

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

St. Dunstan's House,
133-137, Fetter Lane,
London, EC4A 1HD

Date: 23 January 2003

B e f o r e :

HIS HONOUR JUDGE RICHARD SEYMOUR Q.C.

LONDON UNDERGROUND LIMITED

- and -

PILLAR BROADWAY LIMITED

Defendant

Richard Wilmot-Smith Q.C. (instructed by D. J. Freeman for the Claimant)

Vivian Ramsey Q.C. and Sean Brannigan (instructed by Gouldens for the Defendant)

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN

H.H. Judge Richard Seymour Q. C. :

Introduction

1.

The Claimant, London Underground Ltd. ("LUL"), owns and operates the Underground railway network in London. Part of that network comprises the District Line. One of the stations on the District Line is Fulham Broadway ("the Station").

2.

LUL has a division which manages its property interests which is called "LT Property" . I shall call that division in this judgment "LTP" .

3.

The Defendant in this action, Pillar Broadway Ltd. ("Pillar"), is a property development company which seems to have been formed as a special purpose vehicle for a development of the vicinity of the Station by constructing in, around and over it retail and leisure facilities. In this judgment I shall call that development "the Development" .

The Development Agreement

4.

By an agreement in writing dated 20 January 2000 ("the Development Agreement") and made between (1) LUL, (2) Pillar, (3) Pillar Property Plc and (4) Pillar (Fulham) Ltd. provision was made as to the commercial terms upon which LUL would permit the undertaking of the Development by Pillar.

5.

By clause 19 of the Development Agreement it was provided, so far as is presently material as follows:-

" 19.1 The Developer [that is, Pillar] shall pay to LUL in accordance with this clause all proper fees costs charges and expenses or other sums properly incurred by LUL or any party responsible from time to time for the management of the Railway or the maintenance or inspection thereof in connection with or as a consequence of this Agreement whether incurred before or after the date of this Agreement as certified by LUL and including (without prejudice to the generality of the foregoing and whether or not LUL shall retain such sums itself or discharge the accounts of third parties):-

19.1.1 proper legal costs and surveyors' fees together with any disbursements in respect of the implementation of this Agreement the grant of the Lease and the negotiations and completion of all documents contemplated by this Agreement;

19.1.2 proper costs incurred (having regard to LUL's responsibilities as a transport authority) by LUL in the design and checking of designs the approval of plans and the inspection of the Works;

19.1.3 the proper costs incurred by LUL in respect of the services of LUL's project manager and for the services of its officers and employees in relation to the provisions of this Agreement and its implementation;

19.1.4 all proper sums paid by LUL to such consultant surveyors quantity surveyors and/or project managers as LUL may reasonably require in connection with the monitoring of the Development and advice in relation thereto;

19.1.5 all proper fees and charges paid by LUL to any public authority or to any statutory undertaker in connection with the carrying out or execution of the Works;

19.1.6 all proper costs properly incurred in relation to the implementation of the LUL Works Conditions and for the occupation of the line during the railway non traffic hours and for the supervision by employees and/or contractors (as the case may be) of work carried out either on or adjacent to the railway;

19.1.7 all proper costs incurred in making any alterations or additions whether temporary or permanent to the railway signals electrical equipment and other appliances and in the provision alteration or removal of lighting power or other services to the railway station and in the support of or protection to the railway;

19.1.8 all proper costs incurred in connection with the provision of signs advisory notices and information to the public in relation to the details and progress of the Development;

19.1.9 all other proper costs properly incurred by LUL in connection with the Development.

save that the Developer shall not be liable to repay LUL the purchase price paid by LUL in relation to the purchase of the Property pursuant to the Sale and Purchase Agreement.

19.2

19.3 LUL shall issue to the Developer not more frequently than once in every period of four weeks an invoice in respect of such costs and other monies payable pursuant to this clause together with a breakdown of such costs and other monies and copies of invoices rendered to LUL and the Developer shall within ten working days of receipt of any such invoice pay to LUL a sum equal to the amount shown on any such invoice. ”

The Invoice

6.

LTP issued an invoice numbered 374707 dated 14 June 2002 (“the Invoice”) addressed to Pillar Property Plc in the total sum of £510,247.85 which was said to relate to:-

“ LUL & LT Property costs as per attached documentation for period to 14/06/2002. ”

The figure which appeared beside that description was £2,718,751.91, to which was to be added Value Added Tax of £475,781.58. However, the Invoice then indicated that credit was to be given against those figures for sums of £2,284,498.42 and Value Added Tax of £399,787.22 in respect of sums previously invoiced. Thus the total sum claimed in the Invoice was £434,253.49, together with Value Added Tax of £75,994.36, making the total of £510,247.85. It was common ground at the hearing before me that the Invoice was payable, if at all, by Pillar rather than by Pillar Property Plc.

7.

The Invoice was sent to Mr. Christopher Newns of Pillar Property Plc under cover of a letter dated 13 June 2002 written by Mr. Christopher Bailey, who signed himself as of “LT Property” , but who is actually an Associate Director of a company called MPM Capita Ltd. and was engaged by LTP to act as LUL’s project manager for the purposes of the Development. What Mr. Bailey said in his letter was:-

“ I enclose L T Property’s invoice No 374707 in respect of our costs and those of London Underground Limited. It is accompanied by supporting documentation for your approval.

I have sent copies to Sam Walsh. ”

Mr. Walsh is a partner in the firm of E. C. Harris, construction consultants, and had been engaged to advise Pillar in relation to the costs claimed by LUL under clause 19 of the Development Agreement.

8.

The Invoice as sent to Mr. Newns was accompanied by a number of documents. One was entitled “Summary” , and I shall refer to it by that name in this judgment. So far as is presently material the Summary indicated that the sum of £434,253.49 which, together with Value Added Tax, was claimed by the Invoice was made up as follows:-

“ LT PROPERTY SALARIES 21,190.00

EXTERNAL PROJECT MAN. 27,955.00

QUANTITY SURV/EXT VALUER 2,000.00

EXTERNAL SOLICITORS 29,105.00

COMPENSATION -4,500.00

PFI CONTRACTORS 662,473.63

LUL GENERAL

Internal Contrs 17,218.00

SSL Stations 18,103.68

Eng Services 43,686.00

ADJUSTMENTS -382,978.72"

9.

The item in respect of "LT PROPERTY SALARIES" also appeared on a document entitled "PROJECT EXPENDITURE REQUISITION 970226 & 950102: FULHAM BROADWAY REDEVELOPMENT COST ANALYSIS FROM START OF PER- PERIOD 3 2001/01 (24 JUNE 2001)", to which I shall refer in this judgment as "the Analysis", as "SURVEYORS COSTS". In relation to "This invoice" that item was said in the Analysis to relate to the following:-

" FINANCIAL RATE HOURS

YEAR

2002/03 1 G. Ayers 115 9 1,035.00 1 J. Sawtell 37.5 7 262.50

2 G. Ayers 115 37 4,255.00

2 J. Sawtell 37.5 26 975.00 "

The arithmetical total of those items is £6,527.50. No other documents enclosed with the Invoice gave any more information concerning the item in the Summary called "LT PROPERTY SALARIES".

10.

The item in the Summary "EXTERNAL PROJECT MAN", that is to say, external project management, also appeared in the Analysis. The indication in the Analysis as to what was included in respect of that item in "This invoice" was an invoice numbered 077858 from MPM Capita in the sum of £6,630. Again no other information as to the item for external project management in the Summary was included in the documents enclosed with the Invoice.

11.

The Analysis indicated that "This invoice" included in respect of "QUANTITY SURVEYORS/ EXTERNAL VALUER/CONS GENERAL", which was the same item as that called "QUANTITY SURV/ EXT VALUER" in the Summary, an amount of £20,000 in respect of the firm of Richard Ellis. Once more, no additional information was included with the information enclosed with the Invoice.

12.

The information attached to the Invoice as sent to Mr. Newns did include a copy of a fee note of Messrs. Travers Smith Braithwaite numbered 53571 dated 17 January 2002 addressed to LTP in the sum, net of Value Added Tax, of £29,105.90. The fee note described the period to which it related as January 2001 to January 2002 and the matter with which it was concerned as "FULHAM BROADWAY". Of the total of £29,105.90, £29,000 was said to be "Professional Charges", while the balance was "Disbursements". Attached to the fee note was a narrative which indicated that the charges were:-

" in connection with acting on your behalf in relation to the development at Fulham Broadway between January 2001 and 31 December 2002. All correspondence, attendances etc. "

The disbursements were broken down between £9.25 for "Fares and expenses" and £96.65 for "printing costs" . Copy documents attached to the Invoice indicated that LUL had paid the fee note.

13.

I need not dwell on the credit for "COMPENSATION" in the Summary as there was no dispute about it before me.

14.

The reference in the Summary to "PFI CONTRACTORS" was, so it appears from the attachments sent with the Invoice, to a company called Seeboard Powerlink Ltd. ("Seeboard"). The attachments included a copy of a letter dated 28 August 2001 written by Mr. John Stirling of Seeboard to Linda Lilly of LUL which said this:-

" POWER PFI CONTRACT

PSC - Supplementary invoice for Fulham Broadway Development Variation ECMV0046

Please find attached invoice number AC046 together with the associated blue copy of LUL's Contract Payment Approval Form.

This invoice has been raised to the value of £399,771.00 (plus VAT) as an advance payment in respect of the ordering of long-lead plant items together with design work in relation to the Fulham Broadway Development project sponsored by LT Property. "

The invoice referred to was also copied as an attachment to the Invoice. It was dated 28 August 2001 and described the work to which it related as "Variations: (Initial payment for Fulham Broadway Development V0046)." The attachments to the Invoice included in addition documents indicating that the invoice numbered AC046 raised by Seeboard had been paid by LUL.

15.

The documents copied as attachments to the Invoice also included a letter dated 11 March 2002 written by Mr. Stirling of Seeboard to Linda Lilly, an invoice numbered AC063 raised by Seeboard which was enclosed with the letter, and documents indicating that LUL had paid the invoice. The letter dated 11 March 2002 was in these terms:-

" POWER PFI CONTRACT

PSC Supplementary Invoice for Fulham Broadway Variation ECMV0046

Please find attached Invoice number AC063 together with the associated blue copy of the LUL Contract Payment Approval Form.

This Invoice has been raised to the value of £262,702.63 (plus VAT) in respect of an interim payment for Variation ECMV0046 - Fulham Broadway Redevelopment. "

The copy of the invoice numbered AC063 enclosed with the attachments to the Invoice indicated that it related to "Variations: (ECMV0046)." The addition of £399,771.00 and £262,702.63 produces a total of £662,473.63, the amount indicated in the Summary as that included in the aggregate amount of the Invoice in respect of "PFI CONTRACTORS" .

16.

The element in relation to "Internal Contrs" included in the Summary under the general heading "LUL GENERAL" was not in dispute before me and I need say no more about it.

17.

The element in respect of "SSL Stations" included in the Summary under the general heading "LUL GENERAL" of £18,103.68 was an aggregate total of five "Inter-Company Invoices" , numbered, respectively, 27674, 27827, 27840, 27877 and 27878. These "Inter-Company Invoices" seem to represent internal accounting charges made by the operating part of LUL to LTP. The attachments to the Invoice included not only copies of the relevant "Inter-Company Invoices" , but also copies of standard form "Allocation & Certification of Expenditure" documents in respect of each invoice indicating that it had been approved, and copies of documents indicating how the amount of the relevant invoice had been calculated. There was a similar pattern of copy documentation included in the attachments to the Invoice in relation to the "Eng Services" element included in the Summary under the general heading "LUL GENERAL" . Again the total amount indicated in the Summary in respect of that item, £43,686, was made up of the aggregate of five "Inter-Company Invoices" , respectively numbered 27726, 27738, 27836, 27838 and 27900, and copies of those invoices were included in the attachments to the Invoice. Also copies of the relevant standard forms of "Allocation & Certification of Expenditure" in respect of the various invoices were included, as well as documents showing how the amounts invoiced had been calculated. Whereas in respect of the sums included within the Summary as "Eng Services" the copy documents showing how the invoiced amount had been made up all took the same basic form, namely a statement of the number of hours worked either by Mr. Paul Setchell, described as a Project Manager, or by Mr. Anthony Dunne, described as a Cost Controller, in particular weeks, and a rate per hour for the time in question, the position in relation to the "Inter-Company Invoices" concerning the "SSL Stations" element and the supporting documentation showing how particular elements included within the total of the invoice had been arrived at was more complicated and requires individual attention.

18.

"Inter-Company Invoice" numbered 27674 was in the sum of £850 and bore this narrative:-

" EARLS COURT STATION STAFF 4 PERCENT PAY AWARD

COSTS FOR PERIOD 2 TO 8 - 779.18

REVENUE STAFF - 70.80

PERIOD OF CHARGE: PERIOD ENDING 08/12/01 "

Separate documents showed how these elements totalling £849.98 were made up. The sum of £779.18 was said in a memorandum dated 5 December 2001 written by Mr. Robert Clark, described as Stations Liaison Manager, Fulham Broadway Project, to Karen Thomas to relate to "GSM Earl's Court, Cost Centre 2881 for Station Staff" , while the sum of £70.80 was indicated as relating to "Revenue Control Manager Cost Centre 4558 for Revenue Staff." In a memorandum dated 4 December 2001 to Mr. Bailey Mr. Clark gave a breakdown of these figures of £779.18 and £70.80 by period and general activity. The "Revenue Control" was all said to relate to "Football" , while some station staff activity also related to "Football" , but other activity to "Platform" . However, it appeared from the memorandum that the greater part, in cash terms, of the sum of £779.18, a total of £657.83, related to the activities of Mr. Clark himself on "Operations" .

19.

The narrative of "Inter-Company Invoice" numbered 27827, which was in the total sum of £2,887, was:-

" COST OF PROJECT REP P12 - 2,822.17

GOODS OR SERVICES ORDERED FOR USE ON PROJECT P12 - 65.08

PERIOD OF CHARGE: PERIOD ENDING 19/03/02 "

The documentation which showed how those figures were made up indicated that the figure of £2,822.17 represented a claim for the cost of 102.5 hours worked by Mr. Clark in the period 3 February 2002 to 3 March 2002, plus 8 hours overtime on 11 February 2002 conducting a CCTV survey. The figure of £65.08 was said to represent, as to £12.54 on each occasion, mileage for Mr. Clark on 11 February 2002 and 25 February 2002, on the first date in connection with the CCTV survey and on the second date delivering equipment for Seeboard. The balance of £40 was described as a payment of rental to Vodafone for Mr. Clark's mobile telephone for the month of January 2002. The documents to which I have referred on their respective faces indicated that they had been prepared by Mr. Clark.

20.

The details of the make up of the total of "Inter-Company Invoice" numbered 27840 of £4,625 set out in the invoice were:-

" COST OF PROJECT REP P13 - 2,911.56

GOODS OR SERVICES ORDERED FOR USE ON PROJECT P13 - 30.00

PLATFORM ATTENDANCE P13 - 163.43

FOOTBALL CROWD CONTROL P13 - 102.06

FOOTBALL CROWD REVENUE P13 - 1,418.34

PERIOD OF CHARGE: PERIOD ENDED 31/03/02 "

Supporting documents indicated that the charge in respect of "COST OF PROJECT REP P13" was again a claim for the cost of Mr. Clark, this time for a total of 114 hours worked in the period 4 March 2002 to 29 March 2002 at a rate of £25.54 per hour. The £30 was the sum paid to Vodafone for rental of Mr. Clark's mobile telephone in the four weeks ending on 30 March 2002. So far as platform attendance was concerned, the details set out named the individuals involved, the dates of the relevant activities, the general nature of the relevant activities, the hours worked and the charge for each individual. The charges in respect of football crowd control were detailed in documents which again named the individuals concerned, set out the date of the relevant football match, specified the match concerned, recorded the hours worked and the charge for each individual. Each of the supporting documents bore upon its face an indication that it had been prepared by Mr. Clark.

21.

"Inter-Company Invoice" numbered 27877 in the total sum of £4,301.23 included a narrative which was similar in nature, although different in detail, from that on "Inter-Company Invoice" numbered 27840. It was said to relate to period 11. It was supported by documents similar in nature to those which supported invoice numbered 27840, all bar perhaps one of which were produced by Mr. Clark.

22.

"Inter-Company Invoice" numbered 27878 in the total sum of £5,440.55 was again similar in its narrative to those on invoices 27840 and 27877, but related to period 10. The nature of the

supporting documents was also similar to that of the documents supporting the other two invoices, and those supporting documents were produced by Mr. Clark.

23.

The figure for "ADJUSTMENTS" in the Summary of £382,978.72 appears in fact to represent a sum of £450,000 less Value Added Tax at a rate of 17.5%. The sum of £450,000 inclusive of Value Added Tax seems to have been paid by Pillar to Seeboard pursuant to an arrangement set out in a letter dated 21 December 2001 written by Mr. News to LUL. What Mr. News wrote was:-

" Contrary to the Development Agreement between us dated 20th January 2000 LUL have requested, due to the existence of a PFI contract with Seeboard Powerlink Limited which prohibits electrical works to be carried out at Fulham by anybody other than Seeboard Powerlink Limited, that the procedure set out in the Development Agreement for the procurement of the Station Works be varied.

The nature of the requested variation is that London Underground Limited be allowed to procure directly from Seeboard Powerlink Limited those elements of the Station Works (as defined in the Development Agreement) set out in the attached Schedule (the "Seeboard Works"). No control or contractual comfort will be provided to us in respect of those Seeboard Works and we have today been notified by your Solicitors that already Seeboard have notified that there will be a ten week delay to the programme submitted initially. This delay will further delay the completion of the Development as a whole and we will seek to recover the costs of the delay from yourselves.

We have agreed to pay the figure of £450,000 in connection with the Seeboard Works and will forward a cheque in relation to this order under separate cover.

It is noted that this matter is of considerable concern to Pillar (Broadway) Limited as contractual rights of action against Seeboard Powerlink Limited will not exist. This will have time and cost consequences on the completion of the Development as a whole. That said Pillar (Broadway) Limited are prepared to allow this procurement route to be used on the basis that it is now time critical to the completion of the Development on the current programme and that this matter will need to be resolved finally in terms of both cost and liability consequences at some point in the future. "

The Dispute

24.

Pillar did not pay the Invoice within ten working days of receipt. This action was commenced on behalf of LUL by a claim form issued on 3 September 2002. In it LUL initially claimed not only the amount of the Invoice, but also other sums. The claims in respect of the other sums were subsequently compromised and I am not concerned with them. Further, by an agreement the terms of which were recorded in an order made by consent by H.H. Judge Richard Havery Q.C. on 24 October 2002, Pillar paid a sum of £23,618.17 to LUL in respect of the item under the general heading "LUL GENERAL" in the Summary called "Internal Contrs" , together with £269.15 against "Inter-Company Invoice" 27827, £1,713.44 against "Inter-Company Invoice" 27840, £2,194.18 against "Inter-Company Invoice" 27877 and £3,205.80 against "Inter-Company Invoice" 27878, which total sum of £23,618.17 took account of the offered credit of £4,500 in respect of "COMPENSATION" in the Summary and included Value Added Tax. The justification for the payments made against the "Inter-Company Invoices" which I have identified I understand to be that the only challenges Pillar wished to make to the sums claimed in respect of "SSL Stations" were in respect of the allegedly inadequate specification of detail in relation to "Inter-Company Invoice" 27674 and in respect of the allegedly inadequate details of when and in relation to what Mr. Clark spent the time for which it was sought to charge Pillar. By a further

term of the agreement recorded in the consent order dated 24 October 2002 Pillar paid LUL a additional sum of £180,759 in respect of the Invoice, but that further sum was not allocated to any particular item.

25.

The position adopted on behalf of Pillar in relation to the Invoice insofar as any sum claimed has not been paid, was, first, that it was only liable under clause 19.1 of the Development Agreement to pay “all proper fees costs charges and expenses or other sums properly incurred by LUL” , that to be entitled to recover any sum LUL had to prove not only that the relevant fee, cost, charge, expense or other sum had actually been incurred, but that it had been properly incurred, and that LUL had not done in this action.

26.

It was further submitted on behalf of Pillar by Mr. Vivian Ramsey Q.C. and Mr. Sean Brannigan that in any event the only obligation of Pillar was to pay upon delivery of an invoice which complied with the requirements of clause 19.3 of the Development Agreement. As they put it in their written closing submissions:-

“ 2. Clauses 19.1 and 19.3 are clearly intended to and must be read together. The clear and sole purpose of Clause 19.3 is to act as a mechanism for controlling claims made pursuant to Clause 19.1, ensuring that such claims are made in a manner which allows them to be properly assessed by Pillar so that any wrongly claimed costs can be identified.

3. If compliance with Clause 19.3 does not, as LUL contends, have any effect on a Clause 19.1 claim, the clause is robbed of any contractual worth or effect and is rendered entirely pointless. The parties must be assumed to have included Clause 19.3 for a reason and to have intended it to be effective: to suggest otherwise is misconceived. ”

27.

As to what the requirements of clause 19.3 were, Mr. Ramsey and Mr. Brannigan submitted, first, that the obligation of Pillar was to pay, within ten days of the delivery by LUL of “an invoice in respect of such costs and other monies payable pursuant to this clause” , “a sum equal to the amount shown on any such invoice” . In other words, nothing was payable in respect of an invoice issued purportedly pursuant to clause 19.3 unless each and every item included within the total of the amount of the invoice fell within one of the categories for which clause 19.1 provided, the amount of such item was correct, and the overall amount of the invoice was arithmetically correct. So far as the Invoice was concerned, Mr. Ramsey and Mr. Brannigan submitted in their written closing submissions that that requirement was not met because:-

“ 10.... By its own admission the Invoice LUL supplied was at best one which related to a mixture of such costs and other items which it accepts it cannot show to be proper costs.

11. LUL suggests that this is of no consequence. That, however, is incorrect:

(a) the Development Agreement is clear that an Invoice as to “such costs” is to be supplied before the Claimant is entitled to payment in respect of a Clause 19.1 claim. To that extent compliance with 19.1 could be described as a condition precedent;

(b) In fact such an invoice has not been supplied;

(c) Therefore no sum is due under the Agreement.

12. It is to be noted that the only real answer advanced by LUL to this point has been to suggest that this analysis cannot be right because that would mean that in all cases where a party sues under an invoice its claim would fail in full if it could be shown that the invoice was incorrect. However this submission by LUL is once again misconceived: this case is different to many others in that:

(a) the claim made is one made pursuant to a specific term of a bespoke contract (and not, for example, one made pursuant to a quantum meruit);

and

(b) that contract contains bespoke terms as to what needs to be supplied as a condition precedent to the claim succeeding. ”

28.

The second requirement which Mr. Ramsey and Mr. Brannigan submitted needed to be met if there was to be compliance with clause 19.3 was that the invoice was accompanied by “a breakdown of such costs and other monies and copies of invoices rendered to LUL” . As they put it in their written closing submissions:-

“ 7. The intent of Clause 19.3 is clear: it is to provide a mechanism by which a claim for monies under clause 19.1 is to be made in sufficient detail to allow Pillar to ascertain that the claim is one for “proper costs properly incurred”. Accordingly it is relatively clear what “Breakdown” is required: one sufficient to permit a reasonable party to ascertain whether the claim made is one for proper costs properly incurred. Anything less makes an absurdity of what the parties were trying to achieve in agreeing this clause.

8. What breakdown would therefore be sufficient to permit a reasonable party to ascertain whether the claim made is one for proper costs properly incurred? That will depend on the nature of the costs claimed in each case. In relation to works carried out by an LUL employee it may simply be enough to provide details of what works were carried out and when: the time or allocation sheets lying behind the global figures put forward may well be enough. In relation to PFI contractors rather more may be needed: details of the work carried out and the rates used may well be necessary - this would presumably come from the build up to the application for payment which, apparently, has been signed off by LUL. ”

29.

Mr. Ramsey and Mr. Brannigan submitted that the Invoice did not comply with the requirement that it be accompanied by a “breakdown” . Although their position seems to have modified somewhat in their written closing submissions, in his oral submissions Mr. Ramsey seemed at one point to be submitting that “a breakdown” for the purposes of clause 19.3 was documentary proof of the relevant cost, as I understood it to the standard which would satisfy an auditor or a court. That submission shades into the issue of whether LUL had proved that the alleged costs included within the aggregate total of the Invoice fell within clause 19.1 in the first place. As to that, in respect of the items in the Summary relating to “LT PROPERTY SALARIES” , “EXTERNAL PROJECT MAN.” and “QUANTITY SURV/EXT VALUER” Mr. Ramsey and Mr. Brannigan submitted that there was simply no documentary proof at all, while in relation to the items “EXTERNAL SOLICITORS” and “PFI CONTRACTORS” the evidence put forward did not demonstrate that the sums paid related to the Development. Furthermore, in respect of those items the lump sum invoices relied upon did not amount on any view to “a breakdown” of the sums in question. So far as the challenged elements within “SSL Stations” and the claims in respect of “Eng Services” were concerned, Mr. Ramsey and Mr. Brannigan submitted that

what was required if there was to be proof of time spent by individuals which was properly chargeable to Pillar was time sheets or some other indication of exactly between what hours on what days time was spent, and doing what.

30.

In their written skeleton argument prepared in advance of the hearing Mr. Ramsey and Mr. Brannigan stated, at paragraphs 12 and 13,

“ 12. Pillar contends that on the 3rd February 2000 Mr. Bailey of LUL and Mr. Walsh of Pillar entered into an agreement whereby LUL agreed that it would provide timesheets in relation to all staff being charged for by LUL. That is disputed as a matter of fact by LUL and both Mr. Bailey and Mr. Walsh will give evidence on the issue. ”

13. If the Court accepts that such an agreement was reached LUL's present stance of refusing to supply those timesheets which lie behind its claim is all the more noteworthy and unacceptable. ”

Contrary to the case set out in the Defence of Pillar in this action, it was not in the event contended that the agreement alleged was legally binding. Rather what seemed to be said was that it was evidence of what the parties envisaged would be provided as “a breakdown” of costs.

31.

Mr. Richard Wilmot-Smith Q.C., who appeared on behalf of LUL, accepted that LUL was only entitled under clause 19.1 of the Development Agreement to recover costs “properly” incurred. He emphasised that LUL was not seeking in this action to recover any cost which had not been “properly” incurred. Mr. Wilmot-Smith accepted that on the material before the Court LUL had not proved that “LT PROPERTY SALARIES” had been incurred in any sum greater than £6,527, but he submitted that, notwithstanding that a greater sum in respect of this element had been included in the total sum claimed in the Invoice, LUL was entitled to recover the sum which he contended it had proved. He made a similar submission in relation to the element for “EXTERNAL PROJECT MAN.” He accepted that on the evidence nothing could be recovered in respect of the item in the Summary “QUANTITY SURV/EXT VALUER” because such evidence as there was indicated a charge by Richard Ellis of £20,000, and where the sum of £2,000 included in the total value of the Invoice came from or what it represented was obscure. He contended that all of the other elements included in the Summary were proved on the evidence. In his written closing submissions Mr. Wilmot-Smith submitted that:-

“ 4. No point has been taken either on the pleadings or in oral or written submission that if part of the invoice is not proven, then the whole is irrecoverable and it is submitted that such a proposition (unsupported, if made, by authority) would be incorrect in law and too late to take on the pleadings. No more about that will be said in these written submissions. ”

32.

Mr. Wilmot-Smith submitted that it was not a condition precedent to the entitlement of LUL to payment of sums recoverable under clause 19.1 of the Development Agreement that LUL comply with the requirements of clause 19.3. Moreover, he submitted that clause 19.3 of the Development Agreement did not require that any breakdown at all be supplied of figures which were the subject of an invoice rendered to LUL by a third party - all that clause 19.3 contemplated in such a case was provision of a copy of the relevant invoice or invoices. So far as the obligation to supply “a breakdown” of costs was concerned, Mr. Wilmot-Smith submitted that all that was required was an indication of how the total sum claimed in the invoice rendered by LUL under clause 19.3 had been

made up. It was not necessary, in his submission, for LUL to supply documentary proof of costs. In his written closing submissions Mr. Wilmot-Smith summarised this part of LUL's case in this way:-

"9. Clause 19.3 refers to two different types of invoice. Firstly, invoices rendered to Pillar by LUL and secondly invoices rendered to LUL by others. The clause also requires a breakdown of the costs which make up the invoice rendered to Pillar by LUL. The breakdown is referred to in the words "breakdown of such costs and other monies and copies of invoices rendered to LUL".

10. The breakdown of costs which is now sought by Pillar is altogether different to the type of breakdown which the clause provides for. The breakdown which the clause provides for is precisely in the form of the spreadsheet which accompanies the Claimant's Opening [which was the Summary] ... It is a costs summary which sets out the amount and category of claim made by LUL in invoices rendered to Pillar.

11. What is sought by Pillar is a different type of breakdown, namely the costs and backup timesheets which would justify the invoices which are rendered to LUL by others....

12. ... The aggregate of costs within the invoice rendered to Pillar by LUL should be broken down, as indeed the spreadsheet does. But the clause does not require a breakdown of the costs charged to LUL within any invoice rendered to LUL by others.

13. Such a requirement is not contained within clause 19.3 and would produce an uncommercial result. The construction which Pillar puts forward would allow for an endless audit which could stretch far beyond the ten working days allowed for payment of the invoice after its presentation.

14. It is submitted that the information which was supplied with invoice number 374707, being the various spreadsheets and supporting documentation, is sufficient for the purposes of clause 19...."

The submission contained in paragraph 14 of Mr. Wilmot-Smith's written closing submissions seems to reflect a more cautious position than that adopted in paragraph 10, that the Summary was a sufficient "breakdown" on its own.

The evidence

33.

There was no dispute as to the rendering of the Invoice or as to the documentation which accompanied it. Insofar as the arguments on both sides depended simply on that documentation, therefore, no further evidence was necessary.

34.

LUL did seek positively to prove that those elements of alleged cost the subject of the Invoice which it sought to pursue had been incurred and were proper by calling Mr. Bailey as a witness. Mr. Bailey made a witness statement for the purposes of this action which was dated 27 November 2002. The relevant parts of that statement were as follows:-

" 84. I refer to the summary. LT Property Salaries which are referred to as surveyors Costs on the project expenditure requisition includes time expended on the project by Mr. Ayers, Mr. Holmes and Mr. Sawtell of the Claimant. I set out the number of hours spent and the rate. Each individual records their time electronically....

86. External Project Management represents the costs of employing me on the project. The costs included in this invoice are £27,955.

87. The Quantity Surveyors/External Valuers/Cons General costs include the costs of Tweeds, the consultant quantity surveyor employed by the Claimant and Insignia Richard Ellis who are the Claimant's valuers. A fee of £20,000 paid to Richard Ellis was included in this invoice....

89. External Solicitors are the costs of Travers Smith Braithwaite in negotiating the Development Agreement and dealing with property related issues. £29,105.40 of their fee supported by an invoice was included in invoice 374707....

94. The next item on the summary is PFI costs. The Claimant has entered into three PFI contracts whereby the PFI contractors are engaged to undertake certain categories of work on the tube network. Under the Power PFI, Seeboard Powerlink supply power to the network. Under the Prestige PFI, Transys deal with fare collection. Under the Connect PFI, Citilink deal with communications.

95. There were two invoices for Seeboard Powerlink works included in invoice 374707. The scope of the works and the cost of the works had been set out in a detailed implementation statement agreed by the Claimant with Seeboard Powerlink which was sent to the Defendant before works were carried out.

96. The next costs heading on the summary is LUL General which is further sub-divided into internal Contractors, LT Property, Miscellaneous, SSL Stations and Engineering Services. I put the invoices into chronological order and, on the invoice schedule, I show the headings under which the costs are claimed. There are no charges for LT Property or Miscellaneous included in this invoice....

99. SSL Stations is the part of the Claimant that runs the stations on the sub-surface lines (which include Fulham Broadway). They provide staff for the running of the station. There are five invoices under this heading totalling £18,103.68.

100. Engineering Services are the costs of various departments of the Claimant dealing with and commenting on and approving designs and drawings. There are five invoices included under this heading totalling £43,686. "

35.

It is, I think, fairly obvious from the passages from the witness statement of Mr. Bailey which I have set out in the preceding paragraph that his evidence in chief essentially added nothing in relation to the items which were included in the total claimed in the Invoice which could not be derived from the documents attached to the Invoice as sent to Pillar. In cross-examination Mr. Bailey explained that his role in relation to the preparation of the Invoice was to receive from LTP's Accounts Department notes of costs which had accrued and copies of invoices. He said that he had no personal knowledge, other, no doubt, than in relation to charges for his own time, as to what costs had been incurred or to what any costs incurred related. He told me that he relied upon the relevant appropriate person within the organisation of LUL verifying by signature costs notes of which were sent to him. He said that copies of everything which he had received in relation to the costs covered by the Invoice had been included with the attachments to the Invoice. He admitted that prior to the rendering of the Invoice errors in sums invoiced had been discovered and credits had been agreed. Mr. Bailey did give an explanation for the discrepancies between the sums included in the Summary for "LT PROPERTY SALARIES" and "EXTERNAL PROJECT MAN." and the sums included in the Analysis in respect of those items. The explanation I did not find to be particularly clear, but it was along the lines that the balance of the sum in each case included in the Summary but not in the Analysis had somehow been rolled up at the end of the financial year. The explanation was not made more impressive by the fact that Mr. Bailey accepted that he had noticed the discrepancies only recently. He did tell me that by looking at back-up

information he was able to say that the sum of £20,000 in respect of Richard Ellis in the Analysis was in fact the aggregate of three invoices, but he did not attempt to reconcile the lower sum of £2,000 in the Summary under the heading "QUANTITY SURV/EXT VALUER" with the sum of £20,000 in the Analysis. He also told me that ECMV0046 was a variation of the main PFI contract between LUL and Seeboard to the effect that Seeboard would provide an electricity sub-station at the Station.

36.

Mr. Bailey was asked in cross-examination about the alleged agreement with Mr. Walsh to which Mr. Ramsey and Mr. Brannigan referred at paragraph 12 of their written skeleton argument. He accepted that he had met Mr. Walsh on 3 February 2000, but he said that he did not remember the meeting at all well. It was suggested to him that in those circumstances he could not really dispute the account of Mr. Walsh concerning the meeting. I think that he was inclined to accept that, but as Mr. Walsh was not, in the event, called to give evidence I was left in the rather strange position that Mr. Bailey seemed inclined to accept an account of which there was no evidence before me, if the account to which Mr. Ramsey was drawing Mr. Bailey's attention was that in a witness statement of Mr. Walsh prepared for the purposes of this action. In fact there was evidence before me, in the form of a letter dated 9 February 2000 written by Mr. Walsh to Mr. Bailey, of what, shortly after the meeting, Mr. Walsh thought were the important points to emerge from it. What Mr. Walsh said in the letter was this:-

" Further to our meeting of the 3rd February 2000 in respect of the LUL and LTP costs, I confirm the following:

1. Richard Ellis.

The basis under which you project the cost is: £6,000 per quarter from the unconditional date to practical completion of the works.

I would be grateful if you could substantiate their proposed increases in the budget for their time.

2. Travers Smith Braithwaite

I would be grateful if you could advise us in detailed substantiation of their increased costs that you are projecting.

I confirm you anticipate that the next invoice will be issued in March 2000.

3. LTP Direct Staff

It is agreed that you will prepare a staff programme to enable a cashflow draw-down to be projected.

4. MPM Capita contract staff

You are currently projecting at £6,000 per month.

It is agreed that you will prepare a staff programme to enable a cashflow draw-down to be projected.

5. LUL

It is agreed that you will prepare a staff programme and cashflow for the LUL staff anticipated for the project.

I confirm that we shall require copies of the timesheets for all staff being paid for by our client and invoices are to be submitted to myself for consideration and approval in the second week of the month following the work having been carried out.

I look forward to receiving the above points of clarification. ”

It is to be noted that while, in relation to some matters, specifically the preparation of staff programmes and cashflows, Mr. Walsh recorded that agreement had been reached at the meeting on 3 February 2000, he did not record that there had been such an agreement in relation to the provision of time sheets. Rather, so far as time sheets were concerned, Mr. Walsh was in the letter communicating a requirement of his own and seeking confirmation that it would be met. I am not, therefore, satisfied that Mr. Bailey did in fact agree at the meeting on 3 February 2000 that time sheets would be provided. Certainly there was no suggestion that he ever did provide time sheets, and my attention was not drawn to any communication from Mr. Walsh to Mr. Bailey in which Mr. Walsh asserted that Mr. Bailey was acting contrary to what had been agreed between them in not providing time sheets.

37.

The only witness apart from Mr. Bailey who was called in a formal sense, although not required by Mr. Wilmot-Smith for cross-examination, was Mr. Newns. His evidence, so far as relevant, was as to the background to the writing of his letter dated 21 December 2001, which I have quoted. Nothing in particular turns on that evidence of Mr. Newns for the purposes of any issue which I have to decide.

Were any of the costs claimed in the Invoice properly incurred?

38.

In their written closing submissions Mr. Ramsey and Mr. Brannigan submitted in relation to the evidence of Mr. Bailey:-

“ 14. In this context the sole evidence advanced by LUL - that of Mr. Bailey - not only fails to support the claim, but fatally undermines it.

15. Mr. Bailey’s evidence was unsatisfactory - particularly in relation to the “mistakes” so recently admitted by LUL. This much was clear however:

16. His Role and the information supplied to him;

(a) He relied entirely upon information provided to him by others within LUL: he merely looked at the documents supplied to him by those departments;

(b) That process provided scope for delay and confusion;

(c) That information had proven in the past to be incorrect;

(d) He had only been able to ascertain the incorrect nature of that information by going behind the documents supplied to him and obtaining further information;

17. The “Mistakes” Made in the Invoice;

(a) He had obtained further information in relation to the costs claimed for:

(i) LT Property Salaries;

(ii) External Project Management; and

(iii) Quantity Surv/Ext Valuer

and now accepted that the costs claimed in the relevant Invoice were not proper costs properly incurred;

(b) He agreed that until he had obtained further information not available to Pillar or the Court, he could not have known that these claimed costs were not proper;

(c) He accepted that in relation to these items one could not say on the basis of the information supplied with the Invoice that these were proper costs properly incurred.

(d) He agreed that LUL's position was that where it discovered mistakes in its invoices it would deal with them, but where they remained hidden through a refusal to provide back up documentation, they would not.

18. As a result the sums claimed are not supported by the evidence. Accordingly LUL has failed to show that any sums are due in relation to these three heads. "

The terms of the comments in that passage on what was not detectable from the documents copies of which accompanied the Invoice reflected the earlier, oral submissions of Mr. Ramsey as to what amounted to a "breakdown" for the purposes of clause 19.3 of the Development Agreement, to which I referred above.

39.

In considering whether LUL has established its claim to payment of any sum greater than the aggregate already paid by Pillar in respect of the Invoice it is logical to start with the issue of whether LUL has proved that any, and if so which, of the alleged costs to which the Invoice related were "properly incurred" for the purposes of clause 19.1 of the Development Agreement. I do not accept the implicit submission of Mr. Ramsey and Mr. Brannigan that the only way in which any element of cost could be proved to have been "properly incurred" is by the direct oral evidence of someone having personal knowledge of that to which the cost related. Thus while I accept that Mr. Bailey did not have such knowledge other than in relation to charges for his own time, that conclusion does not resolve this issue in favour of Pillar. In the absence of any suggestion that any of the copy documents which accompanied the Invoice when it was sent to Pillar was not a genuine document or that there was some reason to suppose that any which purported to record a cost, to what it related, or how it was made up, was not an attempt made in good faith by the author to record accurately whatever was recorded in it, it seems to me that I should have regard to the documents enclosed with the Invoice as sent to Pillar in determining whether any cost has been proved, as well as to such explanation of any such document or the circumstances surrounding it as Mr. Bailey gave me.

40.

In the absence of any satisfactory explanation as to the discrepancies between the figures in respect of the elements of "LT PROPERTY SALARIES" and "EXTERNAL PROJECT MAN." included in the Summary and the figures in respect of what seem to have been intended as referring to the same elements in the Analysis I am not satisfied that any cost in respect of either element has been proved to have been "properly incurred" within the meaning of clause 19.1 of the Development Agreement.

41.

As I have indicated, Mr. Wilmot-Smith did not pursue any claim in respect of the element described in the Summary as "QUANTITY SURV/EXT VALUER" .

42.

However, I am satisfied that the elements of "EXTERNAL SOLICITORS" and "PFI CONTRACTORS" as described in the Summary represent costs which were in fact incurred and were "properly incurred" for the purposes of clause 19.1 of the Development Agreement.

43.

The fee note of Messrs. Travers Smith Braithwaite on its face related to "FULHAM BROADWAY" , and the terms of the letter dated 9 February 2000 written by Mr. Walsh to Mr. Bailey make it clear that it was known to Pillar, or at least to its agent, that Messrs. Travers Smith Braithwaite was to have a role on behalf of LUL in relation to the Development. Given that the date of the fee note was 17 January 2002, the discrepancy between the dates of the period to which it related on the fee note itself, "JANUARY 2001 - JANUARY 2002" , and those in the narrative, "January 2001 and 31 December 2002" , upon which Mr. Ramsey and Mr. Brannigan relied heavily in their written closind submissions, was plainly attributable to a typographical error. No solicitor would seek to charge a fixed fee for work which might not be done for almost a year after the date of the fee note. The dates given on the fee note itself, therefore, in my judgment, are plainly correct.

44.

Both of the relevant invoices of Seeboard referred to a variation numbered ECMV0046 which Mr. Bailey told me was the provision of an electricity sub-station at the Station. Mr. Newns's letter dated 21 December 2001 makes it clear that Pillar knew that Seeboard was going to be doing work at the Station for which Pillar was going to have to pay. The covering letters sent by Mr. Stirling of Seeboard with each invoice make plain that the work to which each related was the Development.

45.

I do not understand how the charges the subject of "Inter-Company Invoice" 27674 arise or why it was considered that Pillar should pay them. It is not obvious that it would be proper for LUL to seek to pass on to Pillar the effects of some pay award, and I was offered no explanation as to why that should be so. Consequently I am not satisfied that the sum of £850 the subject of the invoice was a cost "properly incurred" for the purposes of clause 19.1 of the Development Agreement.

46.

On the other hand, I do consider that the other disputed elements claimed under the heading in the Summary "SSL Stations" and the item in the Summary "Eng Services" have been proved as costs "properly incurred" . Mr. Clark was described, as I have recorded, as Station Liaison Manager, Fulham Broadway Project, and the accuracy of that description was not disputed before me. The time records upon which the claims in respect of his time were based were his own. In the absence of any suggestion that he might have had some reason for falsifying his own records I see no reason to doubt their accuracy. For the same reason I see no reason to doubt the accuracy of the records of the time of Mr. Setchell and Mr. Dunne upon which claims for payment in the Invoice were based.

47.

Subject, therefore, to the questions whether, the Invoice being in an aggregate total the full amount of which has not been proved to relate to costs falling within clause 19.1 of the Development Agreement, any sum was due under the Invoice, whether the documents accompanying the Invoice as sent to Pillar complied with the requirements of clause 19.3 of the Development Agreement, and, if not, what consequences follow, I find that LUL is entitled to payment from Pillar of a further sum of £244,776.55, including Value Added Tax, in respect of the sums claimed in the Invoice.

Construction of clause 19 of the Development Agreement

48.

In my judgment, upon proper construction of the Development Agreement it is clear that clause 19.3 qualifies the obligation in clause 19.1 to make payment of sums falling within that sub-clause to the effect that payment is not due until an invoice covering the relevant amount or amounts has been rendered and received by Pillar. Such an invoice can only be rendered at a frequency of not less than four weekly intervals. Once received by Pillar, Pillar has ten working days in which to make payment.

49.

I do not consider that, upon proper construction of clause 19.3 of the Development Agreement, the obligation of Pillar to pay sums which fell within clause 19.1, and which had in fact been included in an invoice issued purportedly under clause 19.3, is further dependent upon the aggregate total of the relevant invoice being correct, whether in the sense that each and every item included within the invoice both falls within clause 19.1 and is correct as an amount, or in the sense that the total amount of the invoice is arithmetically correct. In other words, in my judgment it is not a condition precedent to the obligation of Pillar to make payment of sums which in fact fall within clause 19.1 not only that an invoice be issued under clause 19.3 which includes the relevant amounts, but also that each and every element included within such an invoice is correctly so included both in principle and as to amount, and the total amount of the invoice is right. While it seems to me that clause 19.3 of the Development Agreement does not have the effect of modifying clause 19.1 so as to make payable by Pillar whatever amount is invoiced, rather than sums falling within clause 19.1, as long as a sum properly falling within clause 19.1 is included within an invoice issued under clause 19.3, that is sufficient to make it payable by Pillar. The primary obligation of Pillar is to pay the sums for which clause 19.1 provides. Clause 19.3 contains some safeguards for Pillar, principally as to the frequency at which payments can be required and as to the provision of "a breakdown of such costs and other monies" , to the exact nature of which I am about to turn. No obvious commercial purpose would be served by making the primary obligation subject to a requirement that any invoice by which performance of the primary obligation is demanded should be irreproachable in every respect, rather than simply include items which are properly payable.

50.

It does not seem to me that, upon proper construction of clause 19.3 of the Development Agreement, it is a condition precedent to the entitlement of LUL to payment in respect of any particular invoice that it is accompanied by "a breakdown of such costs and other monies and copies of invoices rendered to LUL" . In my judgment, the plain commercial purpose of the requirement to provide a breakdown of costs and copies of invoices rendered to LUL is so that Pillar should understand how the sum which it is being invited to pay by any particular invoice has been calculated, so that it can form a view as to whether the sums included in the total were "properly incurred" for the purposes of clause 19.1. However, it would be nonsensical in commercial terms if the obligation to make payment of what might be a substantial sum calculated as the aggregate of many smaller sums could be avoided because, for example, some copy invoice for possibly a small amount had been omitted, or the breakdown provided of a sum in fact properly due was deficient in detail. While, therefore, Pillar would no doubt have a claim for damages in the event that, as a result of a failure on the part of LUL to provide material which it was required under clause 19.3 to provide, Pillar paid to LUL a sum in excess of that which was properly due, and while the obligation of Pillar is only to pay sums properly due under clause 19.1 of the Development Agreement, rather than any sum which LUL might choose to invoice, if Pillar elected not to pay an invoice rendered under clause 19.3, or not to pay the whole of it, that would be at its own risk as to whether LUL would be able to prove that whatever part of an invoiced sum had not been paid was in fact due.

51.

Moreover, in my judgment the giving of the information for which clause 19.3 of the Development Agreement provides is something different from providing proof positive that each and every sum covered by a particular invoice was “properly incurred” . Insofar as any sum claimed within the total for a particular invoice is said to represent a sum which LUL has been charged by a third party it seems to me that the obligation imposed upon LUL by clause 19.3 is simply to record the sum in question as part of an explanation of how the total sum claimed in the relevant invoice has been calculated and to provide a copy of the invoice of the third party which shows that sum. While the expression in clause 19.3 “copies of invoices rendered to LUL” is not in terms qualified as relating only to invoices the amount of which LUL seeks to recover from Pillar under clause 19.1 and only those in respect of the amounts of which claims are included within the particular invoice, it is manifest that it is only such invoices copies of which need accompany a particular invoice. It would be bizarre if, in order to be able to recover the amount of a charge otherwise proper for the purposes of clause 19.1 and which LUL may itself already have paid, LUL had not only to provide a copy of the relevant invoice, but also some other breakdown which the third party may be under no obligation under its own contract with LUL to provide, and it is plain, in my judgment, that upon proper construction of clause 19.3 LUL has no such obligation.

52.

As a matter of ordinary language a “breakdown” , in the context of a figure or figures, is not proof of anything, but simply an indication of how the figure has been calculated. The relevant definition in The New Shorter Oxford English Dictionary , 4th edition, 1993, is “An analysis or classification” . In my judgment, what degree of analysis is required for something properly to be able to be called a “breakdown” is a matter of fact and degree dependent upon the context in which the “breakdown” has to be provided. The Summary certainly amounted to a “breakdown” , albeit not one of great detail. For the purposes of clause 19.3 of the Development Agreement, in which the purpose of providing a “breakdown” is to enable Pillar to form a view as to whether the amount of a particular invoice is properly payable in its entirety by Pillar, it seems to me that the Summary on its own would be insufficiently detailed. However, in my judgment the Summary, the Analysis and the invoice schedules produced by Mr. Bailey and sent with the Invoice, together with the other copy documents sent with it were a “breakdown” of the costs claimed in the Invoice sufficient to satisfy the requirements of clause 19.3 of the Development Agreement. I therefore accept the more cautious of Mr. Wilmot-Smith’s submissions in closing as to whether a “breakdown” was supplied with the Invoice.

Conclusion

53.

In the result I find that LUL is entitled to judgment against Pillar in respect of the sums claimed in the Invoice in the further sum of £244,776.55 in respect of the costs to which the Invoice was alleged to relate which I have found proved.