

JUDGMENT : His Honour Judge Thornton Q.C. TCC. 21st January 2001

1. Introduction

1. This dispute is, essentially, about whether the parties entered into a contract in March 1992 for extensive redevelopment works to a former Cold Store in Kangley Bridge Road, Sydenham, Kent, SE26 so as to convert it into a 24-hour coach depot for the claimant ("Clarke") when it moved from its former base at Minden Road, London, SE20. The claimant ("ACT") is a small contracting company whose moving spirit is Mr Antony Blake. This company is now insolvent, having gone into voluntary liquidation in December 1998 and the action is now brought by the liquidator, Mr KS Tan, with the active support and assistance of Mr Blake who gave evidence at the trial. Clarke is a successful coach operator who owns and manages a fleet of coaches for private hire. Clarke is a family-owned company which is now run by the third generation of that family. The moving spirit of the company during the events with which this action is concerned was Mr Bill Clarke, its then Managing Director. He retired on 1 November 1997, several years after those events and was then appointed its Chairman, being succeeded as Managing Director by his two daughters as joint Managing Directors. He gave evidence on behalf of Clarke at the trial.
2. ACT now claims the balance of what is alleged to be due to it following the completion of the work it undertook for Clarke between April 1992 and May 1994. At the outset of the trial, the parties agreed that I should initially determine certain crucial issues that had arisen in the anticipation that resolution of those issues would enable agreement to be reached as to the overall dispute. These issues are as follows:
 1. Was there a contract entered into between the parties?
 2. If so, what were the terms, if any, of that contract as to:
 - (1) payment;
 - (2) a cap on overall recovery by the claimant;
 - (3) the scope of work;
 - (4) the contract period?
 3. Was the claimant entitled to the claimed markups? If not, was the claimant entitled to reasonable markups and, if so, what would those reasonable markups be?
 4. Was any contract or any entitlement of the claimant to payment illegal and unenforceable?

2. The Factual Background

2.1. Clarke

3. Clarke was incorporated in 1964 with Mr and Mrs E. Clarke, their son Mr Bill. Clarke and their daughter-in-law, Mrs Tania Clarke as the four directors. Mr and Mrs Bill Clarke have two daughters, Mrs Deborah Newman and Mrs Paula Marks who are now Clarke's joint managing directors. In 1976, Clarke acquired land at Minden Road, London, SE20 and developed it into a coach depot. Clarke was run from these premises from 1976 until July 1992. By the late 1980s, Clarke was operating about 20 coaches from that depot but the business has now expanded such that it was operating about 40 coaches in 1992 and, by 1997, it was operating about 70 coaches with an annual turnover of about £5.5m. Relationships amongst the family members of the Board of Directors were not harmonious in the relevant period between 1991 and 1994. The marriage between Mr and Mrs Bill Clarke broke down in this period and they separated in March 1993. Mrs Clarke was the company secretary, a role she had held for many years and which she continued to hold until June 1998 on a daily basis. Furthermore, for much of that period, relations between the two sisters and between each sister and their mother were strained. Despite these personal difficulties, the company flourished, albeit that its administration was under strength. Mr Bill Clarke's principal interest was in the workshop and he invariably worked from about 2.00am until early afternoon, largely in the workshop. He also had a very influential role in the running of the business.
4. Mr Clarke conducted all his business in one to one discussions. He left all the paperwork to his family, particularly Mrs Tania Clarke who was responsible for the book keeping and the payment of all invoices. His daughters, Mrs Newman and Mrs Marks, undertook, before they became joint Managing Directors, such administrative tasks as their parents left for them to undertake. The company also had the use of a retired bank manager as a financial consultant, Mr Gordon Cairns. He had been Clarke's bank manager at the Midland Bank before his retirement and had been engaged for his financial acumen. Clarke also had experienced transport and traffic managers as part of its management. Apart from the management and about 4 staff working in the workshops, the remaining staff were drivers. The number of drivers had risen to over 100 by 1995.

2.2. ACT

5. Mr Blake started his working life by undertaking a sandwich civil engineering course at Enfield College of Technology and working with Sir Robert McAlpine Ltd. In 1967 he joined Cementation Construction Ltd as a section engineer. During his working period with Cementation, he met Mr Roger Hornsby and Mr Chris Fuller and these three set up ACT in 1976. The company traded in a relatively small way of business as civil engineers and builders. Mr Hornsby had worked as a site engineer for many years following a short period in the army as an Officer Cadet and Captain in the Royal Engineers. He retired voluntarily from the army in 1970. Mr Fuller has a BSc in Civil Engineering and, since 1965, he had worked on site for, and in the offices of, several civil engineering contractors. He left ACT in 1989. Soon afterwards, Mr Chalmers joined ACT to replace him. The estimating was done by Mr Blake and, whilst he remained with ACT, Mr Fuller, the building work was run by Mr Blake with Mr Chalmers and the civil engineering work by Mr Hornsby.

6. Mr Blake first met Mr Clarke during the time that his fellow director, Mr Fuller was acting as an expert witness in High Court litigation that Clarke's was involved with in the period 1986 - 1988. This led to the first of several jobs that ACT carried out for Clarke in the following 4 years. In that time, Mr Blake and Mr Clarke established a good social relationship such that the two would, in the period leading up to ACT's start of work on the major work it carried out at the Kangley Bridge Road site and during the early stages of that work, have a drink together on a regular basis and Mr Clarke was invited to, and attended, Mr Blake's fiftieth birthday party on 31 October 1993. It was only in 1994 that relations between them cooled following the cessation of ACT's involvement on the site.
7. ACT has always had a relatively small turnover. In the five years leading up to the start of work on site at Kangley Bridge Road site, the company's annual turnover was no more than one million pounds per annum. Towards the end of this period, the annual turnover was in decline so that, during the first period of the work carried out at the Kangley Bridge Road site, a limited number of other contracts were being carried out. However, once the scope of the work was scaled down in early October 1992, the only other work being undertaken by ACT was some shop fitting work in 1993. The turnover of ACT in the years 1993 and 1994 was, successively, £429,348 and £282,622. The company effectively ceased trading in 1995 although it was not placed into voluntary liquidation until 1998.

2.3. ACT's work at Minden Road

8. Clarke had operated out of its depot at Minden Road since 1976 and, by the late 1980s, the business had outgrown these premises. Moreover, the premises were in an unsatisfactory condition. In the early 1980s, extensive work had been carried out involving, amongst other features, a new drainage system installed under the suspended precast concrete slab of the yard. This had been constructed to inadequate falls and continuously backed up. The problems associated with this work led to litigation which went disastrously wrong for Clarke since the case was struck out in 1989 because the claim was found to be barred by limitation. It was this case and Mr Fuller's involvement as Clarke's expert witness which led to the first contact between Mr Blake and Mr Clarke.
9. The first job undertaken by ACT at Minden Road was a small one and involved Mr Fuller arranging for ACT to replace a smashed manhole cover in March 1988. This led to two further more substantial jobs. Initially, between August 1989 and March 1990, ACT carried out extensive rectification work to the yard and drainage system to a total cost of £56,163. This work had been preceded by a budget quotation for each general item of work and was carried out on a time and materials basis. The work largely followed the work specified in Mr Fuller's expert's report prepared for the litigation against the previous builder. The second job carried out was the construction of the structure of a coach washing facility between October 1989 and January 1990. This contract did not include the supply or installation of the plant and equipment forming the washing facility other than the drainage and electricity supply outlet. The work was carried out under a contract made when Clarke accepted ACT's fixed price quotation in the sum of £31,740 plus VAT. The drawings showing the work formed part of this contract and these had been prepared by, or on the instructions of, ACT who also carried out the necessary work to obtain planning permission and building regulation approval for the work.
10. It was suggested by Mr Blake that these three separate jobs created a course of dealing between ACT and Clarke which provided the basis for the method of charging for work carried out at the Kangley Bridge site in subsequent years. However, no such course of dealing evolved as a result of these contracts. The first job was a minute one-off piece of work which resembled the kind of call-out any householder or small business makes on a regular basis to repair or remedy a specific defect or blockage. Thus, this was a normal dayworks based contract. The second job was undertaken on a quantum meruit basis. A budget estimate, not broken down, led to the work being carried out without a formal contract being made and to a time and materials basis of charging being adopted. The budget estimate would have provided a guide as to the overall sum to be charged. The third job was undertaken as a conventional fixed price contract with a defined scope of work and clearcut contract terms. There is no evidence that Clarke was shown or provided with the breakdown of the lump sum price and this did not form one of the contract documents. It follows that each of the jobs was carried out under very different bases of working and pricing and that no course of dealing could have arisen.

2.4. Before Work at Kangley Bridge Commenced

11. Clarke's business, and hence its coach fleet, had expanded in size in the late 1980s and, as a result, the parking and maintenance of the fleet became increasingly problematic. In late 1989, as a partial solution to this problem, Clarke investigated the installation of a coach wash at the Minden Road depot in conjunction with covering the whole yard. This would assist Clarke in regularising the planning status of the site since it was having to carry out bodywork repairs in the yard at the depot, an activity which was not in conformity with then current planning status of the site. Mr Clarke asked Mr Blake to prepare the necessary plans and seek planning permission for these changes with a view to ACT then carrying them out. Once the application had been submitted, it became clear, from discussions with the Planning Officer that permission would be unlikely, partly given the proximity of adjacent residential premises. The Planning Officer confirmed Clarke's inclination that the Minden Road depot was too small and that it would be better placed moving to larger and more convenient premises.
12. The potential planning difficulties associated with the extension of the facilities at the Minden Road depot occurred at the same time as Mr Clarke first became aware, in September 1990, of a disused cold store previously owned by Birds Eye that was available to purchase at Kangley Bridge Road, Sydenham, Kent which was within a reasonable distance from the existing depot at Annerley in South London. The site was being

marketed at a price of £840,000. However, it presented a number of difficulties to Clarke. Firstly, planning permission would be needed for the conversion and refurbishment work and for the change of use to a coach depot. Secondly, the site itself was at different levels which would create potential access and movement difficulties for coaches. Thirdly, much structural demolition and reconstruction and office refurbishment would be required. However, potential coach depot freehold sites close to South London were difficult to acquire and Mr Clarke was immediately attracted to this one.

13. Following initial favourable discussions with the vendors, Vestey Estates, Clarke agreed, subject to obtaining the necessary planning permission, to purchase the site for £840,000.

Clarke needed permission to operate a coach depot on a 24-hour, round the clock basis and to undertake the extensive refurbishment work that would be needed by Clarke to operate the coach business. The planning application and the associated drawings were prepared under Mr Blake's direction. Mr Clarke had built up a rapport with Mr Blake and had taken him to the site on a number of occasions to discuss the necessary refurbishment. Mr Clarke then invited Mr Blake, in early November 1990, to assemble a professional team and prepare the necessary documents for the application. It was envisaged by both men, from that moment, that ACT would carry out the necessary work if the project proceeded.
14. The first step taken by ACT was to survey the drainage, the roof and the existing cold store in November 1990. The land was also surveyed, trial holes were dug out and windows boarded up. This work was invoiced and paid for, as would be normal for such work, on a daywork basis. The necessary drawings were then prepared for the planning application which was submitted in January 1991. Planning permission was granted on 30 April 1991. Unfortunately, there were three unacceptable conditions attached. These would have prevented 24-hour continuous coach maintenance work being carried out as well as any maintenance work being carried out under contract for other operators. Vehicular access into the depot would also be adversely affected. In consequence, a further planning application was submitted in May 1991 whose objective was to secure the removal or acceptable modification of these conditions. On 22 July 1991, the Planning Authority, the London Borough of Bromley, granted a permission which removed the limitation preventing work being carried out for other operators but confirmed the other two conditions previously imposed.
15. Clarke's intention had been to sell the Minden Road site simultaneously with the acquisition of the Kangley Bridge Road site. A prospective purchaser made an acceptable offer for £900,004 in November 1990. Unfortunately, that bidder withdrew soon afterwards just when Clarke's business, which was heavily dependent on hiring coaches out to tour operators for tourist use, was badly hit by the slump in the tourist trade to the United Kingdom following the outbreak of hostilities in the Gulf in 1991 following Iraq's invasion of Kuwait. In consequence, Clarke put the project of acquiring a new site on hold. This freeze lasted until October 1991 when a new prospective purchaser came forward for the Minden Road site, a heavy plant operator who made an acceptable offer of £606,000 subject to obtaining the necessary planning permission for the necessary change of use of the site. A planning application was submitted to the London Borough of Bromley in December 1991.
16. Meanwhile, Mr Clarke asked Mr Blake to restart the work needed to finalise the details of the renovation work at Kangley Bridge Road. This involved meetings with potential suppliers of equipment, which Mr Clarke was heavily involved in since he wished to negotiate all relevant prices, and with potential subcontractors and materials suppliers. These meetings occurred in the early weeks of 1992. During the course of these discussions, Mr Clarke decided that the proposed workshop was unsatisfactory and instructed Mr Blake to prepare new proposals which combined the proposed preparation and spray booths and to incorporate these with a double inspection pit into a new building which would be the vehicle workshop. This led, finally, to an application to amend the existing planning permission being forwarded with details of the revised layout and the new workshop on 6 April 1992. Approval was granted on 28 May 1992.
17. The application for a change of use at the Minden Road Depot did not proceed as speedily as Clarke had hoped because the planning officer dealing with the application informed Clarke that it could not be approved until acoustic test results were available which showed that sound levels arising from the use of the site as a heavy plant storage depot would not exceed those that had resulted from Clarke's previous coach depot usage. This requirement was communicated to Clarke at a meeting held on 17 March 1992. The necessary testing inevitably caused a delay from that date for obtaining permission for this change of use which was granted, with conditions attached, on 11 June 1992. However, the subsequent negotiations with, and delays created by, the prospective purchaser meant that contracts for the sale of the Minden Road Depot did not occur until 3 December 1993.
18. By early 1992, Mr Clarke decided that Clarke would have to proceed with the acquisition of the Kangley Bridge site without a sale of the Minden Road site having been achieved. Clarke's difficulties in operating their expanding fleet of coaches from the unduly small site at Minden Road were becoming critical. Moreover, Vestey Estates were continuing to market that site and Clarke was fearful of losing it to another purchaser, given the unlikelihood of finding an appropriate alternative site for its relocated depot. In consequence, Mr Clarke instructed Mr Blake to embark upon the necessary work that would enable the renovation of the Kangley Bridge site to commence and, at the same time, he instructed Clarke's solicitors to achieve the purchase of that site. As a result, in the period January - March 1992, Mr Blake arranged for the necessary design work to give effect to Mr Clarke's change of mind as to the location and layout of the workshop. He also arranged for the detailing to be undertaken of the basic electrical layout of the workshop; for essential setting out works to be undertaken; for the obtaining of costings for the supply and erection of the structural steelwork, for the supply of building

materials and for the removal of asbestos and muck from the site; and for the obtaining of costings for, and design information for the installation of, equipment such as brake and headlight testing equipment.

19. The pre-contract conveyancing work for the Kangley Bridge Road site proceed so that contracts were exchanged on 9 April 1992, 3 days after the application for a revision of the planning permission based on the revised layout of the workshop required by Mr Clarke had been submitted and completion occurred on 24 June 1992 immediately following the grant of that revised permission. ACT was instructed to start work on site and that work started on 6 April 1992. The basis upon which that work started is the principal dispute that I must resolve.

2.5. Definition of the Job at Kangley Bridge

20. Mr Clarke, in his thinking about the renovation work at the Kangley Bridge site and in his evidence, always referred to this project as "the Job". This shows the importance to him and to Clarke of the project consisting of the acquisition and renovation of this site and of Clarke's move there from the existing depot in Minden Road. The detailing and costing of the Job was largely left to Mr Blake but Mr Clarke insisted on taking the lead in all negotiations as to the type of equipment and its cost that would be installed in the new workshop. He was able to obtain very competitive trade discounts for this equipment.
21. The outline of the Job was contained in the planning applications submitted in 1991 as amended in the application to amend the permission submitted on 6 April 1992. Mr Clarke wanted "the best" that money could buy. In other words, he wanted, in his mind, a coach depot which would reflect the fact, as he proudly saw it, that Clarke was the best coach fleet operator in the United Kingdom. Mr Clarke's view was justified by Clarke's then turnover and rate of expansion and by other coach operator's favourable opinions. Mr Clarke visited a number of other coach depots in 1991 to help him formulate his requirements. Given his informal methods of working, all his ideas were communicated to Mr Blake verbally, usually during site visits to Kangley Road.
22. The site was essentially triangular in shape with a narrow rectangular extension leading away from one corner. Access to the site was from Kangley Road in a second corner of the triangle. The original Job involved the demolition of the cold store and other buildings, the construction of a workshop and a separate building housing a spray booth and preparation area and the partial demolition of the office block coupled with the construction of a second storey on the remaining section of the block and the construction of an extension linked to the existing block by a bridge. The whole of the central area, where the coaches would be parked, would be paved and covered and would incorporate a vehicle wash area. The revised Job involved an extensive change to the layout. The workshop, spray booth and preparation area became one building and a double inspection pit was added and the shape of the covered parking area was altered so as occupy the area released by the merging of the two vehicle maintenance buildings. The overall Job would require a great deal of demolition and the drilling out of concrete and excavations, the construction of structural steel framing, cladding, extensive roofing and paving, the installation of equipment purchased by Clarke and the partial demolition, building, rebuilding and refurbishment of office accommodation.

3. Was there a contract entered into between the parties?

23. Clarke's case is that Mr Clarke and Mr Blake entered into an oral contract at the Kangley Bridge site towards the end of March 1992 in the simplest terms, namely that ACT would construct "the Job", inclusive of the supply and installation of the necessary workshop equipment, for £815,000. The contract arose because Mr Clarke had finalised negotiations for the purchase of this site for £815,000 and was about to exchange contracts with Vestey Estates and no longer wanted to await the exchange of contracts for the sale of Minden Road. In consequence, he arranged to meet Mr Blake on site and asked him what the maximum price would be for designing, supervising and constructing the Job and, according to Mr Clarke, was informed by Mr Blake that the maximum price would be "what you are paying for the site". Mr Blake also informed him that he would get the best coach station in Great Britain for that price. The two then shook hands and cemented the agreement with a drink in a local pub. There was no other discussion about the precise scope of the work, the contract period or as to when work would start. However, it was understood between them that work would start as soon as contracts were exchanged. Mr Clarke was adamant in his evidence that he always did business in this informal way, that he always expected his business partners and suppliers to honour their agreements, particularly as to price, and that Mr Blake was well aware as to his business methods.
24. Clarke's case, as developed during the trial, was that the scope of the work was clear, given the detailed planning and design work and costings already undertaken by Mr Blake, that Mr Blake would have been clear that he should proceed with all speed and that ACT confirmed the contract by immediately mobilising its labour and starting work on site on 6 April 1992- All the ingredients for a contract were therefore in place.
25. Mr Blake denied that the meeting that clearly took place discussed a price for the work, whether as a prelude to reaching agreement or even as a guide to the overall cost as part of a general conversation. He stated that Mr Cairns, who did not give evidence, was present and that Mr Clarke wanted to start work at the Kangley Bridge site as soon as possible but on a piecemeal basis since he had not yet sold the Minden Road site and he wanted flexibility and the ability to turn expenditure on and off like a tap. Thus, he agreed to provide a labour force to undertake phase 1 of the work on a time and materials basis and would start within days.
26. This conversation was, according to Mr Blake, evidenced by a letter dated 27 March 1992 that he sent to Mr Clarke soon after the meeting in question. The letter reads as follows:
"Dear Bill,

RE: PROPOSED NEW COACH STATION - KANGLEY BRIDGE ROAD SYDENHAM. SCHEDULE OF WORKS FOR PHASE ONE

Please find enclosed a copy of my letter dated the 27th March 1992 to Messrs. R.A. Roberts together with the schedule of works we intend to carry out for Phase One.

I confirm having faxed copies to Paul Winterflood and Terry Bigby.

Yours sincerely,

for A.C.T. Construction Limited

A. BLAKE

Managing Director"

The letter referred to was addressed to Mr J. Langshaw of R.A. Roberts who were the Vestey Estates' solicitors acting in connection with the sale of the site and Mr Bigby was the individual within Vestey Estates dealing with that sale. Mr Winterflood was Clarke's solicitor. The letter to Mr Langshaw read:

"RE: KANGLEY BRIDGE ROAD, SYDENHAM.

In accordance with a request from Mr Bigby of Vestey Estates please find enclosed schedule of works for PHASE ONE which we propose to carry out at the above site.

If the legal formalities can be finalised quickly we propose to commence these works on 6th April 1992.

Please give me a call if you require any further clarification.

Yours sincerely,

A. Blake

Managing Director"

The schedule of works sent to both Mr Clarke and Mr Langshaw read as follows:

"NEW COACH DEPOT FOR E.CLARKE & SON COACHES LIMITED AT KANGLEY BRIDGE ROAD, SYDENHAM.

SCHEDULE OF WORKS FOR PHASE ONE

1. Demolition of main cold store, refrigeration room and workshops.
2. Break out of existing concrete slab to area of existing workshops and refrigeration room, general excavation up to maximum depth of 1.0 metres and construction of steel framed building for new vehicle workshop, spray booth, stores, toilets and offices for fitters and workshop staff.
3. General excavation and break out at main entrance and construction of steel framed and cladded building to house new vehicle washing facilities.
4. Construction of new transformer and service intake building at main entrance.
5. Remedial works to main drainage adjacent to single storey office block and widening of access road.
6. Refurbishment of single storey office block and conversion to two storeys.
7. Works to retaining wall abutting Sydenham Sports Club in order to raise general level of parking area.,,

Neither Mr Clarke nor Clarke answered this letter but it was accepted by Clarke that it was received by Mr Clarke.

27. I accept Mr Clarke's evidence as to the contents of the conversation. He is a patently straightforward and direct individual and, in his mind, a contract or deal was struck at the meeting. Mr Blake, in denying that he mentioned a price, was clearly doing so because he was concerned that any admission that a price was discussed would weaken his case that no contract was entered into save as to an agreement at the daywork rates and as to overhead markups that would be paid on the time and materials arrangement he contended had been entered into. However, an "agreement" as to the lump sum ceiling to be paid for the work to be undertaken does not necessarily suffice to create a legally enforceable contract.
28. The essential ingredients for a building contract of some complexity are agreements as to the scope of work and the price. In this case, neither were defined with any precision.
29. The scope of work was, in Mr Clarke's mind, the Job coupled with a wish for a coach station of the highest quality or one that was "state of the art". However, there had clearly been a discussion between Mr Clarke and Mr Blake about phasing the work. That had led Mr Blake to prepare the schedule of works for phase one that he sent to Mr Clarke. This schedule omitted the roofing work covering over the yard where the coaches would be parked, the paving of that area and the refurbishment of the existing two storey office block. Mr Clarke, in evidence, insisted that the paving work formed part of phase one and that the work to the office blocks was to include the refurbishment of the existing two storey block but was not to include the construction of a new storey to the single storey block. However, the precise content of the two phases had not been finally agreed. Further, permission to amend the planning permission in the vital respects required by Mr Clarke had not been obtained and the scope of Clarke's requirements could not be finalised until that permission had been obtained. It followed that the scope of the work, even in outline, was not agreed since Mr Clarke wanted "the Job" to be constructed whereas Mr Blake envisaged only phase one as being required, there was no agreement as to the scope of phase one and, overriding these uncertainties was the absence, at that time, of a finalised amended planning permission.
30. The scope of the detailed work was also not finalised. The drawings and specification of work had not been finalised, there was no clear agreement as to the extent to which the equipment being ordered and paid for directly by Mr Clarke would be included within the scope of work or its price and the timescale had not been

discussed and could not be until Clarke had finally exchanged contracts for the site and had a date for completion. Even then, given the uncertainty of Clarke's cash flow which was dependent on a sale of the Minden Road site, a timescale would not be capable of being finalised.

31. Finally, the actions of the parties belied there being an intention to create legal relations with immediate effect. Mr Blake's letters to Vestey Estates and its solicitors and to Mr Clarke and his solicitor are consistent with there being an understanding that a formal contract between Clarke and ACT would be entered into in the future but inconsistent with there being a contract already having been entered into. These letters are also consistent with an understanding that ACT would start work on a piecemeal basis with a formal contract being contemplated in the near future. It would be unlikely that the parties would have envisaged a binding and enforceable contract being entered into for the Job before Clarke either acquired an interest in the site, save as a bare non-contractual licensee, or had had confirmed to it that an amended planning permission would be forthcoming or had a clear idea as to when and for what price the Minden Road site would be sold.
32. What was clearly envisaged was that Mr Blake would work up his detailed drawings and costings into formal contract documents on the basis that he had provided an acceptable estimate for the work of £815,000. These documents would then be used, assuming the detailed costings they contained were acceptable to Clarke, to form the basis of a contract which would be entered into when Clarke had acquired the site and an amended planning permission and had a clearer idea as to the timescale it could afford. In the meantime ACT would make a start on site on an informal basis without any contractual framework. That work would, in other words, be paid for as and when it was carried out on the basis of a reasonable remuneration. Since no different basis was ever discussed or agreed to, all subsequent work on site was carried out on that non-contractual basis.
33. It also follows that questions as to the terms of any contract as to payment, a cap on ACT's overall recovery, the scope of work and an overall contract period do not arise.

4. Was any contract or any entitlement of the claimant to payment illegal and unenforceable?

34. The question arose during the trial as to whether ACT could enforce any entitlement to further payment in the light of a suggested fraudulent or illegal rendering of invoices to Clarke in April 1992. There are 7 invoices that are relevant to this issue. They are as follows:

1. *Interim Application No 8 dated 3 April 1992 "For works carried out as follows:*

"Carry out repairs to existing roof, demolish walls, partitions and sundry items as necessary to accommodate installation of central heating system. Break out reinforced concrete floor and edge beam to allow installation of new ducts for additional electrical services. Allow for pumping as required. Make good floor. Decorate throughout following alterations. On Account ... £65,000 plus VAT @ 17.5% of £11,375."

2 *Interim Application No 9 dated 10 April 1992 for works carried out as follows:*

"Break out concrete road surface, excavate trench across road and install new ducts to facilitate additional electrical mains and new gas service.

Construct services "bothy" to house all incoming services and meters.

Break out concrete road throughout length of site to facilitate installation of new ducts for incoming gas services, larger water main and new electrical mains. On Account ... £52,000 plus VAT of £9,100."

The other invoices were for sums (excluding VAT which was also invoiced) of £87,000 (dated 17 April 1992), £72,000 (dated 24 April 1992), 28,000 (dated 30 April 1992), £37,500 (dated 30 April 1992) and £175,000 (dated 30 April 1992). Mr Clarke stated that these invoices were asked for by Clarke's accountant because Mr Clarke wanted to include within the end of year financial accounts sums reflecting part of the cost of the Job. These sums were put into Clarke's 1992-1993 and accounts. However, Clarke did not expect to pay them immediately because it did not have the money to do so. The payment for the work that had just started would be made later in the year when Clarke's cash flow, dependent on the summer holiday trade, would have allowed for it. Mr Blake stated that he had been asked for invoices totalling about £350,000 by Clarke's accountant and prepared and supplied to Clarke's accountant a total of 7 invoices which totalled this sum and which described some parts of the work which were to be performed. ACT received no benefit as a result of these invoices or for providing them to Clarke.

35. Neither party pleaded or relied in their pleadings on this conduct but Clarke in submissions suggested that this conduct was both dishonest and precluded Clarke from recovering anything in this action since, to recover, it had to rely on these invoices which had been prepared and provided for a dishonest purpose, namely to enable Clarke to prepare and put into circulation a tax return and accounts which included these sums as expenditure in the financial and tax years 1991 - 1992 and 1992 - 1993 when such sums had neither been legitimately invoiced, incurred as a liability nor paid.
36. It is unfortunate that such a serious allegation was not pleaded at all nor advanced before the trial. However, Clarke suggested that it was one which had to be dealt with by the court, notwithstanding its absence from Clarke's pleaded case. Because it had not been pleaded, ACT has not had any opportunity to explore what use had been made of these invoices or whether any inclusion of the invoiced sums in ACT's accounts resulted in dishonestly prepared tax returns or annual accounts. Indeed, there was no evidence as to what use was subsequently made of these invoices once they had been received by Clarke. All the court had was an assertion made by Clarke's counsel closing submissions that Clarke's use had been a dishonest one. This remarkable situation, in which Clarke raised for the first time during the trial the suggestion that it fraudulently solicited

invoices from ACT to enable it to have finalised fraudulent annual accounts and fraudulent tax returns, came about purely as a result of forensic opportunism. Clarke, seeing that its case based on a contractually agreed ceiling was weak, decided to seek to avoid liability by adopting an alternative argument that any entitlement to payment was unenforceable, a route only open to it if it asserted that it had been a party to the suggested fraud.

37. In the light of these procedural considerations, I have examined the suggestion that the invoices were solicited and used for a fraudulent purpose with some care. I am unable to find that these invoices, which Clarke had solicited unilaterally and without prompting from ACT, were used for any dishonest or illegal purpose. It is one thing to speculate what use was made of them but quite another to make findings of dishonest and illegal conduct on the sole basis of the invoices themselves. Since the parties envisaged, in April 1992, that a formal contract based on prices very similar to those contained in the invoices, was imminent and since Clarke clearly envisaged, in 1992, spending at least the sums invoiced on the refurbishment of the Kangley Bridge Road site, it is not surprising that Clarke's accountants might contemplate using invoices of the order of magnitude in question in Clarke's 1991 - 1992 and/or 1992 - 1993 accounts. It would be a matter of accounting convention and accountancy practice whether the use of the invoices in this way was impermissible let alone dishonest and if Mr Blake was asked to provide such invoices by Mr Clarke because Clarke's accountants wanted them, it cannot be said that Mr Blake was, when providing the sought-for invoices and with no financial advantage accruing to him, acting illegally or dishonestly or that these documents were themselves to be regarded as void and illegal.
38. Finally, even if the invoices were illegally prepared or were intrinsically illegal, that would not affect the present claims. ACT's cause of action is based on a quantum meruit. It is not based on an agreement to pay for work at agreed rates or prices. The invoices, if they evidence anything, or if they can be said to be relied on at all, could only evidence or be relied on to support a contractually based claim. However, no such claim is open to ACT and the claim said to be unenforceable as a result of these invoices is one which is not dependant upon, is not evidenced by, nor is it in any way related to, the contents of these invoices.
39. Thus, there is no evidence of fraud or illegality and, even if there had been, it would not preclude the present claims for a quantum meruit.

5. Was the claimant entitled to the claimed markups? If not, was the claimant entitled to reasonable markups and, if so, what would those reasonable markups be?

40. ACT has invoiced Clarke on a daywork basis of charging, using the time and materials supplied, the cost of both and markups for overheads and profit which, averaged across labour, materials, subcontractors and preliminaries, averages out at about 20%. Clarke maintains that the appropriate figure should be 8% on all work including the work already invoiced and paid for. The 8% figure is based on Clarke's expert quantity surveyor's evidence that the percentage margin typically used by building contractors during the period of construction was in the region of 8% - 12%. ACT did not directly engage a quantity surveyor expert witness. Instead, an engineer was engaged who consulted a quantity surveyor. I cannot accept that evidence since it was hearsay, not explained and not supported by the pricing books also adduced in evidence.
41. I find that it is not open to Clarke to re-open dayworks already claimed and paid for. These elements of ACT's entitlement to be paid have been settled and not previously challenged. As for the unpaid daywork invoices, I find that an appropriate and fair rate would be 15%. This is slightly higher than the bracket advanced by Clarke's expert but that bracket was based on a defined building contract whereas dayworks were being charged for with higher uplifts in 1992 - 1994. Thus, a modest uplift on what was being charged for defined contracts is appropriate. I take into account the higher percentages charged out and paid for pursuant to the earlier invoices

6. Conclusion

42. In conclusion, I find that no contract came into being between Clarke and ACT and that, in consequence, ACT is entitled to be paid on a quantum meruit basis, being a daywork basis for the time and materials employed. This claim is enforceable and is subject to a markup, on all unpaid invoices and dayworks, of 15%. However, previously payments should remain unaffected by this finding.

Mr Philip Noble appeared for the claimant instructed by Galbraith & Co, 2 Avenue Road, Pinner, Middlesex, HA5 3HH

Mr Kenneth Munro appeared for the defendant instructed by Wedlake Saint, 146 - 148 London Road, St Albans Herts, AL1 1PQ