Claim No. HT-05-125

Neutral Citation Number: [2005] EWHC 1018 (TCC)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Friday, 20th May 2005

BEFORE:

MR JUSTICE JACKSON

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BETWEEN:

(1) COSTAIN LIMITED

(2) O'ROURKE CIVIL ENGINEERING LIMITED

(3) BACHY SOLETANCHE LIMITED

(4) EMCOR DRAKE & SCULL GROUP PLC

Claimants/Applicants

and

(1) BECHTEL LIMITED

(2) MR FADY BASSILY

Defendants/Respondents

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Transcribed from the official tape recording

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MR ROGER STEWART QC and MR BEN PATTEN (instructed by Messrs Pinsent Masons) appeared on behalf of the Claimants.

MR ANTHONY BOSWOOD QC, MR DAVID THOMAS QC and MR NIK YEO (instructed by Messrs Lovells) appeared on behalf of the Defendants.

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JUDGMENT

MR JUSTICE JACKSON: This judgment is in ten parts, namely: Part 1. Introduction. Part 2, The Facts. Part 3, the Present Proceedings. Part 4. Issue (1): at the meeting on 15 th April, what did Mr Bassily instruct Bechtel's staff to do? Part 5. Issue (2): when assessing sums payable to CORBER, under contract C105, is it RLE's duty (a) to act impartially as between employer and contractor or (b) to act

in the interests of the employer? Part 6. Issue (3): has RLE acted in breach of its duty as defined in the answer to Issue (2)? Part 7. Issue (4): if so, is URN thereby in breach of contract C105? Part 8. Issue (5): if so, have Bechtel and Mr Bassily committed the tort of procuring a breach of contract? Part 9. Issue (6): is this an appropriate case in which to grant an interim injunction? Part 10. Conclusion.

PART 1. INTRODUCTION

1. This is an application for interim injunctions. The claimants and applicants are a consortium of companies who are carrying out work for the Channel Tunnel High-Speed Rail Link Project. This project is generally referred to as "CTRL". The contractors who form the consortium are Costain Limited, O'Rourke Civil Engineering Limited, Bachy Soletanche Limited and Emcor Drake & Scull Inc Plc. This consortium is generally referred to as "CORBER" and I shall use that abbreviation.

2. The employer of CORBER in relation to the works with which this court is concerned is Union Rails (North) Limited. This company is generally referred to as "URN" and I shall use that abbreviation.

3. The project manager for the works which are in issue is a consortium of four companies, namely Bechtel Limited, Ove Arup and Partners, Sir William Halcrow and Partners and Systra. This consortium has the collective name "Rail Link Engineering", which is generally abbreviated to "RLE".

4. Mr Fady Bassily is the rail operations manager of Bechtel Limited. He is also the executive chairman of RLE. In this litigation, Bechtel is the first defendant and Mr Bassily is the second defendant.

5. The only statute which has some bearing on the issues currently before the court is the Housing Grants, Construction and Regeneration Act 1996, to which I shall refer as "the 1996 Act".

6. This is a sufficient introduction to the present application. It is now necessary to outline the facts.

PART 2. THE FACTS

7. On 26 th April 2002 CORBER entered into a contract with URN to provide civil engineering and construction works for the extension and refurbishment of St Pancras Station. This was known as Contract C105. The work being done at St Pancras Station forms part of the CTRL project.

8. Recital L to the contract provides as follows:

"The Employer, the Contractor and the Project Manager act in the spirit of mutual trust and co-operation and so as not to prevent compliance by any of them with the obligations each is to perform under the Contract."

9. The contract provides for CORBER to be paid their actual costs less any disallowed costs. Actual cost is defined in clause 11.2(2) as follows:

"Actual Cost is the amount of payments paid to Subcontractors for work which is

subcontracted and the cost of the components in the Schedule of Cost Components

for work which is not Subcontracted, less in both cases any Disallowed Cost. For

the avoidance of doubt, the cost of items or matters referred to in Item 7 (Insurance)

of the Schedules of Cost Components is not Actual Cost."

10. Disallowed cost is defined in clause 11.2(15) as follows:

“Disallowed Cost is cost which the Project Manager decides:

is attributable to a compensation event under a Subcontract which is not also a compensation event under this Contract;

is payable or paid by the Contractor to the Employer pursuant to this Contract;

is not justified by the Contractor ’s accounts and records;

should not or was not required to have been paid to a Subcontractor pursuant to or in accordance with his Subcontract;

was incurred only because the Contractor did not:-

follow an acceptance or procurement procedure stated in the Works Information;

give an early warning which he could or should have given;

comply with this Contract;

comply with a Subcontractor; or

results from paying a Subcontractor more for a compensation event than is include din the quotation or assessment for the compensation event accepted by the Project Manager ;

and/or the cost of:-

correcting Defects after Completion;

correcting Defects before Completion caused by the Contractor not complying with the accepted quality plan referred to in the Works Information or in this Contract or not complying with a requirement for how he is to Provide the Works stated in the Works Information;

correcting Defects notified to the Contractor by the Project Manager which the Contractor failed previously to notify to the Project Manager ;

Plant and Materials not used to Provide the Works (after allowing for reasonable wastage); or

resources not used to Provide the Works (after allowing for reasonable availability and utilisation) or not taken away from the Working Areas when the Project Manager requests.”

11. The contract also provides for CORBER to be paid a fee, calculated in accordance with clause 11.2(18). The contract also contains a target cost mechanism. If actual cost is less than the target, CORBER shares in the gain. If actual cost exceeds the target, then CORBER bears some of that excess. The contract contains a procedure for valuing “compensation events”, such as changes in the scope of works. There are procedures for dealing with acceleration. So far as possible, the sums payable for matters such as these are agreed in advance, but the contract recognises that this is not always possible. There are procedures for dealing with defects and repeat tests and for the project manager to assess costs payable by the contractor.

Clause 50 provides:

“50.1 The Project Manager assesses the amount due at each assessment date. The first assessment date is decided by the Project Manager to suit the procedures of the Parties and is not later than the assessment interval after the starting date. Later assessment dates occur:-

at the end of each assessment interval [ie 28 days] until Completion of the whole of the works;

at Completion of the whole of the works;

four weeks after the project Manager issues the Defects Certificate; and

after Completion of the whole of the works:-

when an amount due is corrected;

at the end of each assessment interval for a period of four months after Completion of the whole of the works; and

when a payment is made late by the Employer .

“50.2 The amount due is the Price for Work Done to Date plus other amounts to be paid to the Contractor less amounts to be paid by or retained from the Contractor . If the amount to be paid to the Contractor is less than the amount to be paid by or retained from the Contractor , the difference is recoverable from the Contractor as a debt.

50.5
In assessing the amount due, the Project Manager considers any application for payment the Contractor has submitted on or before the assessment date. The Project Manager gives the Contractor details of how the amount due has been assessed .

50.6
The Project Manager corrects any wrongly assessed amount due in a later payment certificate.”

Clause 51 provides:

“51.1 The Project Manager by the issue of a payment certificate certifies a payment within 2 weeks of the assessment date, which for the purposes of the HGC&R Act is the due date. ...

51.4 If an amount due is corrected in a later certificate either:-

by the Project Manager , whether in relation to a mistake which is not due to an assessment based on incorrect accounts and records provided by the Contractor or a compensation event; or

following decision of the Adjudicator or the tribunal,

interest on the correcting amount is paid. Interest is assessed from the date when the incorrect amount was certified until the date when the correcting amount is certified and is included in the assessment which includes the correcting amount.

51.5
If the Project Manager does not issue a certificate which he

should issue, interest is paid on the amount which he should have

certified. Interest is assessed from the date by which he should have

certified the amount until the date when he certifies the amount and

is included in the amount then certified.”

Clause 64.1 provides:

“The Project Manager assesses a compensation event:-

if the Contractor has not submitted a required or revised quotation and details of his assessment or more information within the time allowed.

if the Project Manager decides that the Contractor has not assessed the compensation event correctly in a quotation and he does not instruct the Contractor to submit a revised quotation;

if, when the Contractor submits quotations for a compensation event, he has not submitted a programme which this Contract required him to submit; or

if, when the Contractor submits quotations for a compensation event the Project Manager has not accepted the Contractor’s latest programme for one of the reasons stated in this Contract.”

Clauses 90 to 93 of the contract provide dispute resolution procedures, namely meetings, adjudications and arbitration. Section Z of the contract contains some additional provisions to which I shall refer later.

12. RLE is the project manager appointed under the contract. Bechtel is the dominant

member of the consortium which constitutes RLE. Most of the RLE personnel who are performing functions under the contract are Bechtel employees. Quite apart from its role in RLE, Bechtel also has a significant stake in the CTRL project. It is clear from the evidence that in more than one respect Bechtel is playing an important role in this project, which is of national importance.

13. For present purposes, it is not necessary to recount the progress of the works between 2001 and 2004. Suffice it to say that work proceeded. Interim payments were made to CORBER pursuant to payment certificates. In addition, on 27 th November 2003 the parties entered into a supplemental agreement, which provided for certain further payments to be made.

14. Let me now move on to events this year. On 6 th February 2005 RLE issued payment certificate number 47. This showed that the total value of work carried out was approximately £264.2 million and that costs disallowed were approximately £1.4 million. Following the issue of this certificate, RLE appear to have adopted a stricter approach to the assessment of both actual costs and disallowed costs. In payment certificate 48, issued on 8 th April 205, the total amount of costs disallowed was £5.8 million. It can be seen that this is a substantial increase from the previous certificate.

15. On 15 th April 2005 Mr Bassily called a meeting of Bechtel staff who were employed on the CTRL project. This included staff working at St Pancras Station and also staff working on other parts of the project. At this meeting Mr Bassily first talked about the general affairs of Bechtel and then he turned to the CTRL project. In his witness statement Mr Bassily outlines what he said at the meeting as follows:

“5.2 I wanted all those present to understand that we faced many challenges to ensure that the project was successfully completed. Eventually, I commented specifically on the C105 CORBER contract but only as illustrative of the general points that I wanted to make.

5.3
I did say that Bechtel, as the largest shareholder in RLE, had most to lose if the project was not a financial success. This is because if any fee is to be earned by RLE Bechtel’s share of it is greater than the other RLE partners and if any penalties are to be paid (under the pain/gain machinery) Bechtel’s

share of that is also greater than its partners in RLE. I firmly believe that it is in the best interests of all of the parties involved for the project to be a financial success.

5.4 I told those present at the meeting that there was a gap between the Target Cost and the project Outturn Cost of the project and it was important to seek to reduce this gap by adopting a stricter attitude to the administration of the relationship with URN and the Trade Contractors. In relation to the Trade Contract, I emphasises that it was RLE's job to apply the Trade Contracts fully including the provisions for disallowing unjustified costs. I stressed that applying the Trade Contracts in accordance with the terms was what is required. At no time, either at the meeting on 15 April, or before it or after have I instructed or encouraged Bechtel or RLE staff to do anything other than operate the Trade Contracts in accordance with its terms. I do not believe that the spirit of partnering/co-operation, such as it is, necessarily ended from RLE's perspective. I was however concerned that this approach had to be operated by all parties and that was not necessarily happening.

5.5 I made it clear that as project manager we had to challenge costs if it was right to do so. I gave any actual example relating to payment of a subcontractor which came to my attention. At the same time if costs were justified they should be paid. I explained that in some cases it may happen that some cost will be disallowed based on the available information but later as more information emerged a decision to disallow may change."

16. Very soon after the meeting reports of what Mr Bassily had said came to the ears of CORBER. Some of those reports were alarming. They led CORBER to believe that Mr Bassily was instructing Bechtel to disallow legitimate costs when making their assessments for payment certificates. CORBER became concerned that Bechtel, as the dominant member of RLE, had deliberately adopted a policy of administering the contract unfairly and adversely to the contractor.

17. On 4th May 2005, CORBER's solicitors, Pinsent Masons, sent letters before action to Bechtel and Mr Bassily. In these letters Pinsent Masons threatened to commence proceedings unless satisfactory undertakings were given by 5pm on 5th May. The undertakings sought from Bechtel were as follows:

"a. Bechtel will forthwith desist from instructing, persuading or otherwise encouraging any of its employees, ,servants or agents and/or any other person employed by the RLE, from seeking to operate the assessment and certification functions of the project manager under the Contract otherwise than impartially and in good faith.

b.
Bechtel will forthwith issue written instructions to all its employees, servants or agents who were present at the meeting on 15 April 2005, instructing them to disregard the advice, encouragement or instructions given by Mr Fady Bassily at that meeting, in so far as such advice or instructions required or requested that they seek to operate the assessment and certification functions of the project manager under the Contract other than impartially and in good faith.

c.
Bechtel will deliver up to us, on behalf of our clients, by no later than 5pm on Friday, 14 May 2005, a list of the names and job titles of the persons attending the meeting held on 15 April 2005.

d.
Bechtel will (a) forthwith make a reasonable inquiry as to whether any other instructions, requests or advice have been given to its employees, servants or agents in order to persuade them to seek to operate the assessment and certification functions of the project manager under the Contract

otherwise than impartially and in good faith; (b) as soon as practicable thereafter, specifically and in writing will countermand any such instructions, requests or advice in respect of any employee, servant or agent so instructed and (c) within 14 days of the date of this letter will deliver up to ourselves a list of the names of the persons to whom such instructions, requests or advice had been given and details of when these were countermanded."

The undertaking sought from Mr Bassily was as follows:

"… that you will forthwith desist from instructing, persuading or otherwise encouraging any of Bechtel's employees, servants or agents and/or any other person employed by the RLE, from seeking to operate the assessment and certification functions of the project manager under the Contract otherwise than impartially and in good faith".

18. By a letter dated 5 th 2005, written on behalf of himself, Bechtel and RLE, Mr Bassily responded to the two letters from Pinsent Masons. In that letter Mr Bassily denied all allegations of improper conduct and bad faith. He refrained from giving any of the undertakings sought. He did, however, include the following passage:

"In this regard, RLE on its own behalf and on behalf of its Members (particular Bechtel as singled out by you) and Mr Bassily (the Project Director) confirm to CORBER that at all times RLE has sought to carry out and will continue to carry out its Project Management functions in accordance with its obligations. Furthermore at no time has RLE, its members or Mr Bassily intended to encourage any RLE member employee to act otherwise than in accordance with their obligations. RLE, Bechtel and Mr Bassily will continue to comply with their obligations."

19. CORBER did not regard Mr Bassily's letter as a satisfactory or sufficient response to their request for undertakings. Accordingly, CORBER commenced the present proceedings.

PART 3. THE PRESENT PROCEEDINGS

20. By a claim form issued on 6 th May 2005 CORBER alleged that Bechtel and Mr Bassily had unlawfully procured breaches of contract by URN. The accompanying particulars of claim was in slightly different terms. The kernel of CORBER's allegations, as pleaded in paragraph 11 of the particulars of claim, was as follows:

"Mr Bassily, for whose torts Bechtel is liable, has sought to encourage Bechtel's employees to operate the assessment and certification provisions of the Contract partially and in bad faith. In this way he has encouraged a breach of contract by URN, intending that there should be such a breach or being reckless as to whether such a breach was brought about. On the morning of 15 April 2005 at the Shaw Theatre, Novotel Hotel, Euston Road Mr Bassily addressed a meeting of the employees of Bechtel, who were engaged in project management functions under the CTRL Section 2 Contracts. He told them that Bechtel was at risk of losing money on the CTRL Section 2 Contracts and that this was not acceptable. He said that this was 'a Bechtel issue, not an RLE issue', by which he implied that the employees should act according to Bechtel's interests, rather than in accordance with the responsibilities of RLE. ...

Bechtel exercising its influence on RLE through its own employees, has sought to operate the assessment and certification functions of the project manager in a partial manner and in bad faith. In so doing it has been motivated by a desire to reduce the risk to Bechtel of cost overruns on the CTRL Section 2 Contracts and has disregarded the proper nature of the project manager's function and responsibilities. In this way it has encouraged a breach of contract by URN, intending that there

should be such a breach or being reckless as to whether such a breach was brought about. The operation of this influence first became apparent to CORBER on 8 April 2005 when, in respect of payment Certificate 48, RLE disallowed an unusually large element of costs, without adequate justification and in many cases contrary to its previous representations. Thus, in relation to various subcontracts the sum of disallowed costs exceeds the sum sought. ...”

21. The principal relief which CORBER claimed in the particulars of claim was a series of injunctions in similar terms to the undertakings which had been sought in correspondence.

22. On the same day as commencing proceedings, CORBER also issued an application for interim injunctions against both defendants. The proposed interim injunctions are as follows:

“IT IS ORDERED THAT:

(1)
the First and Second Defendants do forthwith desist from instructing, persuading or otherwise encouraging any employee, servant or agent of the First Defendant and/or any other person employed by Rail Link Engineering (‘RLE’) from seeking to operate the assessment and certification functions of the project manager under the Contract dated 26 April 2202 (as identified in the Particulars of Claim) otherwise than impartially and in good faith.

(2)
The First Defendant do forthwith issue written instructions to all its employees, servants or agents who were present at the meeting dated 15 April 2005 (identified in paragraph 11a of the Particulars of Claim) instructing them to disregard the advice, encouragement or instructions given by the Second Defendant at that meeting, in so far as such advice or instructions required or requested that they seek to operate the assessment and certification functions of the project manager under the Contract otherwise than impartially and in good faith.

(3)
The First Defendant do deliver up to solicitors acting for the Claimants, within 14 days of this Order, a list of the names and job titles of the persons attending the meeting held on 15 April 2005.

(4)
The First Defendant do: (a) forthwith to make reasonable inquiry as to whether any other instructions, requests or advice have been given to its employees, servants or agents in order to persuade them to seek to operate the assessment and certification functions of the project manager under the Contract otherwise than impartially and in good faith; (b) as soon as practicable thereafter, specifically and in writing to countermand any such instructions, requests or advice in respect of any employee, servant or agent so instructed and (c) within 14 days of this order to deliver up to solicitors acting for the Claimants a list of the names of the persons to whom such instructions, request or advice had been given and details of when these were countermanded.”

23. In support of the application for interim injunctions, CORBER served witness statements made by Mr Bruce (CORBER’s commercial manager) and Mr Ball (CORBER’s project director). Mr Bruce described the co-operative manner in which contract C105 had proceeded up until late 2004. He went on to assert that in recent months relations had deteriorated between CORBER and RLE. RLE had adopted a different and unreasonable approach to the assessment of sums payable to CORBER. Mr Bruce believed that this new approach was:

"... a result of a policy adopted by Bechtel (and particularly Fady Bassily) to reduce its own risk rather than as a result of an impartial and genuine application of the Contract".

24. Mr Ball, in his witness statement, set out his understanding of what Mr Bassily had said at the meeting on 15 th April. Since Mr Ball had not been present at the meeting, his account was entirely and inevitably based on hearsay. Mr Ball's evidence has subsequently been overtaken by events, namely the service of witness statements by people who were present at the meeting.

25. On 13 th May 2005, Lovells, the solicitors for both defendants, served witness statements made by Mr Bassily and by six members of Bechtel's staff.

26. On 16 th May, Mr O'Hana, an employee of Bechtel who had resigned on 6 th May, provided a witness statement to all parties in the litigation.

27. CORBER's application for interim injunctions came on for hearing on Tuesday of this week, namely 17 th May. Mr Roger Stewart QC and Mr Ben Patten represent CORBER; Mr Anthony Boswood QC, Mr David Thomas QC and Mr Nik Yeo represent both defendants.

28. The principal issues which counsel on both sides have addressed may be identified as follows:

(1)
At the meeting on 15 th April what did Mr Bassily instruct Bechtel's staff to do?

(2)
When assessing sums payable to CORBER under contract C105, is it RLE's duty (a) to act impartially as between employer and contractor or (b) to act in the interests of the employer?

(3)
Has RLE acted in breach of its duty, as defined in the answer to Issue (2)?

(4)
If so, is URN thereby in breach of contract C105?

(5)
If so, have Bechtel and Mr Bassily committed the tort of procuring a breach of contract?

(6)
Is this an appropriate case in which to grant an interim injunction?

29. In the above list of issues, it should be noted that issue (6) will only arise if, as a result of the answers to issues (1) to (5), it appears that CORBER's case against Bechtel or Mr Bassily raises serous questions to be tried.

30. Three comments should be made about the above issues. First, the wording is my own, not that of counsel. This is my attempt to capture the real issues, as they developed in the course of oral argument. Secondly, CORBER's particulars of claim does not plead with precision CORBER's case as presented by Mr Stewart in oral argument. Unsurprisingly, Mr Boswood made some harsh comments about this. Having done so, however, he very fairly accepted that the court would be unlikely to decide the present application on the basis of pleading points. Thirdly, it has been an unusual feature of the hearing that most of the oral argument has been devoted to the substantive merits of CORBER's case. This is because Mr Boswood and Mr Thomas strongly contend that CORBER's case is so weak that it does not pass the threshold test in **American Cyanamid Co v Ethicon** [1975] AC 396 at 409D. In

other words, Mr Boswood and Mr Thomas say that CORBER's evidence does not show that there are serious questions to be tried as against either defendant.

31. The oral argument about these matters lasted for the whole of Tuesday. Unfortunately, this court had other commitments on the following day. I, therefore, said that I would give judgment on the application for interim injunctions on Friday morning. This I now do by reference to the six issues formulated above.

PART 4. Issue (1): at the meeting on 15 th April what did Mr Bassily instruct Bechtel's staff to do ?

32. When these proceedings were commenced, the only information available to CORBER was the hearsay evidence set out in Mr Ball's witness statement. Now, however, the position is different. I have before me the witness statements of six people who were present at the meeting, namely Mr Bassily and five Bechtel employees. Those employees are Mr Land (the systemwide project manager for RLE), Ms Macadam (the contract manager for contract C105), Mr Sedar (the RLE deputy project director), Mr Westwood (the RLE contract manger for contract 103) and Mr O'Hana (who subsequently resigned from Bechtel's employment).

33. None of the witnesses has yet been cross-examined and I am not conducting the trial of the action. Nevertheless, a fairly clear picture emerges from the witness statements. Mr Bassily informed his audience in forceful terms that Bechtel had a financial stake in the CTRL project and needed the costs of that project to be reduced. In relation to contract C105, Mr Bassily told the staff to apply the contract terms more strictly. Mr Bassily told the staff that costs should be kept down so far as they possibly could within the terms of the contract. For example, according to Ms Macadam, Mr Bassily "said we were to aggressively disallow costs where we could". In paragraph 6 of his witness statements, Mr Sedar says:

"Mr Bassily then turned to Section 2 of the CTRL works. Among other things, he indicated that it was important for RLE to carry out its project management role to achieve a cost effective outcome for the project. Mr Bassily told us that there was a significant gap between the Target Cost and the projected Outturn Cost and it was up to all of us to work to narrow that gap."

Mr O'Hana recalls Mr Bassily speaking about CORBER in disparaging, indeed abusive, terms. He recalls very firm advice about keeping costs down.

34. Let me now stand back and look at the evidence overall. I do not consider that that evidence lays the foundation for a case based on dishonesty. There is no evidence that Mr Bassily was instructing staff to disallow sums which they knew to be due under the terms of the contract. In so far as CORBER's claim is based upon allegations of dishonesty in that sense, CORBER has failed to satisfy the threshold test in **American Cyanamid** . The present evidence does not show that there are serious questions to be tried against either defendant.

35. On the other hand, the evidence does show that Mr Bassily was telling Bechtel staff to exercise their functions under the contract in the interests of the employer and not impartially. Indeed, Mr Boswood does not dispute that this was the thrust of Mr Bassily's speech to the staff. On the contrary, it is the defendants' case that Mr Bassily was entirely justified in what he said and that the contract did not require the project manager to act impartially.

36. Whether or not the defendants are correct in this contention of law will be addressed under the rubric of issue (2).

PART 5. ISSUE (2): when assessing sums payable to CORBER under contract C105, is it RLE's duty (a) to act impartially as between employer and contractor or (b) to act in the interests of the employer ?

37. This issue, which has significance extending beyond the boundaries of the present litigation, has been the subject of detailed argument. Indeed, in relation to this issue, Mr Thomas made supplemental oral submissions on behalf of the defendants after the conclusion of Mr Boswood's speech. In relation to this issue, therefore, and without intending any discourtesy, I shall refer to Mr Boswood and Mr Thomas collectively as "defence counsel".

38. The starting point for any consideration of issue (2) must be the decision of the House of Lords in **Sutcliffe v Thackrah** [1974] AC at 727. In that case the House of Lords held that an architect, issuing interim certificates under the then standard form of building contract, was not immune from liability in negligence to his employer. In the course of their speeches, their Lordships necessarily discussed the role and duties of an architect in that situation. At page 737 Lord Reid said this:

"It has often been said, I think rightly, that the architect has two different types of function to perform. In many matters he is bound to act on his client's instructions, whether he agrees with them or not; but in many other maters requiring professional skill he must form and act on his own opinion.

Many matters may arise in the course of the execution of a building contract where a decision has to be made which will affect the amount of money which the contractor gets. Under the R.I.B.A contract many such decisions have to be made by the architect and the parties agree to accept his decisions. For example, he decides whether the contractor should be reimbursed for loss under clause 11 (variation), clause 24 (disturbance) or clause 34 (antiquities), whether he should be allowed extra time (clause 23); or when work ought reasonably to have been completed (clause 22). And, perhaps most important, he has to decide whether work is defective. These decisions will be reflected in the amounts contained in certificates issues by the architect.

The building owner and the contractor make their contract on the understanding that in all such matters the architect will act in a fair and unbiased manner and it must therefore be implicit in the owner's contract with the architect that he shall not only exercise due care and skill but also reach such decisions fairly, holding the balance between his client and the contractor."

At pages 740 to 741, Lord Morris said this:

"An examination of the R.I.B.A. contract shows how manifold are the duties of the architect. Being employed by and paid by the owner he unquestionably has in diverse ways to look after the interests of the owner. In doing so he must be fair and he must be honest. He is not employed by the owner to be unfair to the contractor."

At page 759 Lord Salmon took as the starting point for his reasoning the proposition that in issuing certificates an architect must act fairly and impartially between employer and contractor.

39. The statements made by the House of Lords in **Sutcliffe** have for the last 30 years been accepted by the construction industry and the legal profession as correctly stating the duties of architects, engineers and other certifiers under the conventional forms of construction contract. The term "conventional contracts" has been used by counsel and myself in the present hearing to denote standard forms of contract, such as those promulgated by the Joints Contracts Tribunal, under which a certifier assesses extensions of time, recoverable loss and expense, the valuation of variations and so forth.

40. What I have said so far in Part 5 of this judgment is not a matter of controversy. The issue between the parties does not concern the duty of certifiers in general, but the specific duties of the project manager under the present contract. Defence counsel submit that the present contract should be distinguished from conventional contracts for four reasons:

(i)
The terms of the present contract which regulate the contractor's entitlement are very detailed and very specific. They do not confer upon the project manager a broad discretion, similar to that given to certifiers by conventional construction contracts. Therefore there is no need, and indeed no room, for an implied term of impartiality in the present contract.

(ii)
The decisions made by the project manager are not determinative. If the contractor is dissatisfied with those decisions, he has recourse to the dispute resolution procedures set out in section 9 of the contract. The existence of these procedures has the effect of excluding any implied term that the project manager would act impartially.

(iii)
The project manager under contract C105 is not analogous to an architect or other certifier under conventional contracts. The project manager is specifically employed to act in the interests of the employer. In **Royal Brompton Hospital NHS Trust v Hammond (No. 8)** [2002] EWHC 2037 (TCC); 88 Con LR 1 Judge Humphrey Lloyd QC at paragraph 23 described the project manager as "co-ordinator and guardian of the client's interest".

(iv)
The provisions of clauses Z.10 and Z.11 prevent any implied term arising that the project manager will act impartially.

41. In their skeleton argument, defence counsel submit that CORBER are unlikely to establish the implied term upon which they rely. In oral submissions, however, counsel put this matter much more strongly. They contend that CORBER's case on the implied term is so weak that it does not satisfy the threshold test in **American Cyanamid** . Indeed, Mr Boswood, warming to his theme, submitted that, if there were such an implied term, it would make the whole contract unworkable. Mr Boswood also pointed to the public importance of the CTRL project. He observed that it is in the public interest that the costs should be kept down.

42. In the light of these contentions, I must examine with care the four specific arguments deployed by defence counsel.

43. As to the first argument, I do accept that contract C105 (and indeed the New Engineering Contract on which it is based) is more specific and contains more objective criteria than conventional construction contracts. Nevertheless, there are still many instances where the project manager has to exercise his own independent judgment, in order to determine whether the criteria are met and what precisely should be paid to the contractor or deducted from payments made to the contractor. In giving me a very helpful guided tour through the contract, Mr Thomas referred to these as "residual areas of discretion". Some of those residual areas of discretion are apparent from the contractual provisions which I mentioned in Part 2 of this judgment.

44. When the project manager comes to exercise his discretion in those residual areas, I do not understand how it can be said that the principles stated in **Sutcliffe** do not apply. It would be a most

unusual basis for any building contract to postulate that every doubt shall be resolved in favour of the employer and every discretion shall be exercised against the contractor.

45. Let me now turn to the second argument of defence counsel. The dispute resolution procedure is set out in section 9 of the contract. This provides as follows. If the contractor is dissatisfied with any act or omission of the project manager, it may require a meeting with the project manager. If either the employer or the contractor is dissatisfied with any other matter, then a meeting may be called with both parties and the project manager. Either the employer or the contractor may refer any dispute to adjudication. The adjudication provisions are set out in clause 92 of the contract. Clause 92 is broken down into eight sub-clauses, which collectively comply with the requirements of section 108 of the 1996 Act. If either party is dissatisfied with the outcome of the adjudication, that party may refer the matter to arbitration in accordance with the provisions of clause 93.

46. Upon examining these provisions, I am unable to find anything which militates against the existence of a duty upon the project manager to act impartially in matters of assessment and certification. It is quite true, as Mr Boswood says, that what the project manager decides is not determinative. It is subject to later review by others. But this is also true of all the conventional construction contracts. The interim certificates of an architect or engineer may be challenged by arbitration. Indeed, since May 1998 every construction contract has also contained, either expressly or by statutory implication, provisions for adjudication which precisely mirror clause 92 of the present contract. For present purposes, I cannot see any relevant matter of distinction between the dispute resolution procedures of contract C105 and the dispute resolution procedures of conventional construction contracts. The provisions concerning meetings in clause 90.2 and 90.3 are not unusual. They cannot impact upon how the project manager should carry out his primary functions.

47. Mr Boswood points out that under clause 92.1 the adjudicator is obliged to act impartially. Therefore, he submits, there does not need to be any similar duty upon the project manager. This submission has surprising consequences. If (a) the project manager assesses sums due partially and in a manner which favours the employer, but (b) the adjudicator assesses those sums impartially and without favouring either party, then this is likely to lead to successive, expensive and time-consuming adjudications. I do not see how that arrangement could make commercial sense.

48. Let me now turn to the third argument of defence counsel. I quite accept that in discharging many of its functions under the contract, the project manager acts solely in the interests of the employer. This is the case, for example, when the project manager is deciding which of two alternative quotations to accept. Nevertheless, I do not see how this circumstance detracts from the normal duty which any certifier has on those occasions when the project manager is holding a balance between employer and contractor. In **Royal Brompton** (upon which defence counsel rely in paragraph 33 of their skeleton argument) the contractual arrangement was very different from that set up in the present case. There were architects and others who would carry out the functions of certification and assessing what was due to the contractor. The role of Project Management International in the **Royal Brompton** case was far removed from that of RLE in the present case.

49. Let me now turn to the fourth argument of defence counsel. Clause Z.10 is too lengthy to read out in this judgment. Suffice it to say that this may well be relevant to the question of CORBER's entitlement to an injunction. However, it does not directly bear on the question whether the project manager is obliged to act impartially.

50. Clause Z.11.1 provides as follows:

“This contract supersedes any previous (negotiations, statements, whether written or oral), representations, agreements, arrangements or understandings (whether written or oral) between the Employer and the Contractor in relation to the matters dealt within this Contract and constitutes the entire understanding and agreement between the Employer and the Contractor in relation to such matters and (without prejudice to the generality of the foregoing) excludes any warranty, undertaking, condition or term implied by custom”.

51. At the moment I do not see how clause Z.11 impacts upon the present issue. The implied obligation of a certifier to act fairly, if it exists, arises by operation of law not as a consequence of custom.

52. Let me now stand back from the details arguments and look at the matter more generally. There are two reasons why it is impossible for me to give any final decision on issue (2), despite the fact that the issue has been very fully argued on both sides by experienced leading counsel. The first reason is that this is an application for an interim injunction. I only have to decide whether CORBER pass the threshold test in **American Cyanamid** . The second reason is that URN is not a party to these proceedings. URN is a party to contract C105 and may well wish to put different or further arguments before the court concerning issue (2).

53. For present purposes, my conclusion in relation to issue (2) is that CORBER has clearly made out an arguable case that Bechtel and Mr Bassily are under a misapprehension as to RLE’s legal duty. It is, at the very least, properly arguable that when assessing sums payable to CORBER, RLE’s duty is to act impartially as between employer and contractor.

PART 6. ISSUE (3): has RLE acted in breach of its duty as defined in the answer to issue (2) ?

54. I can deal with this issue quite shortly. I have read the detailed evidence concerning how payment certificate 48 was arrived at. I have noted that certain deductions in that certificate were subsequently found to have been incorrect. A proper analysis of those deductions and the reasons for them lie outside the scope of the present hearing. Nevertheless, if Bechtel, as the dominant member of RLE, is under a misapprehension as to the nature of RLE’s legal duty, it would not be surprising if RLE failed properly to perform that duty.

55. In relation to issue (3), my conclusion is that, on the evidence, CORBER have established that there are serious questions to be tried.

PART 7. ISSUE (4): if so, is URN thereby in breach of contract C105 ?

56. This is an issue which I approach with considerable diffidence, since URN is not a party to these proceedings. I do not know what arguments URN might wish to put forward. There is also some divergence between Mr Stewart’s oral submissions on this point and his pleadings, although Mr Boswood conceded that this application should not be decided on the pleadings point.

57. In relation to issue (4), counsel have drawn my attention to the decision of the Court of Appeal in **Frederick Leyland & Co Ltd v Compania Panamena Europea Navegacion, Limitada** [1943] 76 Lloyd’s List Law Reports, 113, the Australian decision, **Perini Corporation v Commonwealth of Australia** [1969] 12 BLR 82 and the decision of Vinelott J in **London Borough of Merton v Stanley Hugh Leach Ltd** [1986] 32 BLR 51. Counsel have also drawn my attention to the commentary on **Panamena** in paragraph 6-151 of the eleventh edition of “Hudson on Building and Engineering Contracts”.

58. I can see that there may well be arguments both ways on this issue. URN might rely, for example, on page 124 of **Panamena** (a passage cited by Mr Boswood). URN might wish to argue that they have had no proper opportunity to address any misapprehension by RLE as to its legal duty. As I have not heard any submissions on behalf of URN, I certainly cannot make any finding or suggested finding against URN.

59. My conclusion on issue (4) is a limited one. It is simply that CORBER have shown that there are serious questions to be tried.

PART 8. ISSUE (5): if so, have Bechtel and Mr Bassily committed the tort of procuring a breach of contract ?

60. The answer to issue (5) really follows from the reasoning in Parts 4 to 7 of this judgment. If, as is possible, CORBER successfully overcome the hurdles identified by each of the previous issues, then CORBER must have a prospect of success on issue (5). As hurdle is piled upon hurdle, it may well be that CORBER's task in this litigation becomes more difficult. The first two hurdles may be somewhat lower than the third, fourth and fifth hurdles. Nevertheless, my conclusion is that CORBER have satisfied the threshold test in **American Cyanamid** . They have shown that there are serious questions to be tried in their litigation as against both defendants.

PART 9. ISSUE (6): is this an appropriate case in which to grant an interim injunction ?

61. In relation to this issue, Mr Boswood has marshalled an array of formidable arguments. I would summarise the principal arguments as follows:

1.
The injunction is unnecessary. If RLE make incorrect assessments, there are perfectly adequate remedies available under the contract.

2.
If CORBER have any claim against the defendants for procuring breach of contract, damages are an adequate remedy.

3.
The proposed injunctions would require continual supervision by the courts and would unfairly affect third parties.

62. Let me deal with these arguments in turn. The first argument is, in my judgment, well founded. CORBER have entered into a contract which provides elaborate and sensible procedures for dispute resolution. Mr Bruce states in paragraph 20 of his witness statement that repeated adjudications would be time consuming and expensive. No doubt, Mr Bruce is correct in this regard. Nevertheless, that is the dispute resolution procedure to which CORBER have signed up. The first sentence of clause Z.10 of the contract specifically states as follows:

"The rights and remedies of the Contractor as provided for in this Contract are exhaustive of its rights and remedies against each of the Employer and the Project Manager arising out of, under or in connection with the project or the works, whether such rights and remedies arise in respect or in consequences of a breach of contract or of statutory duty or a tortuous or negligent act or omission which gives rise to a right or remedy at common law or in equity. …"

63. In my judgment, it would be a wrong exercise of this court's discretion, certainly at the interim stage, to use the machinery of an injunction to correct any shortcomings in the certification process.

64. I turn now to the second principal argument of Mr Boswood. That, too, is well founded. If at the end of the day CORBER succeed in their claim against either defendant, damages will be an adequate remedy to compensate CORBER for any loss between now and the date of judgment.

65. I turn next to the third principal argument. That, too, in my judgment, is well founded. The proposed injunctions would be difficult for this court to supervise. Also they would adversely affect the rights of third parties, namely the other members of RLE. It would make life extremely difficult for RLE, if they had to carry out their functions of assessment and certification under the shadow of an injunction.

66. Let me now draw the threads together. CORBER have satisfied the threshold test in **American Cyanamid** . They have shown that there are serious issues to be tried in their claims against both defendants. Nevertheless, when it comes to the question of balance of convenience, CORBER have failed to show that this is a proper case for the grant of an interim injunction. On the contrary, I am quite satisfied that this is not a proper case for the grant of such an injunction.

67. For all of these reasons, my answer to the question posed by issue (6) is “no”.

PART 10. CONCLUSION

68. For the reasons set out above, my decision is that CORBER’s application for an interim injunction must be refused.

69. There are, however, two supplemental matters with which I should deal. The first concerns the phrase “in good faith”. It has become clear in the course of the hearing that this phrase is ambiguous. Sometimes it is used as a synonym for “impartially”. Sometimes it is used as a synonym for “honestly”. It is used in the former sense in the defence skeleton argument. Thus defence counsel contend in paragraph 31 that there was no implied term that RLE would act in good faith. In his oral submissions Mr Boswood used the phrase “in good faith” as a synonym for “honestly”. In that sense, of course, Mr Boswood contended that there was a duty of good faith and Bechtel had complied with it. A semantic debate about the precise meaning of the phrase “in good faith” in the context of certification seems to me to serve no useful purpose. I have therefore concentrated on the question whether there was a duty of impartiality and whether, arguably, that duty was beached.

70. The second supplemental matter is this. There is clearly a difference of view between Bechtel and CORBER about an important question of law. That question of law has been identified in issue (2), and it is this:

“When assessing sums payable to CORBER under contract C105, is it RLE’s duty (a) to act impartially as between employer and contractor or (b) to act in the interests of the employer?”

In the context of the present application, it is not permissible for this court to give a definitive answer to this question despite the excellent and thorough arguments of counsel. The importance of this question has been acknowledged on all sides in the present case. If the parties want a definitive answer to this question, either from an arbitrator or from the court, it would be better to raise the question in proceedings to which URN are a party.

71. Finally, I pay tribute to the solicitors on both sides for marshalling the evidence for this hearing at short notice. May I also thank both leading and junior counsel on both sides for the excellence of their oral and written submissions.