Neutral Citation Number: [2007] EWHC 2870 (TCC)

Case No: HT-06-118

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 04/12/2007

Before :

THE HONOURABLE MR JUSTICE RAMSEY

- -

Between :

Ruttle Plant Hire **Cla**

- and -

The Secretary of State for the Environment

And Rural Affairs **Defe**

- -

- -

Andrew Spink QC, Robert-Jan Temmink, and Saul Margo (instructed by **Yates Barnes**) for the **Claimant**

Jonathan Acton Davis QC, Rebecca Stubbs (instructed by **Nabarro**) for the **Defendant**

Hearing dates: 23rd

- -

Judgment

The Hon Mr Justice Ramsey :

Introduction

1.
In these proceedings the Claimant, Ruttle Plant Limited ("Ruttle"), seeks to enforce certain rights which it asserts under a Deed of Assignment dated 24 May 2005 entered into between the Liquidator of Farm Assist Limited ("FAL") and Ruttle. On this application the Defendant, the Secretary of State for the Environment, Food and Rural Affairs ("DEFRA"), seeks to strike out the claim, obtain summary judgment against Ruttle and further relief.

Background

2.

In 2001 there was an outbreak of Foot and Mouth Disease in the United Kingdom. As a result the Defendant (at that stage “MAFF”, the Minster of Agriculture Fisheries and Food) needed to carry out emergency work to contain and eradicate the disease. FAL was engaged by the Defendant under a contract which is pleaded by Ruttle to have been formed partly orally and partly in writing on 13 March 2001 (“the Contract”).

3.
Pursuant to the Contract FAL provided labour, plant, materials and consumables for which FAL invoiced the Defendant and received payment on account. As pleaded, £16,138,035 (incl VAT) was invoiced and £8,485,002.76 (plus VAT) was paid.

4.
In April 2003 FAL and the Defendant sought to negotiate a settlement. This led to mediation on 24 June 2003 which resulted in a Settlement Agreement. That required the Defendant to pay FAL a further sum of £2,937,500 (incl VAT) and that sum was paid.

5.
FAL subsequently ran into financial difficulties. In May 2004 FAL wrote to the Defendant asserting that the mediated settlement had been entered into under economic duress. That was denied by the Defendant.

6.
In December 2004 the Inland Revenue petitioned for the winding up of FAL. The members of FAL resolved to appoint Mr B.J. Ward as Liquidator. The Inland Revenue agreed to a dismissal of the petition and at an Extraordinary General Meeting on 25 February 2005 FAL was wound up voluntarily.

7.
On 24 May 2005 Ruttle and the Liquidator entered into the Deed of Assignment.

These Proceedings

8.
Ruttle issued proceedings on 11 April 2007 and in the Particulars of Claim pleaded the Contract, the performance of the Contract and allegations of breaches of the Contract by the Defendant in paragraphs 10 to 30.

9.
In paragraph 31 Ruttle pleads as follows:-

“The above allegations in respect of contractual terms and breaches of contract are not intended to be exhaustive. Rather, Ruttle’s intention is to plead the case in sufficient detail to enable the claim for economic duress set out at paragraph 54 below to be determined. Should Ruttle be successful with its primary claim so as to obtain the relief sought in paragraph (1) of the Prayer below, then Ruttle will seek case management directions from the Court including directions for and further necessary statements of case so as to enable an account to be taken of the monies due and owing by DEFRA under the Contract. ”

10.
At paragraph 32 to 40 Ruttle pleads a collateral contract and breach of that contract. At paragraph 39 and 40 Ruttle pleads:

“39. Despite the provision of the necessary documentation and information, and in breach of the term of the Collateral Contract set out in paragraph 36 above, DEFRA unilaterally decided in what appears to FAL to have been about April 2003 to halt the valuation process and/or to seek to settle FAL’s potential claim without any or any proper reference to the results of the valuation process contemplated by the parties in entering into and required to be undertaken by the Collateral Contract.

40. Without prejudice to the generality of the averment contained in paragraph 39 above, the particular facts and matters upon which FAL relies in support of its case that DEFRA was in breach of the Collateral Contract are the contents of the letter from Pinsents dated 25th April 2003 referred to in paragraph 41 below, further the facts and matters set out in paragraph 54d below under the heading “DEFRA’s Illegitimate Pressure and/or Bad Faith.”

11.
At paragraph 41 to 55 Ruttle pleads the settlement with DEFRA and matters relied on in respect of the contention that the settlement was entered into under economic duress.

12.
The relief claimed by Ruttle in the prayer is as follows:

“(1) a declaration that the mediated settlement between the parties was entered into by FAL whilst and as a result of being under economic duress;

(2)
rescission of the mediated settlement;

(3)
an order that an account be taken of the sums due and owing to the Claimant as assignee of FAL’s right to the taking of such account;

(4)
directions from the Court for the taking of an account;

(5)
costs.”

<u>This Application</u>

13.
The Defendant seeks alternative forms of relief in its Application Notice dated 17 July 2007 supported by a short witness statement from Fraser Askham which exhibits the relevant documents.

14.
As developed in the written and oral submissions, the application is based on the following grounds:

(1)
That the Deed of Assignment does not entitle Ruttle to commence proceedings against DEFRA in connection with causes of action which FAL might have because:

(a)
FAL’s cause of action in economic duress which was capable of being assigned and was assigned under the Deed of Assignment can only be pursued in FAL’s name and not in Ruttle’s name.

(b)

Causes of action arising out of the Contract, for breach of the Contract or for an account of monies due and owing under the Contract or causes of Action under the Collateral Contract were not assigned under the Deed of Assignment.

(c)
Causes of action arising out of the Contract, for breach of the Contract or for an account of monies due and owing under the Contract could not have been properly assigned to Ruttle under the Deed of Assignment because Clause 21.1 of the Contract prohibits such assignment.

(2)
That paragraphs 10 to 30 and 32 to 40 of the Particulars of Claim do not plead a complete cause of action under the Contract or the Collateral Contract and are irrelevant to a claim for rescission.

(3)
That paragraphs 41 to 55 do not plead a complete claim for the tort of economic duress because there is no pleaded claim for damages.

(4)
That Ruttle's claim for rescission should not be allowed to proceed unless Ruttle offers counter-rescission or counter-restitution.

The Deed of Assignment

15.
The Deed of Assignment contains four paragraphs of recitals and six substantive clauses.

16.
Paragraphs 2 to 4 of the recitals provide as follows;

"2. A cause of action arose before winding up of the Company arising inter alia out of the Company's dealings with DEFRA ("the cause of action"). Specifically, the Company entered into a settlement with DEFRA which purported to settle the potential heads of claim of the Company against the Secretary of State for the Environment, Food and Rural Affairs ("The Secretary of State") but which failed adequately to compensate the Company. The Company wishes to re-open the matter;

3. The company wishes to seek advice on the said cause of action and, dependant on the results of that advice, to issue proceedings against various parties including the Secretary of State in contract and tort ("the Action");

4. The Liquidator, not having the means to pursue the Action, has proposed to sell to the Assignee his right to commence and thereafter continue to prosecute the Action together with any benefit derived from the Action. All the interests of the Company in the Action and monies sought to be recovered in it will be sold to the Assignee upon the terms that the Assignee shall pay to the Liquidator a sum equal to 33% of any monies recovered in the Action. The Assignee shall take upon itself (in exoneration of the Liquidator and of the Company's assets) the further prosecution of the Action and the costs thereof, which proposal the Assignee has accepted."

17.
Clause 1 of the Deed of Assignment provides as follows:

"Assignment of rights of action

In consideration of the Assignee's covenants set out below the Liquidator so far as he is able to do so transfers, conveys and assigns to the Assignee absolutely all those rights of the Liquidator to prosecute and carry on the Action against such defendant or defendants ("the Defendants") as the assignee considers proper, and all rights to recover and receive from the Defendants in the Action all such sums of money, property and benefits as shall be awarded and adjudged to the Claimant in the Action or in any appeal, or other proceedings in the Action and as the Company as the Claimant in the Action (but for the insolvency), or as the Liquidator (but for this assignment) would be entitled to, in respect of the subject matter of the Action and the liability of the Defendant(s) thereunder, together with all the rights, powers and authorities which the Liquidator can confer and is entitled to transfer, to the intent that hereafter the Assignee shall be enabled to prosecute the Action and all proceedings consequent thereon in as full a manner as the Company or the Liquidator could have done and free from all control of any interference by the Liquidator."

The Contract

18.
The written part of the Contract consists of a document made on 12 April 2001 and signed by Mr Hepworth, the Managing Director of FAL. It is apparently a standard form of supply contract used by MAFF, running to some 34 clauses. MAFF was referred to as "the Minister" and FAL was evidently intended to be referred to as "the Supplier".

19.
At "Annex A: Specification" it states that the services are:

"To supply Products, Labour, Plant and Consumables to MAFF during the [Foot and Mouth Disease] crisis as directed by MAFF and/or [Ministry of Defence]."

20.
For present purposes the relevant clause of the Contract is Clause 21.1 which provides:

"The Supplier shall not assign or sub-contract any portion of the Contract without prior written consent of the Minister. Sub-contracting any part of the Contract shall not relieve the Supplier of any obligation or duty attributable to him under the Contract or these Conditions."

21.
I shall now turn to consider the submissions on the various matters raised by this application. In doing so and construing the terms of the Deed of Assignment I bear in mind the normal rules of construction which I have to apply and in particular those set out by Lord Hoffmann in Investors Compensation Scheme v. West Bromwich Building Society [1998] 1 WLR 896 at 912 and by Lord Bingham in BCCI v. Ali[2002] AC 251 at 259.

The Proper Claimant

22.
The Defendant submits that in this case any cause of action which FAL had when it went into liquidation remained the property of FAL and that proceedings would have to be commenced in the name and in the right of FAL.

23.
I have been referred to Cambridge Gas Transportation Corpn v. Official Committee of Unsecured Creditors of Navigator Holdings plc[2006] 3 WLR 689where on an appeal from the Isle of Man, Lord

Hoffmann giving the advice of the Privy Council said at paras 14 and 20 “In corporate insolvency, on the other hand, the insolvent company continues to be owner of its property but holds it in trust for the creditors in accordance with the provisions of the Insolvency Act 1986 : see Ayerst v. C & K (Construction) Ltd[1976] AC 167.” and “Corporate insolvency is different in that, even in the case of moveables, there is no question of recognising a vesting of the company's assets in some other person. They remain the assets of the company.”

24.
The Defendant refers to the Deed of Assignment and contends that what has been assigned by Clause 1 is “the rights of the liquidator to prosecute and carry on the Action”. The Defendant submits that any assignment does not obviate the need for proceedings to be brought in the name of FAL. They have therefore been improperly brought in the name of Ruttle.

25.
Ruttle accepts that the effect of the Cambridge Gas case is that the cause of action remained the property of FAL. However Ruttle submits that Clause 1 of the Deed of Assignment contains a wider assignment than that contended for by the Defendant. Rather Ruttle contends that the assignment includes not only an assignment of the rights of the Liquidator but, in particular, includes “all rights to recover and receive from the Defendants in the Action all such sums of money, property and benefits as shall be awarded and adjudged to the Claimant in the Action…”.

26.
I consider that the Defendant’s contentions are correct. Leaving aside the question of what is meant by “the Action”, which I deal with below, Clause 1 is, in my judgment, limited to an assignment of the rights of the Liquidator.

27.
Clause 1 of the Deed of Assignment first assigns “all those rights of the Liquidator to prosecute and carry on the Action” which would require the Liquidator to do so in the name of FAL. Clause 1 then continues “and all rights to recover and receive from the Defendants in the Action all such sums of money, property and benefits as shall be awarded and adjudged to the Claimant in the Action”. That phrase does not include a separate right for FAL to prosecute and carry on proceedings. Rather, it looks to the position where the Liquidator has used its rights to prosecute and carry on the Action and has obtained a judgment against the Defendants in the Action.

28.
In such circumstances it is the rights to recover and receive “all such sums of money, property and benefits as shall be awarded and adjudged to the Claimant in the Action” which the Liquidator has assigned to Ruttle. That refers, in my judgment, to an assignment of the fruits of the action not to FAL’s cause of action to prosecute and carry on the Action.

29.
It is the rights to the fruits of the Action which “the Company as Claimant in the Action (but for the insolvency) or as the Liquidator (but for this assignment) would be entitled to”. FAL would have been entitled to the fruits but for the insolvency. The Liquidator would be entitled to the fruits but for the assignment. That reinforces the fact that it is the Liquidator’s rights which have been assigned.

30.
The final part of Clause 1 of the Deed of Assignment gives rights to prosecute the Action and consequent proceedings in the same manner “as the Company or the Liquidator could have done”.

Those rights are expressed to be free from control or interference by the Liquidator, indicating again that it is the Liquidator who would have those rights.

31.
The fact that it is the rights of the Liquidator which have been assigned is also confirmed by paragraph 4 of the Recital which states that the Liquidator has proposed to sell to Ruttle "his right to commence and thereafter continue to prosecute the Action together with any benefit derived from the Action."

32.
In addition, Clause 5 of the Deed provides that Ruttle will keep the Liquidator indemnified "from and against all proceedings, costs, claims and expenses arising out of the assignment or out of the Action". This, in my judgment, reinforces the fact that it is the rights of the Liquidator which have been assigned.

33.
In the circumstances, it is the Liquidator's rights to commence and enforce proceedings which have been assigned and I accept the Defendant's submission that the proper Claimant is FAL not Ruttle because those proceedings must be brought in the name and in the right of FAL.

The Scope of the Assignment

34.
The Defendant submits that the Deed of Assignment is only effective in relation to any cause of action arising out of the Settlement Agreement, that is the claim for rescission of the Settlement Agreement on the grounds of economic duress, arising in June 2003.

35.
The Defendant refers to paragraph 2 of the Recital to the Deed of Assignment and submits that "the cause of action" is limited to the re-opening of the Settlement Agreement. It is submitted that the phrase "the cause of action" is followed by the words "Specifically, the Company entered into a settlement with DEFRA…but which failed adequately to compensate the Company" and then continues "The Company wishes to re-open the matter". The Defendant therefore contends that the specific cause of action is the re-opening of the "matter" which is a reference to the "settlement", being the Settlement Agreement. The only available remedy is therefore, on the Defendant's submission, the claim based on rescission of the Settlement Agreement.

36.
Ruttle submits that what are assigned are rights in relation to "The Action" which is dealt with in paragraph 3 of the Recital. Ruttle contends that the Action is not limited to the re-opening of the settlement. Rather it submits that paragraph 3 of the Recital anticipates advice on "the cause of action" and provides that "dependant on the result of that advice" proceedings may be issued "against various parties including the Secretary of State in contract and tort.". That defines "the Action". Thus, whilst the advice will focus on the wish to re-open the settlement, Ruttle submits that the proceedings which form "the Action" are not limited to rescission of the Settlement Agreement but will be as broad as required by that advice.

37.
Further Ruttle points out that proceedings may be issued against various parties, including the Secretary of State, in contract and tort. The reference to "contract", it contends, must include a

reference to the contract between the FAL and the Defendant. It is those proceedings which are described as "the Action" and Ruttle submits that they are not limited as the Defendant contends.

38.
Ruttle also contends that the Defendant's construction of the Deed of Assignment is not consistent with a reasonable commercial view. It submits that obtaining the rescission of the Settlement Agreement, without more, would be an unlikely commercial outcome. Ruttle also refers to the fact that sums of money, including a 33% share to the Liquidator under Clause 4 of the Deed, would not be given a sensible meaning if the Action were limited to rescission or only extended, as the Defendant contends, to damages for tort arising from the economic duress.

39.
I accept Ruttle's construction of the Deed of Assignment. First it is rights in relation to "the Action" which are assigned by the Deed. The Action is not limited to a cause of action in respect of the re-opening of the settlement. Obviously it is that cause of action which is the fount of the rights which are assigned. The parties however chose to widen the definition of "the Action" so as to depend on the outcome of legal advice and it is described in wide terms as "proceedings against various parties including the Secretary of State in contract and tort".

40.
Secondly the commercial purpose of the Deed would be unreasonably limited if it related only to a cause of action for rescission of the Settlement Agreement with any payment limited to damages for the tort of duress. I do not consider that such would be a reasonable commercial interpretation of the Deed of Assignment which evidently envisaged wider rights of payment.

41.
Thirdly it is clear from Clauses 1 and 4 of the Deed of Assignment that sums of money and a share of "proceeds, profits, damages, interest or other means" are anticipated to flow from the assignment. Whilst damages for the tort of duress would, it is true, potentially provide some meaning to these provisions, I do not consider that it was intended to have that limited meaning, particularly given the reference in paragraph 3 of the Recital to proceedings in contract and tort.

42.
As a result, I consider that so far as the Deed of Assignment is concerned, the rights assigned are not limited to rescission of the Settlement Agreement for duress, together with damages for that tort. Rather they could include claims under the Contract and any collateral contract, including sums due, damages or an account.

Clause 21 of the Contract

43.
The Defendant submits that even if the Deed of Assignment is on its face sufficient to assign causes of action in relation to the Contract then Clause 21.1 of the Contract prevents that assignment from being effective as regards the Defendant.

44.
The Defendant submits that Clause 21.1 prohibits a legal or equitable assignment of a cause of action under the Contract, of the right to pursue a cause of action under the Contract and of the fruits of the Contract including the proceeds of any cause of action arising thereunder, unless the consent of the Minister has been obtained, as required by Clause 21.1.

45.
It is common ground that no such consent has been obtained. The Defendant therefore submits that the prohibition against assignment binds the Liquidator and refers me to the decision of Smedley J in Quadmost Ltd v. Reprotech (Pebsham) Ltd[2001] BPIR 349 at 358.

46.
As a result, the Defendant relies on the speech of Lord Browne-Wilkinson in Linden Gardens Ltd v. Lenesta Sludge Ltd[1994] 1 AC 85 as showing that in such circumstances any claim by Ruttle against the Defendant in relation to rights under the Contract must fail.

47.
Ruttle contends that as a matter of construction in the circumstances of this case Clause 21.1 of the Contract does not prohibit the assignment. Ruttle also submits that, as a matter of public policy, Clause 21.1 should not be enforced.

48.
Ruttle submits, first, that Clause 21.1 of the Contract was not intended to prohibit an assignment of FAL's right to payment or other causes of action under the Contract once it had finished providing the services required by the Defendant. Ruttle contends that this construction is supported by the following arguments:

(1)
That the prohibition in Clause 21.1 states that FAL "shall not assign or sub-contract" and that the prohibition on sub-contracting could only apply during the period when FAL was supplying services. The prohibition against sub-contracting is therefore limited and there should be no distinction between assignment and sub-contracting.

(2)
That there is nothing in Clause 21.1 to indicate that the prohibition on assignment should endure for ever. This is to be contrasted with Clause 17 which did contain a provision for that provision to continue to apply.

(3)
That there is no commercial purpose in having an indefinite prohibition on assignment. To the contrary, Ruttle submits that there are several reasons why a supplier who is in financial difficulty and owed substantial sums by the Defendant should be able to assign the right to payment.

49.
Ruttle further submits that Clause 21.1 should not, in any event, be construed as prohibiting the Liquidator from exercising his statutory power to sell rights to payment and any accrued causes of action under the contracts after liquidation. Ruttle relies on the statutory power under the Insolvency Act 1986 which gives the liquidator the power to sell causes of action in exchange for a share of the recovery. I was referred to Grovewood Holdings v. James Capel[1995] Ch 80and Norglen Ltd v Reeds Rains Prudential Ltd[1999] 2 AC 1. Ruttle therefore submits that, absent clear wording to the contrary, the Court should not construe Clause 21.1 as applying to the exercise of the liquidator's power of sale.

50.

Ruttle also reserved for argument on any appeal the question of whether Clause 21.1 was overridden by the statutory provisions of the 1986 Act, accepting that this Court was bound by the judgment of Staughton LJ in Circuit Systems (in liquidation) v. Zuken Redac (UK) Ltd[1996] 3 All ER 748 at 758.

51.
Ruttle further submits that Clause 21.1 should be held to be inoperable on grounds of public policy insofar as the Defendant seeks to rely on it in relation to the Liquidator's assignment to Ruttle in May 2005 of FAL's right to payment and to other causes of action under the Contract.

52.
Ruttle relies on a number of authorities which show that the Courts have held assignments to be invalid on grounds of public policy. Ruttle also refers to the speech of Lord Browne-Wilkinson in Linden Gardens at 107 as lending support to the principle that a prohibition on assignment could be held to be void as being contrary to public policy.

53.
Although in Linden Gardens Lord Browne-Wilkinson held that the clause was not contrary to public policy, Ruttle submits that the decision in Linden Gardens can be distinguished. In particular:

(1)
To prevent the Liquidator from exercising his statutory right to assign the Contract and the rights arising under the Contract would undermine his powers under the 1986 Act. This is therefore not a case where, as Lord Browne-Wilkinson said, "There is no public need for a market in causes in action."

(2)
In this case, Ruttle alleges that the Defendant dealt with FAL's claim in a way which would be likely to, and did cause or contribute to FAL's insolvency and that the Defendant also acted in bad faith. It would therefore be wrong to bar Ruttle from arguing that the Defendant should not be permitted to rely on the assignment clause where the need for the assignment has arisen from the Defendant's conduct.

54.
I now consider these arguments.

Duration of Clause 21

55.
I do not consider that there is any reason to construe Clause 21 as being limited in duration. At any time the right that may be assigned will vary and will depend on performance. Once performance has ended, accrued rights will remain. Over a period of time the remedies available will be subject to limitation. To construe the Contract as imposing a time-limit on assignment in the absence of any express provision would, I consider, need a clear indication that objectively such was the intention of the parties.

56.
In this case, I consider that the matters relied on by Ruttle do not demonstrate such an intention. The phrase "assign or sub-contract" refers to two different concepts and does not lend weight to an argument that the time limit which may apply to sub-contracting should also apply to the different concept of assignment.

57.
Neither do I consider that the fact that Clause 17 of the Contract expressly deals with the continuance of obligations under the Official Secrets Act after termination of the Contract can be taken, in the absence of such a provision in clause 21, to show that the prohibition on assignment ends on completion of the performance of the services.

58.
While there may be a commercial purpose in allowing for parties in financial difficulties to assign benefits after completion of the services, that is not what the parties provided for in the Contract. Rather they provided for a prohibition on assignment of the Contract, which is a common provision where one party does not wish to deal with a third party it has not chosen to deal with as the other contracting party. That represents the commercial purpose for non-assignment clauses as expressed in the clause.

59.
In any event, I consider that there would also be difficulties in applying with certainty a prohibition on assignment which came to an end on completion of the services. The Contract provided for FAL to supply services as directed by "MAFF and/or MOD" during the foot and mouth crisis. Whilst the issue of Certificates FM7 at particular farms may show that certain work has been completed on a certain site, that does not preclude FAL from being required to provide further services. It would at any time be uncertain whether FAL had finished providing services under the Contract.

60.
Equally, whilst the services might end at some stage, there would still be continuing obligations under the Contract, including record keeping under Clause 12 and indemnities under Clause 15.

61.
Ruttle places reliance on the Court of Appeal in ANC Ltd v. Clarke Goldring & Page Ltd (19 May 2000) in which it was held that a prohibition on assignment did not survive termination of the franchise agreement. That however depended on the construction of the particular assignment clause, Clause 16.2, read with Clause 15.4 which provided that:

"The expiration or termination of the Agreement… shall not affect or prejudice any provision of the Agreement which is expressly or by implication provided to come into effect on, or to continue in effect after, such expiration or termination."

62.
In giving the judgment with which the other members of the Court agreed, Robert Walker LJ said:

"Clause 16 comes immediately after Clause 15.4, which states that terms shall continue after termination only if that is provided expressly or by implication. There is no express provision for continuation in clause 16.2, and the submissions made by Mr Hantusch and Mr Boardman persuade me that the implication of such provision would be contrary to the commercial purpose of the clause. There is nothing in the Linden Gardens case laying down any inflexible rule. On the contrary Lord Browne-Wilkinson (with whom all their Lordships agreed on this point) emphasised, in the passage already cited, that in each case the issue must turn on the terms of the contract in question"

63.
There is no equivalent of clause 15.4 in this case and that decision clearly turned on the terms of the particular agreement. I do not consider that it assists Ruttle based on the terms of the Contract.

64.
I therefore conclude that on a true construction of Clause 21.1 the prohibition on assignment did not come to an end on completion of the services.

Clause 21 and the rights of the Liquidator

65.
I do not consider that clause 21.1 of the contract can be construed so that the prohibition on assignment does not survive the liquidation of the Supplier.

66.
It is evident that the Insolvency Act 1986 gives wide powers to liquidators to sell property, including disposing of a cause of action on terms that the assignees will pay over a share of the recovery and, in doing so, will not be open to challenge on grounds of maintenance or champerty: see Grovewood Holdings v James Capel[1995] Ch 80 at 84 to 86, and Norglen Ltd v. Reeds Rains Prudential Ltd[1999] 2 AC 1 at 11 to12.

67.
The fact that a liquidator has that right in relation to causes of action does not however mean that there should be a right in relation to causes of action where the parties have agreed that the cause of action should not be assigned.

68.
As Staughton LJ, with whom the other members of the Court of Appeal agreed, said in Circuit Systems Ltd (in Liquidation) v. Zuken-Redac (UK) Ltd [1996] 3 All ER 748 at 758, referring to the powers of the liquidator under the 1986 Act:

" Next it is said that, whatever the position when the company was trading, it is different now that the company is in liquidation. Paragraph 6 of SCH 4 to the Insolvency Act 1986 confers on a liquidator 'power to sell any of the company's property by public auction or private contract'.

I do not see that this can entitle the liquidator to sell what the company does not own, or to sell property otherwise than upon the terms on which the company owns it. In Nokes v Doncaster Amalgamated Collieries Ltd[1940] 2 All ER 549, [1940] AC 1014 there was an amalgamation of two companies, and the question arose whether it transferred a contract of service. John Morris KC, in argument, said: "The transfer effected by s154 of the Companies Act, 1929 is only of things which by their nature are assignable" (see [1940] AC 1014 at 1015).

That was the argument accepted in the House of Lords. And Lord Atkin equated s 154 to s 151(2)(a) of the Companies Act 1908, the predecessor of the statutory provision now in question (see [1940] AC 1014 at 1033). A similar conclusion was reached in Re Farrow's Bank Ltd[1921] 2Ch 164, [1921] All ER Rep 511."

69.
As I have held above, Clause 21.1 continues after completion of the services and cannot be construed as being limited in duration. Similarly, there is nothing in the Contact to show that, objectively construed, the parties intended Clause 21.1 to terminate on liquidation. Indeed the indications are to the contrary. Under Clause 18 on liquidation the contract does not automatically terminate but depends on a notice from the Minister.

70.

I therefore find that the prohibition on assignment in Clause 21.1 survived the liquidation of FAL.

Public Policy

71.
Whilst, in principle, a prohibition on assignment could be contrary to public policy, I do not consider that the existence of a liquidator's rights under the Insolvency Act 1986 alone can have that effect.

72.
In Linden Gardens Lord Browne-Wilkinson at 106 E dealt with a submission that it is normally unlawful as being contrary to public policy to seek to render property inalienable and that since contractual rights are a species of property, that a prohibition against assigning such rights is void as being illegal. He said that the submission faced formidable difficulties both on authority and in principle and referred to a line of authority before continuing:

"In the face of this authority, the House is being invited to change the law by holding that such a prohibition is void as contrary to public policy. For myself I can see no good reason for so doing. Nothing was urged in argument as showing that such a prohibition was contrary to the public interest beyond the fact that such prohibition renders the chose in action inalienable. Certainly in the context of rights over land the law does not favour restrictions on alienability. But even in relation to land law a prohibition against the assignment of a lease is valid. We were not referred to any English case in which the courts have had to consider restrictions on the alienation of tangible personal property, probably because there are few cases in which there would be any desire to restrict such alienation. In the case of real property there is a defined and limited supply of the commodity, and it has been held contrary to public policy to restrict the free market. But no such reason can apply to contractual rights: there is no public need for a market in choses in action. A party to a building contract, as I have sought to explain, can have a genuine commercial interest in seeking to ensure that he is in contractual relations only with a person whom he has selected as the other party to the contract. In these circumstances I can see no policy reason why a contractual prohibition on assignment of contractual rights should be held contrary to public policy."

73.
I do not consider that there is a distinction to be drawn between the position in Linden Gardens and the position where the liquidator has certain rights in relation to the Contract which would be rendered less effective, so far as public policy considerations are concerned. As set out above, the parties have agreed for good commercial purpose that there is to be a prohibition on assignment and I do not consider that the Liquidator's rights should, as a matter of public policy, render that contractual provision ineffective. Whilst a party in financial difficulties or a company in liquidation may prefer not to have a clause prohibiting assignment, that does not, in my judgment, amount to a public need or one that is sufficient to render a commonly used non-assignment clause unenforceable as a matter of public policy.

74.
Neither am I persuaded by Ruttle's argument that the Defendant's conduct might be shown to be sufficient to prevent the Defendant from relying on Clause 21.1. If Ruttle establishes that the Defendant's conduct is sufficient to lead to that conclusion then any relief arising from that conduct can take that position into account. It would not entitle Ruttle to assert such rights or contend that the Clause should be unenforceable on public policy grounds.

75.

In the circumstances, I do not find any grounds for saying that Clause 21.1 is unenforceable on grounds of public policy.

Complete Causes of Action under the Contract and Collateral Contract

76.
The Defendant submits that Ruttle's Particulars of Claim fail to plead complete causes of action in relation to the Contract or the Collateral Contract. In particular, the Defendant contends that at paragraphs 10 to 30 of the Particulars of Claim in relation to the Contract and paragraphs 32 to 40 in relation to the Collateral Contract, there is no plea of loss or damages having been suffered and no claim for damages. In the absence of any such plea, the Defendant submits that reliance on those parts of the pleading is an abuse.

77.
The Defendant refers to the judgment of Glidewell LJ in Galoo Ltd v. Bright Grahame Murray [1994] 1 WLR 1360 at 1366 B-D as justifying the Court taking action to strike out claims which, at most, would lead to nominal damages.

78.
Ruttle, however, contends that for the pleading of its case on rescission of the Settlement Agreement it requires the Court to consider matters pleaded in paragraphs 10 to 30 and 32 to 40 of the Particulars of Claim.

79.
In particular it refers to the following passages in the Particulars of Claim under the heading of Economic Duress:

(1)
Para 54 (a): "As a result to the breaches of the Contract referred to in paragraphs 28 above and/or the breaches of representation referred to in paragraph 26 above, DEFRA caused FAL's financial position to become parlous in the manner and to the extent referred to in paragraph 51 above."

(2)
Para 54(d): "DEFRA breached the Collateral Contract, as set out at paragraphs 38 to 40 above. This, in itself, amounted to illegitimate pressure and/or bad faith, alternatively it amounted to such in circumstances where at all material times DEFRA knew how parlous FAL's financial position was (as set out in paragraphs 51 and 52 above) and/or when it knew that FAL would be unable to issue or prosecute a claim against DEFRA in the event that FAL decided to reject whatever offer DEFRA made to settle its legitimate claims under the invoices (for the reasons set out in paragraph 53 above)."

80.
It is evident that Ruttle's case on the rescission of the Settlement Agreement refers to and relies on the Contract and the Collateral Contract and matters pleaded in relation to them. The pleading of the Collateral Contract also relies on what is pleaded in relation to invoices which were issues under the Contract.

81.
On that basis, I consider that Ruttle is entitled to plead the matters relied on by it in relation to the Contract and Collateral Contract for the foundation of its claim for rescission and it is not necessary for a claim for sums due or damages to be pleaded in relation to the Contract or the Collateral Contract.

82.
I therefore do not consider that Ruttle should be precluded from relying on paragraphs 10 to 30 or 32 to 40 to the extent necessary to support its claim for rescission.

Tort of Duress

83.
The Defendant also submits that Ruttle has failed to plead a complete cause of action in tort in relation to economic duress because there is no claim for damages. The Defendant refers to the speech of Lord Hoffmann in Investors Compensation Schemev. West Bromwich Building Society[1998] 1WLR 896 at 916. where he said:

"Now it is important to notice that a claim to rescission is a right of action but can in no way be described as a chose in action or part of a chose in action. It is a claim to be relieved of a mortgage, and such a claim can be made only by the owner of the mortgaged property. The owner cannot assign a right to rescission separately from his property because it would make no sense to acquire a right to have someone else's property relieved of a mortgage. Likewise, the possibility of an abatement of the debt as part of the process of rescission is not a chose in action which can be assigned. It is simply part of the process of rescission, which is a right attached to the ownership of the house itself."

84.
Ruttle submits that the pleading of rescission of the Settlement Agreement in this case is sufficient and that it does not need to plead a claim for damages. It can simply seek rescission as its relief.

85.
So far as damages for duress are concerned, I was referred to paragraph 7-046 of Chitty on Contracts (29th Edition) where the authors consider the question of whether damages for duress are recoverable in addition to, or in lieu of rescission. It is evident that the position is not settled although there are good arguments for the existence of a remedy in damages for duress.

86.
In my judgment the remedy of rescission of the Settlement Agreement is a complete cause of action and does not require a remedy in damages to permit a party to pursue rescission. In this case the conclusion I have arrived at means that Ruttle cannot pursue claims in relation to the Contract, even if the settlement is rescinded. In such circumstances, I shall have to consider in the light of any application, whether I should permit a claim to continue if it only seeks rescission.

Counter Rescission

87.
The Defendant submits that Ruttle should not be entitled in any event, to pursue a claim for rescission without offering counter-rescission or counter-restitution to the Defendant. In this respect I was referred to Erlanger v. New Sombrero Phosphate Company (1878) 3 App Cases 1218 per Lord Blackburn at page 1278;Halpern v. Halpern[2007] 2 L1 Rep 56 at paragraphs 60, 62 and 75. The Defendant submits that as a matter of practical justice, it would be entirely wrong if Ruttle, a volunteer to these proceedings, were not required to proffer restitution in integrum.

88.
The Defendant also submits that the court should stay the proceedings unless Ruttle pays into Court the sum of £2,937,500, being the sum paid by DEFRA to FAL following the mediation in June 2003 pursuant to the Settlement Agreement, plus interest.

89.
Ruttle submits that there is no principle or rule of practice which requires a party seeking rescission to proffer counter-restitution at this stage of the proceedings and as a condition for it being able to proceed with a claim for rescission. Ruttle acknowledges that in determining whether to make an order for rescission one of the considerations which the Court will need to take into account is the ability to make counter-restitution and the need for an appropriate form of such relief in the circumstances. Ruttle submits that the approach of the Court will depend on the facts of an individual case and it relies on Halpern v. Halpern.

90.
I have come to the conclusion that Ruttle's submissions are correct. The grant of the remedy of rescission and the requirement of counter-rescission is a matter for the Court to decide at the time when it comes to consider whether to grant that remedy. There is no principle or rule of practice which, in my judgment, requires a party to provide the security of full counter-rescission before that party can proceed with the claim for rescission.

Conclusion

91.
In the light of my conclusion on the arguments raised and given that Ruttle has indicated that it may wish to seek permission to amend, I consider that I should hear further submissions from the parties before I determine what relief to give in relation to the Defendant's applications under CPR rules 3.4(2) and 24.2(a)(i).