IN THE HIGH COURT OF JUSTICE HT-05-325
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

[2006] EWHC 89 (TCC)

St. Dunstan's House

Monday, 16 th January 2006

Before:

MR. JUSTICE JACKSON

B E T W E E N :

SCHELDEBOUW BV Claimant

- and -

ST. JAMES HOMES (GROSVENOR DOCK) LTD. Defendant

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MR. SIMON HUGHES (instructed by Kingsley Napley) appeared on behalf of the Claimant.

MR. STEPHEN DENNISON QC and MS. CAMILLE SLOW (instructed by Trowers & Hamlins)

Appeared on behalf of the Defendant.

J U D G M E N T

(As approved by the Judge)

MR. JUSTICE JACKSON:

1 This judgment is in seven parts, namely part 1, introduction; part 2, the facts; part 3, the present proceedings; part 4, the functions and duties of the construction manager; part 5, preliminary issues 1 to 3, is the employer entitled to replace the construction manager; part 6, preliminary issue 4, is the employer entitled to appoint itself as construction manager; and, part 7, conclusion.

PART 1: INTRODUCTION

2 This is the trial of four preliminary issues arising out of a construction project in Central London. The contractor, who is the claimant in these proceedings, is a company incorporated under the laws of the Netherlands, called Scheldebouw BV. I shall refer to this party as "Scheldebouw". The employer, who is defendant in these proceedings, is a development company called St. James Homes (Grosvenor Dock) Ltd. I shall refer to this party as "SJH". The construction manager for the building was until the 26 th August 2005 a company called Mace Ltd. I shall refer to this company as "Mace". The central

question which arises in these preliminary issues is whether, by one means or another, SJH was entitled to appoint itself as construction manager with effect from 26 th August 2005.

3 After this brief introduction to the case I must now turn to the facts.

PART 2: THE FACTS

4 SJH is constructing a substantial residential development known as “Grosvenor Waterside” close to the north bank of the River Thames in London S.W.1. SJH is using the construction management method. SJH has entered into trade contracts with a number of separate trade contractors for the execution of different parts of the works. There is also a professional team which provides architectural and other professional services in relation to the project as a whole.

5 Three of the buildings within the Grosvenor Waterside development are known as buildings D, E and F. By three separate trade contracts SJH engaged Scheldebouw as trade contractor to install the cladding on buildings D, E and F. The trade contracts in respect of building D is dated the 26 th January 2005. The trade contract in respect of buildings E and F are both dated the 8 th July 2004. I shall refer to these three trade contacts as “contract D”, “contract E” and “contract F” respectively. The three contracts are in similar but not identical terms. All parties are agreed that the differences between the wording of the three contracts are immaterial in the sense that those differences will not affect the outcome of the issues before the court.

6 I shall now set out the relevant provisions of contract D since that is the contract upon which counsel have concentrated their attention. The recitals to contract D read as follows:

“Whereas (A) the trade contractor has agreed to execute and complete the works for the contract sum as requested by the employer. (B) Certain contract documents (including drawings, payment schedules and programmes) are referred to in Appendix 1, Part C, and are attached to this contract and form part of it. (C) The employer has appointed the construction manager to act on its behalf and to oversee the works and has also appointed the design team to provide professional services to the employer in connection with the works. (D) The trade contractor has agreed to complete the design of the works and to provide all further detailed design information in accordance with the provisions of clause 4.2.”

Clause 1 of contract D provides:

“1.1. Definitions. Terms used in this contract shall have the meanings given to them in Appendix 1.

1.2. Related Documents. The trade contractor shall execute as a deed at the same time as it executes this contract each of the agreements listed in Appendix 1, Part G, and shall deliver the same to the construction manager. Neither any request or instruction by the employer or the construction manager to the trade contractor to commence the design or execution of the works nor any such commencement by the trade contractor shall constitute any waiver by the employer or the construction manager of this requirement.

1.3. Priority of Documents. The provisions of this form of contract shall prevail over the provisions contained in any other of the contact documents …

1.6. All certificates to be issued under this contract shall be signed by the construction manager and the architect and in the case of interim certificates under clause 16 and the final certificate under clause 17 also by the cost consultant and shall not be valid unless so signed. Certificates shall be issued to the employer with a copy to the trade contractor.”

Clause 2.1 provides:

“Execution of the Works. In consideration of the payments to be made by the employer to the trade contractor under this contract the trade contractor shall execute and complete the works in strict accordance with the contract documents and shall comply with and adhere strictly to any written instructions issued to it under this contract by the construction manager relating to the work strictly in accordance with the trade contract.”

Clause 3.2 provides:

“Setting Out. The trade contractor shall set out the works by reference to the base grid lines and levels established by the construction manager …”

Clause 4 provides:

“4.1. Contractors Detailed Design Information. The trade contractor shall submit to the construction manager in the format set out in all the detailed information on the dates or on or before the expiry of the period for submission of the same shown on the programme or if no date or period is shown on the programme on a date which is prior to and having regard to the programme proximate to the date on which it is reasonably necessary for the construction manager to examine them. The parties shall comply with the procedures for submission commenting on and use of the detailed design information set out in the contract documents …

4.3. As Built Information. Prior to practical completion of the works the trade contractor shall submit to the construction manager as built documents and sufficient information relating to the operation and maintenance of the works together with manuals as defined in the contract documents in respect of the works and in sufficient detail for the employer to operate, maintain, dismantle, reassemble, adjust and apply the works. The works shall not be considered to be practically completed until these documents and manuals have been submitted to the construction manager.”

Clause 6.2 provides:

“Assistance During Visits. The construction manager and the design team may if they so wish visit the site and the workshops and other places referred to in clause 6.1 from time to time or as may be specified in the contract documents and the trade contractor shall do all things reasonably necessary to assist the construction manager, the design team and their respective representatives during the course of such visits.”

Clause 9 provides:

“9.1. Employers’ Default. Save in the case of construction manager’s instructions (to which the provisions of clause 10 shall apply) if any negligence, omission or default of the employer or of the construction manager or their respective servants or agents disrupts the regular progress of the works or delays the execution of them in accordance with the programme and in consequence of such disruption or delay the trade contractor suffers or incurs loss and/or expense it shall be entitled to recover the same in accordance with the provisions of this clause 9.

9.2. Notice to be Given. Upon it becoming reasonably apparent that an event giving rise to a claim under clause 9.1 is likely to occur or has occurred the trade contractor shall immediately give notice to the construction manager of such event and shall on presentation of its application for interim payment pursuant to clause 16.1 next following the giving of such notice submit to the construction manager an estimate of the adjustment to the contract sum which the trade contractor requires to

take account of such loss and/or expense suffered or incurred by it in consequence of such event prior to the date of submission of his estimate.

9.3. Estimates to be kept up to date. Following the submission of an estimate under clause 9.2 the trade contractor shall for so long as the trade contractor suffers or incurs damage, loss and/or expense in consequence of such event on presentation of each application for interim payment pursuant to clause 16.1 submit to the construction manager an estimate of the adjustment to the contract sum which the trade contractor requires to take account of such loss and/or expense suffered or incurred by him since the submission of its previous estimate.

9.4. Agreement of Estimates. Any estimates submitted by the trade contractor pursuant to clause 9.2 or 9.3 shall be supported by such documents, vouchers and receipts as shall be necessary for computing the same or as may be required by the construction manager. Within 20 working days of receipt of any such estimate duly supported as aforesaid the construction manager shall give notice of acceptance or rejection of the said estimate. If the estimate is accepted the contract sum shall be adjusted accordingly and no further or other additions or payments shall be made in respect of the loss and/or expense suffered or incurred by the trade contractor during the period and in consequence of the event in question. If the estimate is rejected the construction manager shall ascertain and certify a fair and reasonable adjustment to the contract sum in respect of the loss and/or expense suffered or incurred by the trade contractor."

Clause 10 provides:

"10.1. Instructions which give rise to payment. If any instruction under this contract –

10.1.1 shall require the trade contractor to undertake work or do anything not provided for in or to be reasonably inferred from the contract documents, or

10.1.2 shall require the omission of any work or any obligation or restriction

And provided the same shall not have arisen out of or in connection with or shall not reveal any negligence, omission or default of the trade contractor of any sub-contractor or supplier or its or their respective servants or agents the contract sum shall be adjusted and the remainder of the provisions of clause 10 shall apply. Otherwise no adjustment shall be made to the contract sum in respect of compliance by the trade contractor with any such instruction …

10.3. Trade Contractors' Estimates. Where in the opinion of the trade contractor or of the construction manager any instruction issued by the construction manager for the trade contractor under this contract will require an adjustment to the contract sum and/or will affect the programme the trade contractor shall immediately comply with it (unless the construction manager otherwise instructs) and shall also furnish the construction manager within five working days (or within such other period as may be agreed between the trade contractor and the construction manager) of receipt of the instruction with estimates of –

10.3.1 the value of the adjustment whether it represents an increase or decrease in the contract sum (providing it with all necessary supporting calculations by reference to the schedule of rates or otherwise); and

10.3.2 the length of any extension of time to which it may be entitled under clause 13.5; and …

10.3.3 the amount of any damage loss and/or expense which may be suffered or incurred by it arising out of or in connection with such instruction.

10.4. Agreement of Estimates. A trade contractor and the construction manager shall then take reasonable steps to agree the trade contractor's estimates and any agreement so reached shall be binding upon the trade contractor and the employer. The construction manager shall grant an extension of time under clause 13.5 as agreed (if any) and the agreed adjustments (if any) in relation to the trade contractors' estimates under clauses 10.3.1 and/or 10.3.3 shall be made to the contract sum.

10.5. Dispensing With Estimates. If the construction manager dispenses with the trade contractors' obligations to produce estimates under clause 10.3 or if the parties are not able to agree estimates under clause 10.4 the construction manager shall within a reasonable time ascertain and certify a fair and reasonable adjustment of the contract sum based on (where appropriate) the schedule of rates in respect of compliance by the trade contractor with such instructions and any loss and/or expense suffered or incurred by the trade contractor arising out of or in connection with it and a fair and reasonable extension of time shall be granted under clause 13.5."

Clause 13 provides:

"13.2. Completion of the Works. The trade contractor shall commence the execution of the works on site on or before the expiry of 10 working days from receipt of the construction manager's instructions so to do. The trade contractor shall thereafter proceed with the works regularly and diligently so that the works and each part of the works are completed on or before the expiry of the period stated in the programme for the completion of the same.

13.3. Failure to Complete. If the works or any part of the works is not completed in accordance with clause 13.2 the construction manager shall issue a certificate to that effect.

13.4. Grounds for Extensions. No extension of time shall be granted to the trade contractor except in the case of … [there then follows a list of what I may call conventional grounds for extension of time] and then only to the extent that the trade contractor shall prove to the reasonable satisfaction of the construction manager that the completion of the works or any part of the works is thereby delayed and that such delay could not reasonably have been foreseen at the date of this contract by a contractor exercising the standard of due care and diligence described in clause 2.2 …

13.5. Grant of Extensions. So soon as may be practicable after receipt of all the particulars referred to in clause 13.4 the construction manager shall after consultation with the architect grant to the trade contractor in writing such extension of time for the completion of the works and/or any part of the works as it then estimates to be fair and reasonable …

13.6. Review of Extensions. Within a reasonable time after practical completion of the works the construction manager shall confirm the periods for completion of the works or any part of the works previously stated, adjusted or fixed, or may fix a term for completion of the works or of any part of the works which is later than previously stated, adjusted or fixed, whether as a result of reviewing all or any previous decisions under clause 13.5 or otherwise. The construction manager shall notify the trade contractor of his final decision under this clause 13.6."

Clause 14.1 provides:

"Practical Completion of the Works. When in the opinion of the construction manager and the architect the works are or will be subject to completion of any outstanding items of work practically completed and the documents referred to in clause 4.3 have been delivered to the construction manager, the construction manager shall issue a certificate to that effect which shall also be signed by

the architect. Such certificate may as appropriate be accompanied by a list of any outstanding items of work required to render the works complete. Practical completion of the works shall be deemed to have occurred on the day named in such certificate …"

Clause 14.2 relates to practical completion of the project. That clause is in similar terms to clause 14.1. Clause 14.3 provides:

"Defects Period. So that the works shall at or as soon as may be possible after the expiry of the defects period be complete in accordance with this contract the trade contractor shall with all due diligence complete any items of work outstanding at practical completion of the works and shall if the construction manager so instructs at any time during the defects period or within 10 days after it has expired immediately carry out all necessary repairs, replacements and remedial work and make good all defects, shrinkages, snagging list items, de-snagging list items or other faults in the works which may appear during the defects period. When in the opinion of the construction manager and the architect all such defects, shrinkages, snagging list items, de-snagging list items and other faults in the works have been made good, the construction manager shall issue a certificate to that effect which shall also be signed by the architect and completion of making good defects shall occur on the day named in such certificate, provided the expression the 'works' shall where the project is to be completed in sections for the purposes of clause 14.3 include any part of the works in any section."

Clause 16 provides:

"16.1. Trade Contractors' Monthly Application. On the last working day of each calendar month up to and including the calendar month after that in which practical completion of the whole of the works occurs and thereafter as and when further amounts become due from the trade contractor under the contract the trade contractor shall present to the construction manager an application stating the total amount due to the trade contractor calculated in accordance with the provisions of clause 16.2 supported by such documents, vouchers and receipts as shall be necessary for completing the same or as may be required by the construction manager together with the trade contractor's interim statement of account duly completed and signed in accordance with the procedure set out in the contract documents.

16.2. Certificate of Construction Manager. Within 10 working days of receipt by the construction manager of the said application and documents the construction manager shall issue an interim certificate which shall also be signed by the architect and by the cost consultant specifying the amount due to the trade contractor from the employer which shall, subject to adjustments under clause 16.4, be 100% of …"

There then follows a detailed list of the items which will be included in the payment to the trade contractor.

Clause 17 provides:

"17.1. Final Account. The trade contractor shall submit to the construction manager within 20 working days after practical completion of the whole of the works the trade contractor's final account for the works and all documents, vouchers and receipts as shall be necessary for computing the contract sum as finally adjusted in accordance with this contract or as may be required by the construction manager. As soon as possible after receipt of the same the construction manager and the trade contractor shall take steps to agree the trade contractor's final account and following agreement the trade contractor shall sign the same to acknowledge that he accepts the amounts

included in such account in full and final settlement of all moneys due to him under or in connection with this contract and the employer shall waive any further rights it may have against the trade contractor for any deduction or set off by reason of any losses suffered by it arising from any delay in completion of the works.

17.2. Final Certificate. The construction manager shall issue the final certificate which shall also be signed by the architect and by the cost consultant within 20 working days after completion by the trade contractor of all its obligations in accordance with this contract.

17.3. Balance on Final Certificate. The final certificate shall state –

17.3.1 the contract sum as finally adjusted in accordance with this contract, and

17.3.2 the total amount already paid to the trade contractor under clause 16.3

And the difference (if any) between them after taking into account any deduction which the employer is entitled to make shall be stated in the final certificate as a balance due to the trade contractor from the employer or to the employer from the trade contractor as the case may be and shall from the tenth working day after issue of the final certificate which shall be the final date for payment of such balance be a debt payable by the employer or the trade contractor as the case may be. The amount stated in the final certificate shall be final and conclusive as to the amounts due to the trade contractor under or in connection with this contract unless the trade contractor or the employer shall on or before the expiry of the tenth working day after issue of the final certificate issue a notice to the adjudicator referring the dispute to him under clause 21.2 or issue proceedings disputing such amounts."

Clause 21 provides:

"21.2. Adjudication. Any dispute or difference arising under or in connection with this contract may be referred to adjudication. The adjudicator shall be the person named in Appendix 1, Part E, or such other person as may be appointed in accordance with Appendix 1, Part E. The adjudication shall be conducted in accordance with the Scheme for Construction Contracts SI 1998 No. 649.

21.3. Decision. The adjudicator's decision is binding until the dispute or difference is finally determined by the courts as provided in clause 21.6 …

21.6. Courts. The English courts shall have exclusive jurisdiction over any dispute or difference which shall arise between the employer and the trade contractor arising out of or in connection with this contract."

6 Appendix 1 to the contract provides:

"Part A. 'The works' in this contract means the design, procurement, installation, execution and completion of the cladding to building D. 'The site' in this contract means the plot at Grosvenor Waterside, London S.W.1 as shown on the site plan included in the contract documents. 'The project' in this contract means building D forming part of the redevelopment of Grosvenor Waterside, London S.W.1. The development comprises a high quality residential development of seven apartment buildings lettered A to F, together with associated landscaping, mixed amenity and external works …

Part C. 'The contract documents' in this contract means the annexed document which appears in appendix 1 incorporating site logistics plan, programmes, the works, Colasite project work flow protocol document, drawings and specifications, schedule of rates, pricing schedule and the contract

documents shall form part of this contract, and the term ‘this contract’ shall be construed accordingly …

Part E. ‘The adjudicator’ in this contract means Roger Finches, senior partner of Gardiner & Theobald, or if he is not available another partner in the firm of Gardiner & Theobald nominated by the senior partner from time to time to act as adjudicator in place of the adjudicator so appointed. ‘The architect’ in this contract means the Amos Partnership. ‘The construction manager’ in this contract means Mace Ltd. ‘The cost consultant’ in this contract means Gleeds Ltd. ‘The planning supervisor’ in this contract is NHBC Health and Safety Services Ltd. ‘The design team’ in this contract means [refer to section 1.2 of annex to trade contract] or any further or other person notified in writing by the employer to the trade contractor from time to time.”

Section 1.2 of the annex to the contract provides:

“Design Team and Project Team. The client has appointed a team of professional consultants for building D. The design team comprises the architect, Amos Partnership … the structural engineer, Waterman Partnership … the mechanical and electrical engineer, Hilson Moran … Other members of the design team comprise the construction manager\the principal contactor Mace Ltd. … the planning supervisor, NHBC Health and Safety Services … the cost consultant Beads …”

8 By a construction management agreement dated the 12 th August 2004 SJH engaged Mace to act as construction manager in relation to the Grosvenor Waterside project. This agreement required Mace to perform the functions of contract manager as set out in the various trade contacts made between SJH and the individual trade contractors, including Scheldebouw. The agreement between SJH and Mace is sometimes referred to as “the CMA”.

9 Scheldebouw duly commenced and proceeded with the work of designing and installing the cladding on buildings D, E and F. On the 20 th May 2005 Scheldebouw achieved practical completion of the cladding works to building E. On the 23 rd May 2005 a certificate of practical completion in relation to building E was issued by Mace, having been duly signed both by Mace and by the architect.

10 On the 26 th August 2005 SJH sent a letter to Scheldebouw which included the following passage:

“This is to notify you that by mutual agreement and with immediate effect St. James and Mace have agreed to end the appointment of Mace under the CMA. St. James will now undertake all roles and responsibilities of the construction manager under the CMA instead of Mace, including that of principal contractor for the purposes of the CDM Regulations.

Our negotiations with Mace (which are still continuing) are amicable and each party is cooperating with the other with the intent to facilitate a continuous programme and to minimise any disturbance to the project or any increased cost.

As of today’s date you should continue with all works/services under your trade contract in the normal way. Our responsibilities to you as your client under the trade contract remains unaffected by Mace’s departure from the project.”

11 Scheldebouw replied to this letter on the 1 st September, expressing concern about SJH’s substitution of itself as construction manager. On the 8 th September 2005 SJH sent a letter responding to Scheldebouw’s concerns, which included the following passage:

“The ability for St. James to replace Mace as the main construction manager arises pursuant to our right to do so in our contract with you. Construction manager is a defined term in the contract, as set

out in Appendix 1, which is stated to be 'Mace Ltd. or any further or other person notified in writing by the employer to the trade contractor from time to time'. We are therefore entitled to replace the construction manager at any time provided we notify you in writing of the same, and in this regard we have done so, notifying you that St. James is to be the construction manager. Our reasons for doing so are irrelevant.

There is no reason why we cannot appoint ourselves as the construction manager. This is a construction management contract whereby the construction manager, whoever that is, acts on our behalf to manage the works in relation to the contracts entered into between us and the trade contractors. Under construction management, as opposed to management contracting, the construction manager acts entirely as our agent to protect our interests. The construction manager is not appointed as some quasi independent certifier, as you imply, such as is the position of an architect, for instance, under a JCT contract. As far as St. James Group Ltd. is concerned the same points apply, were they to be relevant …

We would repeat our comments above, that there is no obligation on us to act independently and impartially as there was not on Mace …"

12 The issues raised in this correspondence were debated over the next three months but no resolution was achieved. SJH maintained that it was entitled to appoint itself as construction manager and Scheldebouw disputed that contention.

13 In order to resolve the deadlock between the parties Scheldebouw commenced the present proceedings.

PART 3: THE PRESENT PROCEEDINGS

14 By a claim form issued under Part 8 of the Civil Procedure Rules on the 15 th November 2005 Scheldebouw claimed declarations in the following terms:

"That the Defendant was and is in repudiatory breach of three trade contracts between the parties, giving rise to a right to the Claimant to terminate and that the Claimant has additional rights to claim damages, interest and costs for repudiatory breach of the three trade contracts in relation to the development at Grosvenor Waterside, London S.W.1."

The essential basis of Scheldebouw's claim, as set out in the particulars of claim, was twofold: (1) SJH had no power under the trade contracts to replace Mace as construction manager; (2) alternatively, if there was such a power, that power did not enable SJH to appoint itself as construction manager.

15 At a directions hearing on the 23 rd November I directed that these proceedings should continue as though they had been commenced under Part 7 of the Civil Procedure Rules. I also fixed an early date for the trial of any preliminary issues which might be identified.

16 On the 14 th December SJH served its defence. By that defence SJH asserted that it had a contractual entitlement under each trade contract to appoint itself as construction manager.

17 At a directions hearing on the 20 th December the question of preliminary issues was revisited. The draft preliminary issues proposed by both parties were along similar lines. After discussion with counsel I directed that the following preliminary issues should be tried. (1) On their proper construction, do the trade contracts provide expressly that the construction manager can be replaced by any further or other person notified in writing by the employer to the trade contractor from time to time? (2) If the answer to question 1 is no, do any or all of the trade contracts contain an implied term

which permits the employer on notice to replace the construction manager? (3) If the answers to questions 1 and 2 are no, do any or all of the trade contracts contain an implied term which permits the employer on notice to replace the construction manager for good cause? (4) If the answer to any of the above questions is yes, is the employer entitled under any or all of the trade contracts to appoint itself as the construction manager?

18 The preliminary issues were argued at a one-day hearing on the 10 th January. Mr. Simon Hughes represented Scheldebouw. Mr. Stephen Dennison Q.C. and Ms. Camille Slow represented SJH.

19 In giving my decision on the preliminary issues I shall approach matters in the following order: first, I shall analyse the functions and duties of the construction manager. Next I shall address preliminary issues 1 to 3 collectively. Finally I shall address preliminary issue 4.

20 My first task therefore is to consider the functions and duties of the construction manager.

PART 4: THE FUNCTIONS AND DUTIES OF THE CONSTRUCTION

MANAGER

21 The construction manager under contracts D, E and F has two separate and distinct functions. First, the construction manager is the agent of SJH and in that capacity he gives effect to SJH's wishes and carries out SJH's instructions. SJH decides, for example, what variations to the design should be made. The construction manager then gives instructions under clauses 2.1 and 10 of the trade contract, requiring the contractor to implement those variations. The construction manager's second function is quite different. He has to reach decisions on matters where, at least potentially, the contractor and the employer have opposing interests. Under clause 9.4 the construction manager ascertains and certifies loss and expense payable by the employer to the contractor by reason of delay or disruption. Under clause 10.5 the construction manager ascertains and certifies adjustments to the contract sum consequential upon instructions given to the contractor. Under clause 13.5 the construction manager grants fair and reasonable extensions of time to the contractor. Under clause 14 the construction manager issues certificates of practical completion and certificates to the effect that defects have been made good. Under clause 16.2 the construction manager issues interim certificates specifying what should be paid to the contractor. Under clause 17.2 the construction manager issues the final certificate, which states the final balance which is due as between employer and contractor. Under clause 19 the construction manager issues various certificates consequent upon termination, if that occurs. For convenience, I shall refer to the construction manager's first function as the "agency function". I shall refer to the construction manager's second function as the "decision-making" function.

22 In relation to the decision-making function the construction manager does not act in isolation. Although certain clauses require the construction manager to ascertain matters, any subsequent certificate issued by the construction manager must also be signed by the architect (see clause 1.6). Certificates issued by the construction manager under clauses 16 and 17 of the trade contract must be signed not only by the construction manager and architect, but also by the cost consultant. The construction manager named in the trade contract, namely Mace, had its own team of construction professionals. The parties to the contract must have intended that before the issue of certificates there should be consultation between (a) Mace's professional team and (b) the architect and (when appropriate) the cost consultant.

23 In the case of extensions of time the written decisions of the construction manager are not certificates and they do not have to be signed or co-signed by anybody else. Under clause 13.5 the construction manager is obliged to consult with the architect about extensions of time, but he is not obliged to accept or defer to the architect's opinions.

24 Having outlined the functions allocated to the construction manager under each trade contract, let me now turn to his legal duties. In relation to the agency function, the construction manager owes the ordinary duties of agent to principal. These do not call for any elaboration in the context of the present case. In relation to the decision-making function, however, the position is different. The duty of the construction manager is not simply to implement the instructions of his principal, but rather to hold the balance fairly as between employer and contractor.

25 The duties of certifiers and others with decision-making functions under construction contracts have been the subject of much authority. Let me start with Frederick Leyland & Co. Ltd. v. Compania Panamena Europea Navigacion Limitada [1943] 76 Ll.L.Rep. 113. The plaintiffs in that case were claiming payment for the repair of a ship. The defendants were the ship owners. Clause 7 of the contract for repair works included the following passage:

"Payments shall be effected as required by the repairers on the basis of cash against expenditure during the progress of the work and the ascertained balance on the completion of the repairs and every such payment shall be effected promptly by the owners after the issue of a certificate by the owners' surveyor that the work has been satisfactorily carried out and on receipt of a certificate of the amount due issued by the Costs Investigation Branch of the Ministry of War Transport and certifying that the same has been checked and found correct."

The first of the two certificates which this clause mentions was to be issued by the owners' surveyor. Dr. Telfer was both the surveyor of the defendant ship owners and also the president of the defendant ship owners. Dr. Telfer refused to issue a certificate under clause 7, because the repairers had failed to provide all the information and documentation which Dr. Telfer had requested. The Court of Appeal held that Dr. Telfer had misinterpreted his role under clause 7 and that Dr. Telfer did not in fact need the information upon which he was insisting. Accordingly, the absence of a certificate from the owners' surveyor was no defence to the repairers' claim for payment. The leading judgment in the Court of Appeal was given by Lord Justice Scott, with whom both Lord Justice Luxmoore and Lord Justice Goddard agreed. At p.123 Lord Justice Scott said this:

"Dr. Telfer (and he was obviously so appointed with the approval of the repairers) is not either an arbitrator or a quasi arbitrator (a phrase which has no clear meaning and is best avoided) but only an expert whose opinion in regard to the quality of the work done the contractor has to satisfy as a condition precedent to the owner's undertaking to pay; secondly, that there is no arbitration clause to which the validity of the surveyor's action or inaction can be submitted by the aggrieved party; and, thirdly, that he is put in the position of a person whose duty it is to act with scrupulous independence of both parties."

The House of Lords upheld the Court of Appeal's decision: see Panamena Europea Navigacion Compania Limitada v. Frederick Leyland & Co . [1947] A.C. 428. The reasoning of the House of Lords on the principal issues was similar to the reasoning of the Court of Appeal: see the speech of Lord Thankerton with whom Lord Uthwatt and Lord Porter and Lord du Parcq agreed. In relation to the duties of Dr. Telfer, Lord Thankerton said this, at p. 437:

“There can be no doubt that the owner’s surveyor is employed in different capacities under clauses 6 and 7. Under clause 6 he is the employee of the appellants employed to carry out the necessary surveillance and inspection on their behalf and to report to them, advise them and consult with them. There may be other minor duties. In all these matters the decisive opinion is that of the appellants. The position under clause 7 is different, as the decisive opinion is that of the surveyor himself, and that opinion should be an independent one. For these reasons I do not think that the use of such expressions as ‘quasi arbitrator’ or ‘merely an expert’ are really helpful. By entering into the contract the respondents agreed that the appellants’ surveyor should discharge both these duties and therefore they cannot claim that the appellants’ surveyor must be in the position of an independent arbitrator, who has no other duty which involves acting in the interests of one of the parties.”

26 Many interesting points emerge from the judgments and speeches in Panamena but they are for another day. The relevant principle, which I derive both from the judgments of the Court of Appeal and from the speeches in the House of Lords, is that in performing his certification function Dr. Telfer (although not an arbitrator) was under a duty to act independently. It cannot be said that Dr. Telfer was an independent surveyor. He plainly was not. Dr. Telfer was the president of the defendant company, a director of the defendant company, and also the marine surveyor employed by that company. In other words, he was not an independent person but his duty was to act in an independent manner.

22 In Perini Corporation v. Commonwealth of Australia [1969] 12 B.L.R. 82, the plaintiff contracted to build a mail exchange for the defendant. Under the building contract the director of works, an officer of the defendant, had functions as certifier. At pp. 97 to 98 Macfarlan J. said this about the duties of the director:

“I am satisfied that the director of works was not an arbitrator and indeed, unless I am mistaken, this argument was not strongly pressed by learned counsel for the plaintiff. However, the argument that he was a servant and in the alternative that he was a certifier was developed in detail. The decisions of the courts extending back over many years show that in many agreements there are concluded provisions of the same general character as in clause 35. These characteristics appear most notably, and perhaps most frequently, in agreements which have been made for the construction of public works or where one party is a local governing body. The characteristic of them is that there is a person appointed on behalf of the government or semi-government body to supervise the execution of the contract on behalf of his employer. He is generally a senior engineer or a director of works or a principal architect or some other officer who, because of his technical qualifications and experience, is competent to undertake that work. He is, as I have said, an employee of the body on whose behalf he undertakes this work but, in addition, the same cases show that he is commonly charged with a duty either of resolving disputes between the contractor and the body which employs him or in certifying as to the quality of work done or the whole or part of the cost of doing that work. In my opinion the cases make plain that throughout the period or performance of all these duties the senior officer remains an employee of the government or semi-government body but that, in addition, while he continues as such an employee he becomes vested with duties which oblige him to act fairly and justly and with skill to both parties to the contract. The essence of such a relationship, in my opinion, is that the parties by the contract have agreed that this officer shall hold these dual functions and they have agreed to accept his certificate or opinion on the matters which he is required to decide.”

At p. 107 Macfarlan J. added this comment:

“I have already held that the duty of director when acting as certifier was to act independently and in the exercise of his own volition according to the exigencies of a particular application.”

27 In London Borough of Hounslow v. Twickenham Garden Developments Ltd . [1971] 1 Ch. 233, Mr. Justice Megarry reviewed the duties of certifiers under building contracts. At pp. 259 to 260 he said this:

“It seems to me that under a building contract the architect has to discharge a large number of functions, both great and small, which call for the exercise of his skilled professional judgment. He must throughout retain his independence in exercising that judgment: but provided he does this I do not think that, unless the contract so provides, he need go further and observe the rules of natural justice, giving due notice of all complaints and affording both parties a hearing. His position as an expert and the wide range of matters that he has to decide point against any such requirement: and an attempt to divide the trivial from the important, with natural justice applying only to the latter, would be of almost insuperable difficulty. It is the position of independence and skill that affords the parties the proper safeguards and not the imposition of rules requiring something in the nature of a hearing.”

28 In Sutcliffe v. Thackrah [1974] A.C. 727 the House of Lords held that an architect issuing interim certificates under the then standard form of building contract was not immune from suit in negligence. The speeches in the House of Lords contain many valuable statements about the duties of an architect when acting as certifier or decision-maker. At p. 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 matters 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 contactor gets. Under the RIBA 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 issued 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 p.751 Lord Morris made some important observations about the architect’s duties when explaining why the architect should not be characterised as an arbitrator. He said:

“The fact that a building owner and contractor agree that they will treat the certificates of the owner’s architect as conclusive evidence that work has been duly completed does not of itself establish that the architect was an arbitrator between them. Neither does the circumstance that by its very nature the architect’s function involves that he will act impartially and fairly. He must certainly so act because, there being a contract for work to be done according to the terms of the contract, his function is to see that the contract is carried out. But that does not, without more, make him an arbitrator. His duty is to act fairly when exercising his professional skill in considering whether work done satisfied the contract requirements as to work to be done. If that circumstance constituted him

an arbitrator then at almost every stage he would be an arbitrator. His duty to act fairly does not conflict with, but rather is part of, his duty to safeguard and look after the interests of the building owner who has employed him."

The other speeches in the House of Lords contain briefer passages which are to the same effect.

29 Let me now move on 14 years to Beaufort Developments Ltd. v. Gilbert Ash NI Ltd . [1999] A.C. 266. This is the well known case in which the House of Lords overruled Northern Regional Health Authority v. Derek Crouch Construction Co. Ltd . [1984] Q.B. 644. The House of Lords held that the court had the inherent power to open up, review and revise architects' certificates under the JCT standard form of building contract. Lord Hoffmann, in a speech with which Lord Lloyd agreed, said this at pp. 275 to 276:

"If the certificates are not conclusive what purpose do they serve? If one considers the practicalities of the construction of a building or other works, it seems to me that parties could reasonably have intended that they should have what might be called a provisional validity. Construction contracts may involve substantial work and expenditure over a lengthy period. It is important to have machinery by which the rights and duties of the parties at any given moment can at least provisionally be determined with some precision. This machinery is provided by architect certificates. If they are not challenged as inconsistent with the contractual terms which the parties have agreed, they will determine such matters as when interim payments or due or completion must take place. This is something which the parties need to know. No doubt in most cases there will be no challenge. On the other hand, to make the certificate conclusive could easily cause injustice. It may have been given when the knowledge of the architect about the state of the work or the effect of external causes was incomplete. Furthermore, the architect is the agent of the employer. He is a professional man but can hardly be called independent. One would not readily assume that the contractor would submit himself to be bound by his decisions subject only to a challenge on the grounds of bad faith or excess of power. It must be said that there are instances in the nineteenth century and the early part of this one in which contracts were construed as doing precisely this. There are also contracts which provided that in case of dispute the architect was to be the arbitrator. But the notion of what amounted to a conflict of interest was not then as well understood as it is now. And of course the inclusion of such clauses is a matter for negotiation between the parties or, in a standard form, the two sides of the industry, so that what is acceptable will to some extent depend upon the bargaining strength of one side or the other. At all events, I think that today one should require very clear words before construing a contract as giving an architect such powers."

30 Two relevant points emerge from passage. First, the architect is not and cannot be independent, because he is employed by the employer. Secondly, the architect makes decisions which are binding if they are not challenged. This passage seems to me entirely consistent with the authorities mentioned above. The fact that the architect is not independent is perfectly consistent with the proposition that he is required to act in an independent manner in certain situations. Indeed Lord Hoffmann recognised that in most cases the certificates issued by the architect will not in fact be challenged.

31 In Amec Civil Engineering Ltd. v. Secretary of State for Transport [2005] E.W.C.A.Civ. 291; [2005] B.L.R. 227, the validity of an engineer's decision under clause 66 of the ICE conditions was attacked on a number of grounds. One ground of attack was the engineer's failure to abide by the rules of natural justice. Both this court and the Court of Appeal upheld the engineer's decision. The reasoning of Mr. Justice Megarry in Hounslow was approved and applied both by this court and by the Court of Appeal. At para. 47 Lord Justice May (with whom Lord Justice Hooper agreed) said this:

“Under clause 66 the engineer is required to act independently and honestly. The use by the New Zealand Court of Appeal of the word ‘impartially’ does not, in my view, overlay independence and honesty so as to encompass natural justice, as Mr. Ramsey appeared to contend. I would not be coy about saying that the engineer has to act ‘fairly’, so long as what is regarded as fair is flexible and tempered to the particular facts and occasion.”

At para. 81 Lord Justice Rix said this:

“Even, however, if the decision in question was of the more basic kind referred to in the earlier authorities, all of those authorities appear to consider that the engineer (or architect) must nevertheless act fairly, albeit that concept in the ordinary context where the engineer is employed by the building owner means less than it would were the engineer acting in a judicial or quasi judicial capacity. For the same reason ‘independence’ and ‘impartiality’ must necessarily be given a more restricted meaning than they regularly receive in other contexts. Even so, the engineer must ‘retain his independence in exercising his skilled professional judgment’ (Megarry J at 259G). He must ‘act in a fair and unbiased manner’ and ‘reach his decisions fairly holding the balance’ (Lord Reid at 737D). He must ‘act fairly’ (Lord Morris at 744G). If he hears representations from one party, he must give a similar opportunity to the other party to answer what is alleged against him (Hatrick NZCA). He must ‘act fairly and impartially’ where fairness is ‘a broad and even elastic concept’ and impartiality ‘is not meant to be a narrow concept’” (Canterbury Pipe NZCA).

32 Finally in this review of authority, I should perhaps mention the decision of this court in Costain Ltd. v. Bechtel Ltd . [2005] E.W.H.C. 1018 (TCC). The passage at paras. 37 to 53 sets out broadly similar principles to those emerging from the cases cited above.

33 Let me now draw the threads together. In many forms of building contract a professional person retained by the employer, and sometimes a professional person directly employed by the employer, has decision-making functions allocated to him. I will call that person “the decision-maker”. The decisions which he makes are often required to be in the form of certificates, but this is not always so. For example, there are many contracts (of which the present one is an instance) in which extensions of time do not take the form of certificates.

34 Three propositions emerge from the authorities concerning the position of the decision-maker.

(1) The precise role and duties of the decision-maker will be determined by the terms of the contract under which he is required to act.

(2) Generally the decision-maker is not, and cannot be regarded as, independent of the employer.

(3) When performing his decision-making function, the decision-maker is required to act in a manner which has variously been described as independent, impartial, fair and honest. These concepts are overlapping but not synonymous. They connote that the decision-maker must use his professional skills and his best endeavours to reach the right decision, as opposed to a decision which favours the interests of the employer.

35 In my judgment, these propositions are all applicable to the construction manager in the present case. The fact that the construction manager acts in conjunction with other professionals when performing his decision-making function does not water down his legal duty. When performing that function, it is the construction manager’s duty to act in a manner which is independent, impartial, fair and honest. In other words, he must use his professional skills and his best endeavours to reach the right decision, as opposed to a decision which favours the interests of the employer.

36 It follows from this analysis that SJH's summation of the duties of the construction manager in SJH's letter dated the 8 th September 2005 is not correct.

37 Having reviewed the position of the construction manager, I must now turn to the preliminary issues.

PART 5: PRELIMINARY ISSUES 1 TO 3: IS THE EMPLOYER ENTITLED TO

REPLACE THE CONSTRUCTION MANAGER ?

38 In relation to preliminary issue 1, Mr. Dennison, for SJH, contends that Part E of Appendix 1 confers an express power on SJH to replace the construction manager. Mr. Hughes, for Scheldebouw, contends that the last 20 words of Part E relate only to the design team and that "the design team" comprises only the architect, the structural engineer and the mechanical and electrical engineer.

39 Both counsel developed their submissions on issue 1 with commendable brevity; I shall follow suit. On this issue of construction I prefer the submissions of Mr. Dennison. I hold that Part E of Appendix 1 confers upon SJH an express power to replace the construction manager. I reach this conclusion for four reasons:

(1) Part E defines six different entities who feature in the contract and its annexes, namely the adjudicator, the architect, the construction manager, the cost consultant, the planning supervisor and the design team. Part E sets out a replacement mechanism for the first of these entities, but not for the other five. In my view it is a natural reading of Part E to treat the replacement mechanism at the end of Part E as applying to all five of those entities.

(2) From a commercial point of view it would be bizarre if the employer were entitled at will to replace the architect and the various engineers but not the construction manager. Insofar as Part E is ambiguous, it is proper to have regard to commercial reality and to the circumstances in which this contract was made. See Investors Compensation Scheme Ltd. v. West Bromwich Building Society [1998] 1 W.L.R. 896 at pp. 912 to 913, and BCCI v. Ali [2001] UKHL; [2002] 1 A.C. 251 at para. 39.

(3) Although punctuation is relevant, the presence of certain full stops in Part E cannot override the obvious meaning of the clause.

(4) If (contrary to my view) the last 20 words of Part E relate only to the design team then one looks at para.1.2 of the Annex in order to see who comprised the design team. That paragraph expressly states:

"Other members of the design team comprise the construction manager\the principal contractor, Mace Ltd."

40 In relation to the fourth of the reasons which I have given, it should be noted that there is a difference between the wording of contract D on the one hand and the wording of contracts E and F on the other hand. In Part E of Appendix 1 the words in square brackets "Refer to section 1.2 of Annex to Trade Contract" appear in contract D, but do not appear in contract E or in contract F. Instead in contracts E and F there is a blank after the words "the design team in this contract means". In my judgment, this difference in wording does not lead to any different interpretation of contracts E and F. I have reached this conclusion for two reasons: (1) Neither counsel relies upon this feature as leading to a different outcome. It is common ground between counsel that the preliminary issues must be answered in the same way in relation to all three trade contracts. (2) The blank space which appears

in contracts E and F is obviously a slip. One must look at the annex in order to supply the omission and to see who constitutes the design team.

41 Let me now draw the threads together. For the reasons set out above, I hold that the answer to preliminary issue 1 is “Yes”. In those circumstances preliminary issues 2 and 3 do not arise for consideration. If the replacement of the construction manager is the subject of an express term, there cannot be an implied term covering the same ground.

PART 6: PRELIMINARY ISSUE 4. IS THE EMPLOYER ENTITLED TO

APPOINT ITSELF AS CONSTRUCTION MANAGER ?

42 Mr. Dennison, for SJH, submits that the answer to issue 4 is “Yes”. Mr. Hughes, for Scheldebouw, contends that the answer is “No”.

43 The written arguments of both parties were refined and developed during the course of the oral hearing. Drawing together Mr. Dennison’s skeleton argument and his oral submissions I would summarise the principal arguments advanced on behalf of SJH as follows:

(1) An express term of the trade contract permits the employer to appoint “any further or other person” as trade contractor.

(2) If the parties had intended to exclude the employer from the range of permissible appointees, they would have said so expressly. They did not.

(3) The construction manager, when acting as certifier under the trade contract, is not called upon to make value judgments but rather to implement the provisions of the trade contract. Therefore it is not objectionable for the employer to perform this function.

(4) The construction manager, when acting as certifier under the trade contract, has a duty to act honestly and fairly. Indeed, as the argument progressed, Mr. Dennison also accepted that the construction manager has a duty to act impartially. These duties, which are imposed by law upon the construction manager, are a sufficient protection for the contractor. Therefore it is not objectionable for the employer to become the construction manager.

(5) It is in the interests of both parties that the construction manager carries out his duties as certifier correctly: see dicta in Perini , Panamena and Sutcliffe v. Thackrah . Therefore there is no conflict of interest between the parties and it is unobjectionable for the employer to become construction manager.

(6) The involvement of other professionals in all of the decisions of the construction manager creates a system of checks and balances. Indeed, both the architect and the cost consultant have major roles in decisions within their respective spheres. This makes it unobjectionable for the employer to become construction manager.

(7) All the authorities recognise that (a) certifiers under construction contracts are likely to have conflicts of interest, but (b) the certifiers will put those conflicts on one side. In Panamena and Perini the certifier was directly employed by the employer, and this was regarded as unobjectionable. In Lubenham Fidelities and Investments Co. Ltd. v. South Pembrokeshire District Council [1986] 33 B.L.R. 39 the certifying architects were regarded in effect as the alter ego of the employer: see the judgment of Lord Justice May at pp.73 to 74.

(8) If, despite all the above, the employer fails properly to perform his duties as construction manager, then the contractor has his remedies under clause 21 of the trade contract. He may challenge the construction manager's decisions by adjudication or by litigation.

44 Let me now turn to Scheldebouw's case. Drawing together Mr. Hughes's skeleton argument and his oral submissions, I would summarise the principal arguments advanced on behalf of Scheldebouw as follows:

(1) The trade contract makes it plain that the employer and the construction manager are separate entities. See, for example, clauses 1.6 and 9.1. It cannot have been contemplated that the employer would become the construction manager.

(2) It is extremely unusual and rare for the employer under any construction contract also to be the certifier. There is only one reported case in recent times where this occurred, namely Balfour Beatty Civil Engineering Ltd. v. Docklands Light Railway Ltd . [1996] 78 B.L.R. 42. In the Balfour Beatty case the contract contained an express term that the employer should be the certifier. The Court of Appeal clearly had misgivings about the contract, but gave effect to its express terms.

(3) If the employer is going to become the certifier there must be an express term in the contract permitting such an unusual state of affairs. There is no express term in the present contract permitting the employer to become the construction manager. The general words in Part E of Appendix 1 cannot be construed as such a term.

(4) A certifier has duties to act fairly, impartially and independently: see Hounslow and Amec . These duties are inconsistent with the employer occupying the role of construction manager. Given the modern notions of bias and conflict of interest, it is absurd for the employer to make himself construction manager.

(5) If the employer becomes the construction manager, the contractor loses part of the protection which the trade contract provides. It is true that the contractor still has remedies under clause 21. But it is expensive and time-consuming for the contractor to challenge the construction manager's decisions by adjudication or litigation, however strong the contractor's case may be. The commercial reality is that, for the most part, the construction manager's decisions are accepted and they are implemented without challenge.

(6) The scheme set out in clause 21 envisages that if either the employer or the contractor is dissatisfied with a decision of the construction manager, he may challenge that decision by adjudication or litigation. It is unrealistic to envisage the employer challenging his own decisions by any form of legal proceedings. This is an example of the anomalies which arise if SJH is correct on issue 4.

45 The arguments advanced from both sides of the court room were cogently presented. Having carefully considered and weighed those arguments, I have come to the conclusion that, in relation to this issue, Mr. Hughes's interpretation of the trade contract is correct. SJH had no power to appoint itself as construction manager. I reach this conclusion for nine reasons:

(1) It is such an unusual state of affairs for the employer himself to be the certifier and decision-maker that this can only be achieved by an express term. In the present case there is no express term authorising this, as there was in Balfour Beatty . The general words at the end of Part E of Appendix 1 to the trade contract are not sufficient.

(2) The whole structure of the trade contract is built upon the premise that the employer and the construction manager are separate entities. Endless anomalies arise if the employer and the construction manager become one and the same. For example, under clause 1.6 the employer issues certificates to himself. Under clause 21 the scheme for dispute resolution becomes distorted. The employer will, by definition, be in agreement with his own decisions. The only party which might feel the need to challenge certificates or decisions would be the contractor.

(3) The construction manager is under a legal duty to perform his decision-making function in a manner which is independent, impartial, fair and honest. In other words, he must use his professional skills and his best endeavours to reach the right decision, as opposed to a decision which favours the interests of the employer: see Part 4 above. Whilst I reject Mr. Hughes' submission that the employer is incapable of performing this task, I do consider that this task is more difficult for the employer than it is for a professional agent who is retained by the employer. Furthermore, this task is more difficult for the employer as an entity than it is for a specific individual who is employed by the employer. A senior and professional person within an organisation can conscientiously put his employer's interests on one side and make an independent decision. See Perini . It is more difficult for the organisation itself to make a decision which is contrary to its own interests. The employer could of course ask a named professional employee to make the relevant decision, but the employer would still have to go on and adopt that decision as its own.

(4) In the course of argument Mr. Dennison conceded that the words in Part E of Appendix 1 "any further or other person" cannot mean literally any other person. The term must be limited to persons who have the requisite competence. When I asked whether this limitation was express or implied, Mr. Dennison inclined to the view that the limitation was express but he wished to reserve his position. It seems to me that Mr. Dennison's concession was an entirely proper one. The phrase "any further or other person" cannot be read literally, it must be read subject to at least some limitation.

(5) Mr. Dennison is correct that, in one sense, both the employer and the contractor have an interest in securing that the construction manager makes correct decisions and issues correct certificates. There are dicta in the authorities to this effect. On the other hand, this argument of identity of interest cannot be pressed too far. Anyone who has practised or sat in this court will have seen many cases where the stance of both employer and contractor is driven by their own commercial interests rather than by any more lofty ideal. Property developers are in business to make a profit. They do not always welcome large awards of loss and expense to the contractor, however well merited such awards may be.

(6) Under the trade contract in this case, and indeed under most standard forms of construction contract, the contractor has two separate protections which reduce the likelihood of under-assessment or under-certification occurring. First, the assessment or certification is made by an identified professional person or firm who (despite being employed and paid by the employer) is nevertheless separate from the employer. Secondly, the decision-maker has a duty to act in a manner which is independent, impartial, fair and honest. If the employer suddenly becomes the assessor and certifier, the contractor loses one layer of protection. As Mr. Hughes forcefully put it in argument, a contract in which the employer acts as construction manager is very different from the contract which Scheldebouw priced at tender stage.

(7) The involvement of other professionals in the construction manager's decisions is not a sufficient protection for the contractor. Neither the architect nor the cost consultant can compel the construction manager to issue a certificate which is unacceptable to him. In the case of extensions of

time no certificate is required. The construction manager must consult the architect, but he need not accept the architect's advice. Extensions of time are, of course, relevant not only to damages for delay but also to loss and expense.

(8) So far as my researches go, every case in which the certifier was a direct employee of the employer is a case in which this circumstance was known to the contractor at the outset. The contractor went into such a contract with his eyes open. The seventh edition of **Keating on Building Contracts** (edited by Vivian Ramsey Q.C. and Stephen Furst Q.C.) indicates that the contractor's knowledge may be an essential element: see the second paragraph on p. 147. The one reported case where this aspect of the facts is not entirely clear is Panamena . However, Panamena proceeded on the basis that the repairers had expressly consent to Dr. Telfer acting as certifier: see the judgment of Lord Justice Scott at p. 123.

(9) As Mr. Dennison conceded in the course of argument, if his interpretation of Appendix 1, Part E is correct, the employer is entitled at any time to dismiss the entire professional team and appoint himself to act in their place. The employer would thus become the construction manager, the architect and the costs consultant. In response to my suggestion that this situation could not have been intended by the parties, Mr. Dennison characterised this as "the Armageddon scenario". The analogy with chapter 16 of the Book of Revelation is appropriate. The contract would be utterly transformed from that which Scheldebouw had priced. This possible scenario is a further reason why I reject the broad interpretation of Part E of Appendix 1 for which Mr. Dennison contends.

46 Let me now draw the threads together. For the reasons set out above, in my judgment the employer is not entitled under any or all of the trade contracts to appoint itself as construction manager. The answer to preliminary issue 4 is "No".

PART 7: CONCLUSION

47 I am grateful to all counsel for the excellence of the skeleton arguments and the oral submissions. For the reasons set out in parts 5 and 6 of this judgment my answers to the four preliminary issues are as follows: Issue 1, yes; Issue 2, this does not arise; Issue 3, this does not arise; Issue 4, no.
