payment should be made within 10 days of receipt of the plaintiffs' interim application or valuation. Mr. Thomson vehemently denies that there was any such conversation saying that he would not get involved in discussion of rates or time for payment. But it is not suggested that in that conversation he got involved in the discussion of rates, indeed quite the contrary. I do not believe that Mr. Brian Thomson would not get involved in such an important matter as time for payment, which did not require delving into detail. A note made by Mr. McDonald (the Project Manager for Budge and then for the plaintiffs) on 7 January, 1993 had suggested at that date that the questions of discount, mobilisation payment and fortnightly payments were to be decided by Mr. Brian Thomson. I accept Mr. Brown's evidence about this conversation. Revised arrangements were made on Mr. Brown's instructions for date for payment of application no.3 and similar arrangements were applied for all subsequent applications. There is no explanation for that important change apart from the conversation on 2 March, 1993 as spoken to by Mr. Brown. Curiously, Mr. Clarke says that the agreement was made between him, Mr. Clarke and Mr. Brown, and was for payment within 14 days. I prefer Mr. Brown's evidence, but if I were to accept the evidence of Mr. Clarke on this point, I would still find that there had been agreement reached on the last point of difference between the parties.

46. Then on 23 June, 1993, Mr. Ian Burnell visited another site at which the plaintiffs were working and Mr Ian Clarke came into the site office. Mr. Burnell asked Mr. Clarke about the location of the paper work for the Swan Village contract. He replied, *"Wait there, don't go away"* and went straight out of the office to his car and took the documents (the order letter and two copies of the blue form and its attachments together with other documents) from the boot of his car as though he had known all along that they were there. This should be set in the context that Mr. Burnell said in his written statement that he had meetings with Mr. Clarke on 25 May and 4 and 8 June, 1993 and raised the question of the whereabouts of the documents with him and, *"It appeared that he had at least temporarily forgotten where he had put the documents"*. Mr. Burnell certainly had difficulties in finding out what was in the knowledge of his company, but it has to be accepted that what was in the knowledge of Mr. Clarke was within the knowledge of the company. Moreover, if Mr. Clarke had really told the defendants that the contents of

the documents were not agreed, he would surely have said to Mr. Burrell when first asked for them, *"I have the documents, I have them in my personal custody to prevent them from being accepted by accident, and I have told the defendants more than once by telephone that the documents are challenged"*. He did not.

47. Between March and July, 1993, the plaintiffs proceeded with the works on site in accordance with the provisions of the Order letter and applied for and received interim payments as agreed between Mr. Brown and Mr. Brian Thomson.

48. During that period, there were disputes raised with Mr. Pennington about charges to be made for certain items such as "drainage arising" and materials brought onto site, and testing of those materials. To deal with those disputes, Mr. Pennington asked for a copy of the sub-contract and could not get one from either side, but no one suggested there was no sub-contract.

49. It was not until July that the plaintiffs disputed the terms of the Sub-Contract order (apart from the questioning of the dates of payment by Mr. Brian Thomson by telephone). On 1 July, 1993, a letter was written to the defendants on the plaintiffs notepaper, not addressed to any specific individual at the defendants, and signed with an illegible squiggle *"p.p. I.Pennington"*. The letter read as follows:

"Please find enclosed Application for payment No 11 carried out to 26th June 1993, totalling the sum of ,691987.43.

Please note that we do not accept that the contents of your draft sub-contract documents accurately reflect the oral agreements reached at tender stage, and as such, this application is submitted on a without prejudice basis. The content of the Sub-Contract is dealt with under separate cover."

50. As he himself stressed in his evidence in chief, Mr. Pennington was not involved in any *"oral agreements reached at tender stage"* and it is clear that he wrote the letter simply on instructions from his clients. That is no criticism of him. Indeed, Mr. Pennington said, and I accept, that he wrote it on the instructions of Mr. Burnell after Mr. Burnell on 23 June, 1993 had been given the sub-contract documents out of the boot of Mr. Clarke's car and discovered that they were not signed on behalf of the plaintiffs. So the person who gave the instruction for the letter to be written also had not been involved in negotiations. There was no document dealing with the content of the sub-contract under separate cover as promised in the letter.

51. There was a meeting on 7 July, 1993 attended by Messrs. Dunks, Tim Brown, and Tyler (the site agent) on behalf of the defendants and by Mr. Pennington and Mr. A.J. Thomson on behalf of the plaintiffs. Mr. Tony Thomson was employed as the Contracts Manager for the Swan Village in early January, 1993. I have no doubt that he is good at his job, but he made it plain that he had no involvement in negotiation or preparation of contract documents which were no part of his job. He needed to be given those documents in order to do his job. He started the work on site in the expectation that he would be given a sub-contact document in the blue form, but the best he ever got were B/Q rates. It was he who appointed Mr. Pennington to make interim applications and prepare the final account. So the plaintiffs chose to be represented at the meeting of 7 July, 1993 by two men who, with no discredit to them, knew nothing about the negotiations of the sub-contract.

52. Indeed, the purpose of the meeting was not to consider the negotiation of the sub-contract or its terms. It was not called as a substitute for the document dealing with the content of the sub-contract as promised in the letter of 1 July, 1993. I have minutes of that meeting prepared by Mr. Pennington.

53. Those minutes begin:

4. "REASON FOR MEETING

Following various notices regarding the soils condition and items of measurement differences [[the defendants] had held a meeting recently with the Engineer and several points arising needed to be resolved before further submissions were to be made by [the defendants] to the Engineer."

54. This was a meeting at which the defendants wished to raise matters as to which they were having arguments with the Engineer under the Main Contract but in which the plaintiffs were involved as a matter of sub-contract.

The last point appears to have been raised by the plaintiffs' representatives:

"6. SUBCONTRACT CONDITIONS

VHE explained the reason for the qualified letter accompanying the Application for Payment No 11 dated 1 July 1993. There appeared to be several matters arising out of discussions prior to the submission of the contract tender, during the revision to tender calculations and following the issue of various documents subsequently.

55. There are some eight items which appear to need resolving, being, Measured Rates, Clause on contra charges, Daywork rates, drainage arisings/vent trench arisings, discount, programme, responsibility for damage to services and the source for the importation of materials.

[The defendants] considered the points and were of the opinion that all matters had been fully dealt with excepting the disposal of vent trench arisings which was never contemplated if the work was to be carried out by others. This had been denied by [the defendants' staff] some 3 months ago who had referred VHE to the sub-contract document. This item had been introduced by [the defendants] after drafting and discussion and without consultation.

It was recommended that the individuals from both parties involved in the submission of prices and the formation of documents should meet to resolve present difficulties."

56. In his oral evidence, Mr. Pennington said that the sub-contract document to which he referred in that minute consisted of the Blue Form, B/Q, Drawings, Specification, and the covering order and correspondence. There was no suggestion that there was no contract. As I understand the totality of the evidence, the suggestion was that the terms of the contract should be considered in the light of all the negotiations.

57. The day after the meeting, on 8 July, 1993 Mr. Pennington sent his notes of the meeting to Mr. Tyler. That letter came to the attention of Mr. Brown who wrote a letter dated 16 July, 1993 correcting certain points. In his written evidence, Mr. Brown made the important observation that the points made in paragraph 6 of the notes of the meeting were specific items in relation to the sub-contract works themselves rather than the drafting of the documentation. I would express that as saying that they went rather to the interpretation of the contract than to the question of whether a contract had been made.

58. An examination of the progress of negotiations is important in considering whether there was a contract: Pagnan ***v. Granaria*** [1986] 2 Lloyd's Rep 547; ***Pagnan v. Feed Products*** [1987] 2 Lloyd's Rep 601. But it is contrary to principle to consider what was said in negotiations when construing the terms of the contract. It is the latter which it seems to me that the plaintiffs were trying to do at the meeting of 7 July,1993 following the letter of 1 July, 1993, albeit through the mouths of people who had no personal knowledge of what had happened.

59. There followed many meetings and written communications in which the plaintiffs argued about various items of detail as to pricing. In the light of the findings I make about the contract in this case, those arguments are irrelevant. I shall mention only one matter. There was dispute arising from the failure of the defendants to give to the plaintiffs a copy of the full text of the Specification in the Main Contract referring to testing of soil to be brought onto site. I have already referred to the clause in the Blue form deeming that the plaintiffs have knowledge of the terms of the Main Contract. If the plaintiffs did not have actual knowledge it was up to them to ask for it. They certainly had partial knowledge of that provision and knew enough to realise that they should ask for and insist upon more.

60. There is overwhelming evidence that there was a contract between the parties. The multitude of disputes raised late in the day about how certain items should be paid for are mainly a matter of construction of the agreement, though some of them genuinely contest whether an agreement was made. Those questions will not be resolved by a consideration of what was or was not said during negotiations nor by disputes raised after the making of the agreement but by construction of the agreement which I find was made.

5. CONCLUSION:

61. I answer the question put before me not entirely in the manner I was invited to do as follows:

"A sub-contract was completed by a telephone call between Mr. Brown and Mr. Brian Thomson in late February or early March when they agreed a reduction in the period for payment being the last issue to be resolved between the parties and was further agreed to by the parties by their conduct. The terms were those set out in the sub-contract order dated 9 February 1993 signed by Mr. Brown on 11 February, 1993 together with the documents attached to it (the Bills of Quantities and payment Schedule being those attached to the fax dated 19 January, 1993) and the documents sent under cover of the letter dated 11 February 1993 from Mr. Brown and the enclosures attached to it and further amended by the agreement made orally between Mr. Brown and Mr. Brian Thomson that the time for payment should be 10 days after valuation rather than 35 days after valuation."

Richard Gray Q.C. and Vincent Nelson for the plaintiffs instructed by Emsley Collins
John Marrin Q.C. fpr the redefendants instructed by Dibb Lupton Broomhead