JUDGMENT : Her Honour Judge Frances Kirkham. TCC. 24th March 2003

Introduction

1. The claimant ("Twintec") specialises in the design and construction of industrial concrete flooring. The defendants ("GSE") are civil engineering contractors.

2. This is a trial of liability issues only. Briefly, Twintec contend that they contracted with GSE to undertake external slab work at a B & Q site at Belvedere, Kent, but GSE repudiated that contract. GSE contend that they did not enter into a binding contract with Twintec. It is not in issue that, instead of proceeding with Twintec, GSE engaged Isotec, a company formed by Mr David Martin, Twintec's former commercial director to undertake the work.

3. Twintec's primary case is that it entered into a binding contract with GSE to design and construct external concrete work at the B & Q site, that contract contained in or evidenced by:
   (1) Twintec's quotation Q0518B of 31 July 2001
   (2) GSE's letter of 13 August 2001
   (3) Twintec's letter of 15 October 2001

4. In opening, Miss Gough for Twintec put her case on the basis that a contact was concluded on or about 13 August 2001 as confirmed by GSE's letter of 13 August 2001.

5. In their defence, GSE deny that a binding contract was concluded, and plead:
   (1) that they did not accept unequivocally Twintec's quotation Q0518B
   (2) that GSE's letter of 13 August 2001 was expressly said to be a letter of intent and
   (3) that their clear and unambiguous intention as at 13 August 2001 was that a legally binding agreement had not been concluded between the parties.
   (4) Twintec's letter of 15 October 2001 amounted to no more than an offer or counter offer which GSE never accepted.

6. In its initial reply to GSE's defence, Twintec pleaded that the parties entered into a binding contract on the terms set out in the documents I have listed, "*which context includes their conduct or is evidenced by their conduct*", in particular as set out in paragraphs 4.7.1 to 4.7.5 inclusive of their reply. Miss Gough for Twintec clarified in opening that Twintec's case was that, if (contrary to Twintec's primary case) there was anything outstanding at 13 August 2001 which prevented the conclusion of a binding contract, those matters were addressed subsequently and in the manner set out in paragraph 4.7 of the reply to defence.

7. By its reply, Twintec also pleaded an alternative claim to entitlement to payment by quantum meruit.

8. On the first day of the trial, I ruled that the question whether Twintec was entitled to payment on a quantum meruit was an issue of liability and thus one for trial in this action. Shortly after that, Mr Darling QC for GSE confirmed that, whilst GSE reserved the right to contend that the correct quantification of a quantum meruit claim was nil, GSE would consent to a declaration to the effect that Twintec was entitled to a quantum meruit payment if it failed to establish a contract. The wording of a declaration has been agreed, to the effect that GSE's letter of 13 August 2001 gives rise to an entitlement in principle to a quantum meruit or reasonable sum in respect of the works carried out and costs incurred pursuant to that letter.

9. Following my ruling that the issue raised in paragraph 11 of GSE's defence was one of liability and thus for determination at this trial, Mr Darling confirmed that GSE would not rely on matters raised in paragraph 11 by way of defence.

10. Mr Darling for GSE conceded that, if there was a binding contract, then GSE did repudiate it.

11. The only remaining liability issue for determination therefore is whether Twintec and GSE entered into a binding contract in August 2001

12. This has been an unusual case, in a number of respects. I therefore set out some of the procedural background. The Court heard evidence on 27 and 28 January 2002. It became apparent from evidence given by Mr Trevor Parker, a managing surveyor employed by GSE, that, at a meeting on 2 August 2001, he and Mr Martin, then Twintec's commercial director, discussed matters which are central to the issue. Evidence as to these matters had not been detailed in witness statements served before trial. Until the afternoon of the second day of the trial, there had been no suggestion in any pleading witness statement or other document that the meeting had such significance. The evidence as to matters discussed at that meeting emerged during Miss Gough's cross examination of Mr Parker. As the meeting on 2 August 2001 is of critical importance, it would have been wholly artificial not to have permitted full evidence about it to be called. That evidence was in effect available only to GSE. I subsequently ruled (1) that GSE be permitted to call Mr Martin to give evidence and (2) that Twintec be permitted to amend their reply to plead that the terms of the offer of 31 July 2001 had been "discussed, modified and agreed" at the meeting on 2 August 2001, and that GSE's letter of 13 August 2001 constituted their formal acceptance of Twintec's offer of 31 July 2001. A third hearing day was held on 16 February 2003, at which Mr Martin gave evidence, as did Mr Cantarella, Twintec's managing director.

13. After the close of the evidence on 28 January, Counsel for both parties made submissions. They amplified and clarified these in written submissions delivered on 3 February. Following evidence from Mr Martin and Mr Canterella, Counsel made final submissions. During Mr Martin's evidence, questions arose as to his daybook. Miss Gough did not have the opportunity to consider that document in detail before or during the resumed hearing on

16 February. Following discussion with Counsel, it was left that I would be sent a copy of the daybook. I have subsequently received copies of relevant pages together with a copy of a letter from Miss Gough to GSE's solicitor commenting on extracts. I have not seen any reply to that letter.

14. Oral and documentary evidence from GSE has emerged piecemeal during the trial. Their preparation was not carried out as CPR requires. I cannot be confident that GSE have complied with their disclosure obligations.

15. I heard evidence from Mr Gilburt, commercial director of GSE and Mr Parker. Mr Darling for GSE conceded that GSE did not rely on any of the evidence given by Mr Gilburt or Mr Parker. That was realistic. It quickly became apparent that, save in the specific respects to which I refer later, I should not feel able to accept any of their evidence.

16. Mr Darling challenged little of Twintec's evidence relevant to material issues. I found Twintec's employees to be honest and straightforward witnesses, though I have some reservations about the evidence of Mr Cantarella, as set out below.

17. Mr Martin was a shareholder of Twintec. He was employed as Twintec's commercial director for four years. During 2001 there was a divergence of view between Mr Martin and Mr Cantarella as to how the company should be run. By mid-summer, relations between Messrs Martin and Canterella were poor. Mr Martin left Twintec on 8 October 2001 in unhappy circumstances. On 7 September 2001 he had established Isotec. He is that company's technical director and principal shareholder. Isotec is a competitor of Twintec. Mr Martin's evidence was that, while he maintained a diary/daybook, he did not retain this; he photocopied those pages which he considered might be useful and discarded the original. I find that explanation for the lack of the original document to be hard to accept. My scepticism was reinforced by the entry on which Mr Martin relied to support his evidence that he spoke to Mr Cantarella on 2 August 2001 about the GSE contract. In fact, Mr Cantarella was on holiday at the time and was not in telephone contact with Twintec. I do not believe that Mr Martin did speak to Mr Canterella on 2 August. I have little confidence in Mr Martin's evidence. I formed the impression that his greatest concern was to try to dispel the suggestion that he had manoeuvred to secure the contract for his new company.

Background

18. In May 2001, Wates asked GSE to quote for groundworks for a new B & Q warehouse at Bexley, Kent. GSE sought a contractor to carry out work to the concrete slabs.

19. GSE learned that Twintec had the capabilities they were seeking. Mr Parker approached Mr Martin during May 2001. Mr Martin expressed interest so Mr Parker sent him some details of the work. Mr Martin then arranged for Twintec to send GSE a quotation, Q0518 dated 16 May 2001. Twintec based their quotation on information which had been supplied by Michael Bradbrook Consultants ("MBC") civil and structural engineers, engaged on the B & Q project. The quotation offered to provide skilled labour, plant and materials to supply and lay approximately 33,427 square metres of steel fibre reinforced concrete for both internal and external floor slabs suspended on piles. The quotation noted that a full method statement and design notes would be provided in due course. Included as part of Q0518 was a table containing separate entries for sub base preparation, warehouse slab, extend car park slab, external hard standing slab and materials testing. Against each of these items, except the last, Twintec had shown the area in question (in square metres), a rate per square metre and the money sum resulting from application of the rate to the area.

20. Mr Martin and Mr Parker had a discussion on 21 May. Mr Martin wrote to Mr Parker that day to confirm matters they had discussed. He noted that the internal floor slab would not necessarily be within the scope of work. He stated "The contract sum for the external car park and hard standing areas is subject to remeasure" and that the rates for the external car park and hard standing would not vary as a result of "a minor change in area". Mr Martin then invited a letter of intent for the work within seven days, for which Twintec would offer a 2½% discount from Q0518 rates.

21. On 19 June 2001, Mr Parker telephoned Mr Martin asking for references for Twintec's work. Mr Martin arranged for these to be sent to GSE.

22. By fax dated 9 July 2001, Mr Parker informed Mr Martin that Twintec were GSE's "preferred flooring or sub-contractor".

23. Mr Parker faxed Mr Martin on 18 July 2001, asking him to provide a fixed price quotation for the external work only, based on information contained in three drawings and a programme attached to the fax.

24. At about this time, Wates informed Twintec that they had placed an order with GSE for the external work only. Wates asked Twintec to quote directly to Wates for the internal work. Wates and Twintec subsequently contracted directly in respect of internal work.

25. Twintec wrote to GSE by letter dated 31 July 2001 enclosing a revised quotation Q0518B. The letter stated that Twintec offered to provide labour, plant and materials to supply and lay about 23,642 m^2 of internal (sic) and external floor slab suspended on piles. The letter contained information about insurance and technical details such as loading criteria, joint patterns and sub base preparation. The letter stated that Twintec might wish to site batch the concrete for both the internal and the external slabs with continuous mix process. The letter sets out proposals for retention, suggesting a bank guarantee in lieu of retention, alternatively they required that the second moiety

of retention be paid 12 months after completion of Twintec's work. The letter said that a full method statement and design notes would be provided in due course. The quotation acknowledged that the question who was to undertake the sub base preparation was outstanding. The quotation Q0518B annexed to that letter again listed separate elements relating to the external slab work, namely
(1) the sub base preparation
(2) external car park slab
(3) external sales area and hard standing, and
(4) materials testing.

26. There is no reference in the revised quotation to the internal slab. For each of elements (1) to (3) the area in question was identified, the rate per square metre was shown and, by extension, the cost. For element (4) a total sum of £1,400 was shown. The total of those four elements is £637,897.46, though that sum does not appear on the letter or quotation. The quotation noted that the rates did not include for joint sealant or provision for primary aggregates tax. Twintec's prices were said to be based on a number of assumptions, including that there would be a single, uninterrupted visit to site. It set out the attendances which Twintec would require.

27. Mr Parker and Mr Martin met on 2 August 2001. Mr Martin set up the meeting. Both have now given evidence about the meeting. I have seen four sheets of manuscript notes made by Mr Martin during that meeting. If Mr Parker made any notes, GSE have not disclosed these. Mr Martin's notes show, at point 1, that Twintec are to "submit full design package" to MBC. At point 3 are sketches to illustrate detailing, eg to kerbs. Point 4 refers to an issue as to fibres on the car park surface. Item 5 reads:

5) "Commercial - 2½% MCD for prompt order? Guaranteed maximum price as per Q0518B 31/07/01... including details (local thickening)". The words "Guaranteed maximum price as per Q0518B 31/7/01" are underscored.

28. Item 6 refers to the cutting off of piles. It is followed by the words "L of I [ie letter of intent] Subject to Eng Approval & details." Item 7 notes "retention 2". There follow two pages of sketched details.

29. I believe that, in cross examination, Mr Parker (possibly unwittingly) told the truth about the matters discussed at the meeting on 2 August 2001. His evidence is that he and Mr Martin discussed technical and commercial matters, in the context of Twintec's quotation of 13 July. As appears from the manuscript notes, they discussed, for example, how drainage channels were to be supported and kerb details. Mr Martin drew a number of sketches to explain technical details. Mr Martin and Mr Parker went through the quantities shown on the relevant drawings and did a further take off to check whether the quantities in Twintec's quotation were correct. This remeasurement of the areas resulted in amended figures for the areas of the car park slab and the external sales area hardstanding. Mr Martin noted in manuscript the corrected area figures on the quotation, but made no adjustment to the total sum for each of these two elements. Mr Parker and Mr Martin discussed the fact that Twintec had quoted for the work on the basis of an inaccurate calculation of the area of work to be undertaken. In their quotation of 13 July, Twintec had offered to undertake the work on a remeasurement basis. GSE by their fax of 18 July had asked Twintec to quote a fixed price lump sum. Because there was some leeway in the area of work to be undertaken, Mr Martin could be more comfortable than he might otherwise have been about committing to a fixed price. Mr Parker's recollection and understanding was that he and Mr Martin initially agreed that the options were for Twintec to undertake the work either on a fixed price lump sum basis, for the £637,897.46 total contained in Q0518B, in the knowledge that this figure had been calculated by reference to an area of concrete greater than in fact was to be laid, or on the basis of re-measurement. Item 5 of the manuscript note supports this. Mr Parker's evidence, which I accept, is that Mr Martin gave him a choice: GSE could contract with Twintec on the basis either (1) of payment for measured work with a 2.5% main contractor's discount or (2) of a fixed price, based on the inaccurate measurement figures stated in Q0518B. Mr Parker told Mr Martin that his preference was to contract on a fixed price, lump sum basis. The words in item 5 which are underscored record the option which Mr Parker chose, namely the fixed price approach. It was left that Mr Parker would send Twintec a letter of intent. This is supported by item 6 of the manuscript note. Mr Parker had wanted to tie Twintec down to price and a tight programme. He was happy to proceed on the basis agreed at the meeting.

30. Mr Martin's evidence as to the meeting was as follows. He said that the purpose of the meeting was to do a deal if he could. He acknowledged that GSE wanted Twintec to undertake the work for a fixed price, but said he did not recall giving Mr Parker the choice between a fixed price contract and payment on a remeasurement basis. Mr Martin said that he was not prepared to undertake the work on a lump-sum basis. His view was that he and Mr Parker had agreed "heads of agreement" to enable the companies to go forward.

31. In a supplemental witness statement, Mr Martin suggested that he discussed the B&Q project with Mr Cantarella after the meeting on 2 August. He said that Mr Cantarella required him, amongst other matters, to insist on remeasure before Twintec entered into a contract with GSE. I do not accept that evidence. As I have indicated earlier, Mr Cantarella was on holiday at the time and was not contacted by Mr Martin before his return from holiday in mid-August. The manuscript note on which Mr Martin relies is said to be a photocopy of the original entry, the original now having been destroyed. I find implausible the explanation as to present state of Mr Martin's daybook.

32. It is clear to me that the option between lump sum and remeasure was discussed at the meeting on 2 August. I believe that Mr Martin did not express any reluctance to contract on a fixed price lump sum basis. To the

contrary, he did give Mr Parker a choice. Mr Parker chose the fixed price route and Mr Martin recorded that choice by underscoring the relevant words in his notes. It was left that GSE would send Twintec a "letter of intent" to confirm what had been agreed.

33. Twintec International SA, in Luxembourg, is Twintec's parent. Twintec and its parent required Twintec to register, with the parent company, details of contracts which Twintec had entered into. On 2 August 2001, immediately after the meeting between Mr Parker and Mr Martin, a fax was sent by Twintec to Miss Van Loenen, general secretary of the parent company, attaching a copy of the 31 July 2001 quotation and some costing sheets. The original fax bears Mr Martin's signature. Initially he denied having sent it. Having been shown the original, he said he had no recollection of having sent it. It is possible that Mr Martin dictated the fax over the telephone to Mr Wildman of Twintec who prepared it for signature by Mr Martin. It is possible that Mr Wildman sent it at Mr Martin's request and in Mr Martin's name. Either way, GSE do not challenge that the fax was sent. The fax stated:

"Please find enclosed the following documents to enable the registration of TU0192GB

copy quotation Q0518B

cost sheet for car parking

cost sheet for hard standing

The project is suspended on piles…

Our contract for this element is with [GSE]. The internal slab will be with Wates Construction and will be a separate contract and order number.

Please confirm you have registered the B & Q external area for July…"

34. Miss Van Loenen was not called. The content of her witness statement was not challenged. It is clear that Twintec's parent company registered the "contract" after receipt of this fax.

35. The fact that Mr Martin arranged for this fax to be sent to Luxembourg supports Mr Parker's version of the discussion at the meeting on 2 August 2001 and reinforces my view of the evidence given by both men as to that meeting.

36. On 9 August 2001 various people, including representatives of MBC and Wates, visited Belgium to view Twintec slabs in use.

37. Mr Parker of GSE wrote to Twintec by letter dated 13 August 2001as follows:

"Re: New B&Q, Belvedere

With reference to the above contract, we confirm our intent to place a sub contract order with yourselves as follows:

Lump sum, fixed price, all risk quotation totalling £637,897.46 nett to supply labour, plant and material to concrete all the external hard standing areas to the engineers specification.

On my return from holiday, we need to arrange a meeting with Wates Construction to agree a sequence of works."

38. Thereafter, Twintec proceeded with design work and the ordering of materials.

39. Wates sent Twintec a letter of intent dated 6 September 2001 in relation to the internal floor slab.

40. Mr Eddy, at that time Twintec's business development manager, took over Mr Martin's responsibilities for the B & Q project at the beginning of September 2001.

41. Mr Cantarella said in cross examination that, in early September, he learned from Mr Martin that the contract was on a fixed price, lump sum basis. He said he then considered the rates, checked the margins and concluded that the contract price was acceptable. I do not believe this. I conclude that Mr Canterella was making up evidence which he believed would bolster Twintec's case. It appears that no one in Twintec addressed his mind to the fact that the GSE letter of 13 August referred to a lump sum, fixed price or to what Mr Martin and Mr Parker had discussed.

42. Mr Eddy prepared a draft letter to GSE, dated 6 September 2001. That letter was never sent. The draft letter thanks GSE for their letter of 13 August and "*the most valued order"* for the external floor slab work. It states that the letter and quotation Q0518B provide full details of the scope of Twintec's work. The letter lists 26 different topics, including: *"19. Rates: As per quotation Q0518B and remeasurable at the end of work"*.

43. The draft letter notes that Twintec's prices are based on a number of matters, including *"order acceptance by Twintec subject to satisfactory creditor insurance"* and *"3% retention, half released upon completion of Twintec works, remainder 12 months later."* The letter notes that the remobilisation cost, if a second visit were required, was to be £6,000 per extra visit.

44. I accept Mr Eddy's evidence that he prepared this letter following a Twintec template. Mr Martin had not briefed him as to the matters discussed at the meeting on 2 August. Mr Eddy did not know what Mr Martin and Mr Parker had agreed.

45. Mr Eddy and Mr Dobbins (Twintec's contracts manager) attended various site and progress meetings between 13 September and 2 November 2001. Representatives of GSE, Wates, MBC and other interested parties attended those meetings and discussed detailed aspects of the work, relating to both the internal and the external slab.

46. Mr Eddy prepared a letter dated 15 October 2001. Before Mr Darling's concession on the evidence of Messrs Gilburt and Parker, GSE's case was that Twintec did not send out the 15 October 2001 letter. Given the concession, that assertion is now untenable. In any event, I prefer Twintec's evidence on this point and conclude that it was indeed sent and was probably received by GSE. The letter of 15 October is in very similar terms to the 6 September draft, but with some differences. It begins by thanking GSE for their "letter of intent" dated 13 August 2001. It sets out similar details to those contained in the draft letter of 6 September 2001. It refers to the need for four site visits (as opposed to the one visit which Mr Martin had envisaged). As in the draft of 6 September, at paragraph numbered 19 the letter states "Rates: As per quotation Q0518B and remeasurable at the end of works".

47. Mr Eddy attended a Wates team meeting on 23 October 2001. The purpose of the meeting was to discuss the aims and objectives of the project, in what seems to have been a team-building exercise. I accept Mr Eddy's evidence that the meeting was to provide a forum for sub-contractors and the full design team for the B & Q project to discuss potential problems. No other flooring sub-contractor was present at the meeting. A representative of Wates stated that the floor-laying package for both internal and external work had been placed with Twintec.

48. Mr Eddy attended two meetings on site on 2 November 2001, first with GSE and then, immediately after, with members of the design team and Wates to review details of the work relating to the external slab. Mr Gilburt of GSE was present at both meetings. By then, Twintec had undertaken some detailed design. At the second meeting, Mr Eddy issued some design notes for some items; action points for Twintec on some matters were agreed. Mr Eddy viewed this as a design co ordination meeting, not a tender review.

49. Thereafter, Twintec finalised its detailed design package, taking account of matters discussed at the meetings and in subsequent correspondence.

50. Miss Tull, Twintec's Planning Engineer, said in evidence that she sent GSE a detailed design pack on 30 November 2001. Her evidence on this was not challenged. GSE's evidence initially was that they did not receive that design pack until 14 December 2001. In cross examination, Mr Gilburt conceded that GSE had received the 30 November letter but that the design section was missing. I do not believe him. Correspondence from Mr Westrop of GSE indicates that GSE had received the design pack by early December. It is plain that GSE did receive it. But GSE either chose not to send Twintec's design information to MBC, or failed to send it to MBC.

51. By 10 December 2001, Mr Dobbins for Twintec had arranged to begin preparatory work in December and complete concrete production during early January 2002.

52. Twintec learned that GSE were not proceeding with Twintec on 17 December 2001, when Mr Dobbins learned that Mr Martin was on site. It became apparent to Twintec that GSE were proposing to use Isotec for the external work. Mr Cantarella wrote to GSE on 19 December asking GSE about the employment of another contractor. Mr Parker replied to say that GSE had changed its mind and elected to use a different contractor.

53. Mr Martin's evidence was that GSE contacted him out of the blue on 12 December 2001 asking him whether Isotec would undertake the external work. Now that information from Mr Martin's copy daybook has become available (after he gave his evidence), it appears that, contrary to his evidence, there had been contact between GSE and Isotec by 7 December 2001 at the latest. It appears that GSE notified Mr Martin on 12 December 2001 that they would place an order with Isotec. These documents appear to contradict the evidence of Mr Gilbert, Mr Parker and Mr Martin as to when GSE first contacted Mr Martin. I do not believe their evidence on these points.

54. By 14 December 2001, Mr Martin was able to send GSE a fax which referred to Isotec's appointment to carry out the design and construction of the external slab and to send design notes to GSE. He arranged for materials to be delivered to site by 17 December. It now appears from Mr Martin's daybook that he spoke by telephone on, probably, 17 December 2001 to Mr Parker about the B & Q job. The notes of that conversation record:

"[Mr Parker] will send order at latest by Wednesday 19 December:

[Mr Parker] held off placing order until confirmation received by GSE legal team that GSE not in breach of contract;

DE [presumably Mr Eddy] threatened an injunction to stop job!

AD on phone several times in similar vein".

55. Mr Martin claims that Isotec began work on site on 18 December 2001.

56. In a fax dated 14 December 2001 MBC, who had learned that GSE were not proceeding with Twintec, commented that they were not surprised that GSE had chosen Isotec rather than Twintec. It is not clear on the face of the document why MBC expressed that criticism of Twintec, but it appears likely that MBC believed that Twintec had not provided the design details which MBC needed. The truth appears to be that GSE did not forward to MBC the information which Twintec had sent them. Isotec subsequently undertook the external slab work for GSE. It appears that Isotec's quotation was based on Twintec's quotation and design. A superficial comparison suggests astonishing similarities between Isotec's quotation to GSE and the detailed work which Twintec had undertaken. This suggests that MBC's comment may have related not to Twintec's design, but more likely to their perception that Twintec had delayed in providing information. If that is right, MBC's comments can now be seen to be unfair to Twintec.

57. As Mr Gilburt and Mr Parker accepted, neither had technical expertise. They were unable to appraise Twintec's design. GSE's case was that its "*change of mind*" was precipitated by alleged failures by Twintec to provide

necessary design and construction information. They no longer pursue that case. In any event, it is clear that such allegation could not be sustained. GSE made no complaint to Twintec at the time. Their criticisms appear to be without foundation, particularly when one takes into account the fact that Isotec produced, apparently at remarkably short notice, a design for the external work which appears to bear astonishing similarity to Twintec's design and which was accepted by MBC and GSE. GSE's excuses for not proceeding with Twintec do not withstand scrutiny.

58. It is not relevant for this trial to decide why GSE chose to abandon Twintec and contract with Isotec. I make no findings on those matters. However, it is not surprising, in all the circumstances, that Mr Darling concedes that GSE's position is commercially unattractive.

59. Mr Cantarella issued instructions during 2001 regarding the formalities required for contracts entered into by Twintec. In a memorandum dated 19 June 2001 addressed to Mr Martin and Mr Eddy, Mr Cantarella directed that a Twintec reply to order or order confirmation must conform to Twintec's policies regarding payment terms, credit insurance cover, retentions and performance bonds and so on. It also stated that all order confirmations had to be sent through Twintec's Rugby office and bear two signatures, including that of either Mr Wildman or of Mr Cantarella. In a memorandum dated 17 August 2001, Mr Canterella repeated the contents of his memo of 19 June, stating "I insist those procedures, defined in the best interest of the company, are fully and accurately complied with". It is clear that, here, these formalities were not complied with. Mr Canatarella's evidence that Mr Martin's character was such that he would abide by such instructions if it suited him, but not otherwise. Mr Martin trod his own path. Sometimes that approach was successful for Twintec, sometimes it was not. Mr Martin's evidence was that he would not have disobeyed such instructions, as to do so would have put him at risk of losing his job and interest in Twintec. Having seen Mr Martin, I understand and accept Mr Cantarella's analysis. Mr Martin and Mr Cantarella were on poor terms by mid July 2001. Mr Martin was very much his own man. I conclude that Mr Martin was in no mood to comply with instructions issued by Mr Cantarella.

60. During August 2001, Mr Wildman attempted to arrange a credit insurance policy for the project, with Gerling. Gerling declined to cover GSE. Mr Wildman contacted Mr Forman, GSE's finance director, who agreed to provide information which would enable Gerling to reconsider the question of cover. Mr Wildman obtained further information about GSE at the end of November 2001 and asked that Gerling contact Mr Forman directly and then to reconsider the application for cover in respect of GSE. However, no credit insurance cover was put in place.

Conclusion

61. Twintec's case is that their offer to undertake work, in their quotation Q0518B dated 31 July 2001, was refined during the meeting on 2 August 2001 and was accepted by GSE by their letter of 13 August. By the date of the letter of 13 August, all material terms had been agreed; only the sequencing of work remained. Mr Dobbins' evidence that, during November 2001, he agreed sequencing of pours with Wates and GSE, was not challenged. GSE's case is that their letter of 13 August 2001 did not amount to an acceptance of Twintec's quotation of 31 July 2001 because on its face, the letter of 13 August was not and was not intended to be acceptance of an offer. The letter of 13 August 2001 referred only to an intent. It did not amount to an offer capable of acceptance. If, however, the letter of 13 August did amount to an acceptance, it did not in fact accept the offer contained in the quotation. The 13 August letter did not accept an offer contained in the 31 July letter. There are significant differences between the two: (1) Twintec quoted for a re-measurement contract; GSE's letter referred to a lump sum fixed price job (2) Twintec's quotations assumed shared risks; GSE's letter assumed Twintec would take all risks. Further, issues relating to retention remained unresolved. Of the critical matters outstanding and unresolved, namely remeasurement, all risks and retention, only remeasurement was dealt with at the meeting, leaving outstanding two issues of critical importance, namely risk and retention. There was no meeting of minds. No contract was formed.

62. The court was and is faced with an unusual state of affairs. The issue which has emerged is whether Twintec's offer of 31 July was accepted at the meeting on 2 August or clarified at that meeting and accepted by GSE's letter of 13 August. That case was not originally pleaded, nor was it set out in witness statements, nor has it been suggested in any document before trial. It is understandable that Twintec has not been able to put that case until trial. Information about the meeting was, in effect, available to GSE only: they were able to obtain that information from Mr Parker, and, it appears, from Mr Martin who has been willing to assist GSE at material times.

63. I have set out already my conclusions as to the matters discussed at the meeting on 2 August 2001. In summary, it is clear to me that Mr Martin agreed that GSE could choose whether to contract on a lump sum basis, knowing that that gave Twintec some benefit on quantities, or to contract on a remeasurement basis. At the meeting, Mr Parker chose the former. By his letter dated 13 August 2001, Mr Parker confirmed that choice.

64. It is not suggested that Mr Parker did not have authority to commit GSE. Mr Martin ignored the written instructions issued by Mr Cantarella, but it is not suggested that he did not have authority to commit Twintec to a contract with GSE on a lump sum, fixed price basis.

65. By 13 August 2001, the quality and scope of work was clearly identified and identifiable. The site boundaries did not change. GSE did not challenge Twintec's case that the detailed design was to be developed post contract award.

66. GSE's case is that the absence of agreement on risk and retention prevented contract formation. I reject that. So far as risk is concerned, by agreeing to proceed on a fixed price basis, Twintec agreed to take all risks. As for retention, while Mr Martin's manuscript notes, at item 7, indicate that retention was discussed, there is no evidence as to what, if anything, by 13 August 2001 the parties had agreed with respect to retention. On the available evidence, I accept Miss Gough's submission that, on its true construction, the contract was not subject to any retention. In any event, in my judgment retention was not a material term the absence of which prevented contract formation.

67. The fact that the GSE's letter of August describes itself as a letter of intent is not material. I have given consideration to passages in ***Chitty on Contract***, Vol. 1, 2-115, ***Hudson Building and Engineering Contract***, 11th Edn, Vol.1, 3-071 and ***Keating on Building Contracts***, 7th Edn 2-08. There is no settled law on the meaning and effect of letters of intent. The court must decide each case on its facts. It was clear from the evidence that GSE was committed to Wates and needed to secure Twintec's services quickly. Mr Martin and Mr Parker both appear to have proceeded on the basis that a letter of intent would constitute commitment by GSE. It was capable of amounting to an acceptance of Twintec's offer. As a matter of fact, it did amount to such an acceptance.

68. Credit insurance was never a term of the contract. It was simply an internal issue for Twintec. Twintec wanted to achieve it but the question of insurance was not a deal breaker. At the time this was an issue, the assumption, apparently on both sides, was that the deal was on, materials had been ordered and Twintec had mobilised for a proposed start on site during December. The inference is that, if credit insurance could not be arranged, Twintec would have proceeded without it.

69. I need not spend time on the letter of 15 October 2001. Twintec accept that it was inaccurate. Twintec do not rely on it as constituting a final record of the terms of the contract. As Mr Martin had not briefed Mr Eddy, it is understandable that the latter wrote as he did in both the 6 September draft and the letter of 15 October, suggesting a remeasurement basis. But as the contract had been formed before both letters were written, the 15 October letter is of no contractual effect.

70. I am reminded of the basic legal requirements of offer, acceptance, intention to create legal relations and consideration, and am referred to passages in ***Chitty on Contracts***, Vol 1.paras 2-002, 2.024 and 2.025. By their quotation Q0518B, Twintec offered to undertake work. I have set out already my conclusions as to the matters discussed at the meeting on 2 August 2001. It is clear to me that Mr Martin agreed that GSE could choose whether to contract on a lump sum basis, knowing that that gave Twintec some benefit on quantities, or to contract on a remeasurement basis. Twintec's offer of 31 July 2001 thus was modified by the discussion on 2 August, to the effect that Twintec offered to contract either on a fixed price, lump sum, all risk basis for £637,897.46 or on the basis of remeasurement at the rates set out in the quotation and subject to MCD of 2.5%. Mr Parker informally accepted the former. In their letter of 13 August 2001, GSE formally accepted the fixed price, lump sum, all risks approach.

71. There is no suggestion that there was any lack of consideration.

72. It is clear from the evidence of matters discussed at the meeting on 2 August that both Mr Martin and Mr Parker intended to do a deal if possible. There was a pressing need for design work to begin. I conclude that GSE and Twintec both intended that their respective companies should create legal relations.

73. I conclude that Twintec and GSE contracted at the latest on 13 August 2001 whereby GSE would undertake work to the external slab at the B&Q site as detailed in Twintec's quotation Q0518B dated 31 July 2001 for £637,897.46, on terms whereby Twintec would assume all risks for the contract. At that point, all essential terms, as to price, scope and programme, were agreed. The only outstanding issue was the sequence of work. The parties expressly agreed that that be decided later. It was, in fact, resolved by the end of November 2001. It is not suggested that absence of agreement as to the sequence of work prevented contract formation.

74. Broadly, post-contract events do not assist greatly. Some are consistent with Twintec's case, some with GSE's case. None detracts from my firm conclusion as to events up to GSE's letter of 13 August 2001.

75. Twintec's secondary case is that, if any matters were outstanding after 13 August 2001, they were resolved. Mr Darling conceded that, although Twintec's evidence strictly did not cover all the matters referred to in paragraph 4.7 of Twintec's reply, he would meet the case as Twintec were, in fact, putting it. GSE's case is that, whether or not the 15 October 2001 letter was received by them, the parties did not regard themselves as bound by a contractual relationship, and by December 2001 many critical matters were still outstanding. Given my findings and conclusions with respect to Twintec's primary case, it is not necessary for me to deal with Twintec's secondary case and I decline to do so.

76. I have explained earlier why I consider the fact of registration with Twintec's parent company on 2 August to be of assistance in understanding the evidence. Otherwise, the fact of registration is an internal matter for Twintec and is not a factor which I take into account when deciding, objectively, whether or not a contract was concluded.

77. It follows that Twintec succeed on liability.

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