Neutral Citation Number: [2007] EWHC 70 (TCC)

Case No: 5T 00595

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LEEDS DISTRICT REGISTRY
TECHNOLOGY & CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/01/2007

Before:

MR JUSTICE CHRISTOPHER CLARKE

- -

Between:

SHEPHERD HOMES LIMITED	**Claimant**
-and –	
ENCIA REMEDIATION LIMITED	**Defendant**
- and –	
-	
GREEN PILING LTD	**Third Party**

- -
- -

Mr Michael Black QC (instructed by **Hill Dickenson**) for the **Defendant**
Mr Constable (instructed by **Hawkswell Kilvington**) for the **Part 20 Defendants**

Hearing dates: 20th & 21st December 2006

- -

Judgment

MR JUSTICE CHRISTOPHER CLARKE:

1. This is a preliminary issue as to whether a particular term was incorporated into a contract and, if so, with what effect.

The background

2. Eden Park is a site at Hart Lane, Hartlepool. The underlying soil is peat. It is owned by the claimant - Shepherd Homes Limited ("SHL"). SHL sought to develop the site so as to produce 94 homes. They employed Encia Remediation Ltd ("Encia"), then named AIG Remediation Limited, as a civil engineering contractor to provide ground works, roads, paths and sewers for the site, and also to pile the site and create ring beams and floors for the dwellings to be erected. AIG Remediation Ltd (now Encia, by which name I shall hereafter refer to it) was a subsidiary of AIG Engineering Group and part of the American International Group of companies. This is one of the largest insurance groups in the world. Encia employed Green Piling Ltd ("Green Piling") as a specialist sub-contractor to carry out the piling work. Green Piling Ltd was a small piling sub contractor with a turnover in the year to March 2001 of £336,682. The work was divided into two stages: Phase I consisting of 46 plots and Phase II consisting of 48 plots. The contract price of the works as between SHL and Encia turned out to be £777,459 for Phase I and £1,236,031.80 for Phase II. The contract price for Phase I as between Encia and Green Piling turned out to be £91,316 for Phase I and £156,286 for Phase II.

3. Green Piling carried out the work between July 2001 and September 2002. In around May 2003 properties constructed on the site began to show signs of cracking due to settlement. On 18th October 2005 SHL began these proceedings against Encia, which include allegations that the piling design was defective, because of a failure on the part of Green Piling to take into account down drag, and that that was the cause of the settlement. Green Piling attributes the failure to poor workmanship in relation to the ground beams. SHL make a similar allegation but their experts attribute the failure to pile design.

4. SHL's claim as at April 2006 was of the order of £3,000,000 in respect of 12 properties. At present there is a claim in respect of 41 properties together with a claim for general damages for blight. The exact scope and cause of the settlement is the subject of dispute and continuing expert investigation and the number of properties in respect of which there will be a claim may rise. Mr Michael Black, QC, for Encia told me that his best estimate was that there was a potential liability of the order of £10,000,000 but with a possibility of more. Green Piling contends that the problems that have arisen have been caused by Encia's construction techniques. A trial date has been fixed for 4th June 2007.On 10th March 2006 Encia was granted permission to join Green Piling as a third party.

The issue

5. On 24th November 2006 Mr Justice Jackson ordered that:

> *"There be a preliminary issue to determine in respect of the Phase 1 Contract and the Phase II Contract to what extent, if at all, clause 4.3 of the Third Party's standard terms and conditions of contract :*
>
> *a. formed part of the Third Party's offer which was accepted by the Defendant;*
> *b. is enforceable as a matter of law;*
>
> *c. was revised and/or waived;*
>
> *d. cannot be relied upon by the Third Party by reason of estoppel."*

6. Clause 4.3. of Green Piling's standard terms and conditions provides as follows:

> *"4.3 Our maximum total liability is limited to the Contract Price; whether in contract or in tort, for any damage or loss whatsoever, including all direct, indirect or consequential loss."*

The making of the contract

Initial contact

7. On 26th June 2001 Mr Philip Bates of Green Piling telephoned Mr Patrick Kane, Encia's Contracts Director. This was a cold call. Mr Bates had learnt from Mr Garry Stewart of Abbey Pynford, a contractor which was not able to provide a competitive tender for the piling works (see paragraph 8 below), that Encia was looking for a piling sub-contractor. Mr Kane and Mr Bates arranged to meet the following morning at Encia's offices.

8. Encia had been in discussion with a number of piling contractors since early April and by 26th June 2001 had obtained tenders from four of them: (i) Van Elle, (ii) Stent Foundations Ltd, (iii) Aarsleff Piling Ltd and (iv) Abbey Pynford Plc. Insofar as those quotations referred to conditions Mr Kane had not considered them in any detail, his intention being to be fully familiar with the terms and conditions before any contract was made. On 26th June Mr Kane made a note of the piling options open to Encia based on the offers that had been made. They were as follows:

Contractor	**Remeasure**	**Lump Sum**	**Lead in**
Van Elle	£ 80,601		5-6 weeks
Stent		£ 99,789	5-6 weeks
Per Aarsleff	£ 111,292	£ 120,419	w/c 9.7.01
Abbey Pynford		£ 112,600.50	

The "Remeasure" quotations were quotations that allowed for an increase in price if it should turn out that the pile lengths that had to be used were greater than those for which the contractor had allowed. The lump sum quotes did not allow for such an

increase. Per Aarsleff had quoted on both bases. Van Elle's quote related to concrete piles but they had also suggested the use of steel piles, as had some at any rate of the other contractors.

9. Mr Kane was concerned that the prices on offer were more than the sum he had allowed for in Encia's tender to SHL and that the lead times were longer than he had hoped for. He needed a contractor to start work on site within a relatively short time.

The meeting of 27th June 2001

10. On 27th June 2001 Mr Bates and Mr Kane met at Mr Kane's office in Wetherby. Mr Bates was keen that Green Piling should establish a relationship with as prestigious a client as Encia. There is a deal of common ground as to what occurred then and thereafter, although there are some differences. I have no doubt that all the witnesses were endeavouring to tell me the truth as they recalled it. What follows are my findings of fact.

11. Mr Bates took with him to the meeting a package of information relating to Green Piling which included (i) photographs of piles in, or being driven into, the ground, completed works and various pieces of plant and equipment; (ii) a company profile; (iii) details of some of Green Piling's previous clients; (iv) Green Piling's terms and conditions; (v) outline method statements; (vi) a typical health and safety plan; and (v) standard drawings of pre-cast piles. He handed this package to Mr Kane and expanded on the information contained in it, mentioning his own knowledge and expertise.

12. Mr Kane outlined the works that were required and handed to Mr Bates a tender package which included some site/plot layout and construction drawings and AIG borehole logs numbered 201-209. Mr Bates asked to be given any other information that there was. Mr Kane confirmed that the number of piles required was 641.

13. Mr Bates was then left alone for about 15-30 minutes in order that, on the information that he had been given, he might calculate a price for the works to give to Mr Kane. After that Mr Bates quoted a price which Mr Kane said was too high. Neither Mr Kane nor Mr Bates can now recollect what that price was but it was greater than £100,000. Mr Kane told Mr Bates (as was correct) that Van Elle and Stent had tendered for the work; and that Van Elle's tender was based upon piles averaging 11 metres in length and was in the sum of £80,000 but subject to re-measurement. Stent had offered a fixed price of £99,000 with piling lengths ranging from 6-10 metres. He did not mention any other tenderer or the lead-in times that Van Elle and Stent had indicated. Mr Kane expressed a preference to work with Green Piling if the price was competitive.

14. Mr Bates realised that he would have to reduce his price and, on reconsideration, confirmed that Green Piling's best offer was £100,000. He said that this was what he called a *qualified* offer based upon the information provided. By this he meant that if the piles had to go deeper into the ground than he had allowed for Green Piling would

not charge any additional sums unless they had to go deeper than was reasonably foreseeable from the information that had been made available. What is less clear is whether Mr Bates gave any further explanation of what he meant. I revert to this in paragraph 72 below.

15. Mr Kane accepted the £100,000 price and instructed Green Piling to start work on 2nd July 2006.

16. During the course of the meeting Mr Bates expressed the view, in suitably diplomatic terms, that it might be possible to save costs by making some design changes. He suggested that the ground beam and pile layout design was over engineered, that a more cost effective design of pile type, number of piles and pile beams was possible, and that this would result in cost savings that could be shared between Encia and Green Piling. In particular he thought that tubular steel piles could be used instead of precast concrete ones, and that the number of piles could be reduced as could the dimension of the pile beams. Mr Kane agreed to discuss Mr Bates' comments with Mr Paul Valentine of Hilton Jolley Partnership ("Hilton Jolley"), the engineering firm instructed by Encia, in order to see whether these reductions could be achieved.

17. Hilton Jolley was responsible for the design of the ground beams and for specifying the position of the piles on the house plans and calculating the loads to be imposed by each type of house on the piles. They had produced a connection detail which showed the way in which concrete piles would connect to the prestressed concrete ground beam. The design of the piles was the responsibility of Green Piling and the beams were to be the work of Moortown Construction Ltd ("Moortown").

18. During the meeting it was agreed that the payment terms were to be 28 days as opposed to 14. Mr Kane raised the issue of payment terms because, while Mr Bates was working out the tender price, he had looked at Green Piling's terms and conditions, where the 14 days are specified and the 14 is underlined. He was unhappy with the 14 days because it was unusually short (that was the reason for it being underlined), and was a shorter payment period than Encia had with SHL. SHL rendered monthly accounts and the payment terms, either by agreement or practice, were at least 28 or 30 days.

19. It is common ground that there was no discussion of clause 4.3.

The upshot of the meeting

20. The upshot of the meeting was that it was agreed that Mr Bates would return to his office and send a fax confirming the position. Mr Kane recalled that the meeting concluded by (a) Mr Bates saying that he would confirm Green Piling's quotation in writing and (b) his saying that he would then send a letter of intent. I am satisfied that (a) or something like it was said and that Mr Kane indicated that, after he had received the quotation, he would send a letter in response. I am in doubt as to whether Mr Kane used the expression "*letter of intent*" and Mr Kane himself did not recollect what exact expression he used. I think the likelihood is that he indicated that

he would send a letter of confirmation or instruction. I note that in his letter to Encia's solicitors of 10th August 2001 he referred to the letter of 29th June (see paragraph 24 below) as "*our confirmation letter*". It is not now suggested that the parties had reached a binding contract, as opposed to an agreement in principle, at the meeting.

The letter of 27th June

21. At 12.43 on Wednesday 27th June Mr Bates faxed to Mr Kane the following letter:

> *"We thank you for your recent enquiry and have pleasure in submitting our agreed offer of £100,000.00 net, as detailed in the attached documents.*
>
> *The programme is 3 days on site for the first visit starting early next week and 20 days for the second visit in mid July, with 5 weeks float. The current period of notice, which may vary from time to time, is two weeks.*
>
> *If this offer is of interest we look forward to visiting the site and agreeing terms etc before accepting an order."*

22. Enclosed with that letter were the following documents:

(a) Two Technical Specifications: one of these indicated that the estimated lengths for the piles were "*based on site investigation information provided";*

(b) An Outline Method Statement;

(c) Terms and Conditions of Contract. These had been amended by Mr Bates in manuscript at the meeting with Mr Kane, and in his presence, so as to replace "*14*" with "*28*" in relation to the period of days for payment, and initialled "*PB*";

(d) A Bill of Quantities;

(e) A Company Profile, together with a list of clients.

23. One of the specifications stated that the estimated pile lengths were 6-10m for precast and 9 – 12m for steel piles "*based on site investigation information provided*". Item 2 in the Bill of Quantities was *Establishing piling equipment to site - 2 visits - £ 2,207".* Item 5 was "*Supply, handle, pitch and drive precast concrete/steel piles 200/250mm square/140mm diameter - 641".* The offer was, therefore, to provide either concrete or steel piles. The company profile included details of the company's insurance which included £1,000,000 professional liability.

The response of 29th June

24. On Friday 29th June 2001 Mr Kane replied by fax as follows:

> *"Further to our recent discussions and your offer letter dated 27th June 2001, we have pleasure in confirming your [sic] instruction to commence piling works at the above site on Monday 2nd July 2001.*
>
> *The agreed lump sum price to supply, pitch and drive a total of 641 piles to achieve the required loading capacity set out on the construction drawings passed to you at our meeting on Wednesday 27th June 2001, is £100,000 net.*
>
> *This price is based upon two visits to site only. Any additional visits will be subject to a mobilisation charge as set out in your lump sum schedule of £ 2,207.00.*
>
> *For clarity, we confirm that you have received all AIG Borehole logs for this site, have made an assessment of likely pile depths for the scheme and as such bare (sic) all risks/retain all benefits associated with conditions varying from your initial assessment.*
>
> *The first visit to site is primarily to install piles to the three show-homes identified, however if at all possible we would request that you also install the associated piles (2-3 plots) in the area of the proposed Shepherd Homes compound area during this visit. The second visit will follow on within a maximum of two weeks from this point and will encompass the majority of the remaining works.*
>
> *Finally, as discussed we are proceeding with a "value engineering" exercise to reduce through design the number of piles necessary to complete these works. This will be an ongoing process and we confirm that any savings realised after additional design costs have been take into account will be shared equally between AIGR and Green Piling Ltd.*
>
> *I trust you will find the above satisfactory and look forward to working with you on what I hope will be a mutually successful project.*
>
> *Our formal order will be forwarded to you during the course of the next few days."*

25. No order was ever forwarded. Green Piling commenced work on Tuesday 3rd July 2001. The fact that they were instructed to do so practically dictated the use of steel piles since concrete piles would not be available for several weeks. They began the work with such piles, never having been instructed not to do so.

26. On 25th June and 2nd July 2001 Green Piling received from another engineer some drawings which indicated that it might be possible to reduce the number of piles and the width of the ground beams on the development.

The meeting of 5th July 2001

27. On Thursday 5th July 2001 there was a meeting at Encia's offices in Wetherby attended by Mr Kane, Mr Bates and Mr Valentine of Hilton Jolley. Prior to the meeting Mr Kane had told Mr Valentine by telephone that Green Piling thought that savings could be made in the design of the ground beams and the piling layout for each property on the basis of using 140mm diameter tubular steel piles, which Green Piling said could carry greater loads so that it would be possible to reduce the number of piles and the width of the ground beams.

28. The purpose of the meeting was for Green Piling to put their design proposals, in particular about reduction of pile numbers and beam width, to Mr Valentine. At the meeting Encia confirmed that they and Hilton Jolley were proceeding with the "*value engineering exercise*" referred to in the fax of 29th June. It was agreed that any savings would be shared and Mr Bates stressed the urgency of providing Green Piling with revised information as soon as possible so that potential savings could be realised.

29. The fullest note of the meeting is that taken by Mr Kane, who was effectively an observer of a discussion between engineering experts. (Mr Bates was a qualified chartered engineer). This note was made of the points that arose as the meeting progressed. As his note reveals, the meeting began with discussion as to pile cut off lengths and pile layouts and arrangements.

30. One of the matters that was discussed was the number of piles and whether some of the piles for each house type could be removed. Mr Bates expressed the view that steel piles could carry 80 tons, as opposed to the 40 ton figure to which Mr Valentine had worked. Mr Valentine accepted that this was theoretically possible[1] but said that in practice the load bearing area of the piles was insufficient and loads of this magnitude would damage the beams[2]. It was agreed that the number of piles would stay the same for the moment. Later on the number of piles was reduced.

Pile head design

31. At some stage there was a discussion as to the connection between the steel pile head (to be provided by Green Piling) and the concrete ground beam (to be provided by Moortown). Mr Valentine felt unable to design a connection which would meet relevant standards. Mr Bates then sketched a design for the connection and said that it illustrated what was accepted custom and practice. This design called for the use of an angle beam set into the void in the pile and cast into the concrete of the ground

[1] By what he regarded as an abuse of the Hiley formula.
[2] He was also concerned that a reduction in the number of piles would increase the span of the ground beams and thus necessitate an increase in the amount of steel reinforcement which would mean increased cost in that respect.

beam with the angle bar tied to the top of the steel reinforcement cage of the beam. Mr Valentine said that Hilton Jolley was unhappy to assume liability for such a design[3]. Mr Valentine was concerned at the smallness of the diameter of the pile and at what he thought might be the high upward stress at the angle corner producing undue loading across the ground beam. Mr Bates said that his design worked and that he had used it for years. A stalemate was reached. This was resolved by Mr Bates offering (on behalf of Green Piling) to indemnify Encia and Hilton Jolley in relation to the pile design. Mr Bates was happy to give this indemnity because he was satisfied as to the suitability of the pile head design and could not see how it could give rise to a claim. In the latter respect his belief was accurate. Whilst Encia does allege that the pile head design was defective it does not allege that that design was causative of the settlement[4].

Insurance cover

32. At that point Mr Kane said "*This is covered by your insurance, is it not?*" or words to the effect. Mr Bates confirmed that Green Piling had professional indemnity insurance of £1,000,000. Mr Kane asked whether this was on an "*each and every claim basis*" or in the aggregate. Mr Bates was 90% sure that it was in the aggregate but said that he would check and confirm that. The parties never proceeded on the basis that Green Piling's insurance was in fact for £1,000,000 on each and every claim. Mr Bates indicated that the cover would remain in place for 12 years.

33. Mr Kane made the following note to himself:

> *"Order will need to include*
> - *P.I. insurance - £ 1m*
> - *warranty for 12 yrs (Maintain P.I.)*
> *each and every*

Slenderness of the piles

34. At some stage there was a discussion as to the slenderness of the piles. Mr Bates' recollection was that that was an issue with which Mr Valentine was concerned before the meeting and which was raised *before* any discussion about the pile head design. This tallies with Mr Kane's note which, after reference to "*Pile layouts/arrangements*" and before the note set out in the previous paragraph, reads:

> *" - Steel piles – design issues*
> *- Connection detail – concrete + rebar"*

[3] In evidence he expressed the view that the question of whether the structural engineer or the piling contractor was responsible for pile head design, i.e. the connection between the pile and the beam, was a "grey area". One reason for an indemnity was to make it clear that Green Piling was accepting responsibility for the pile head design and the interface between the piles and the ground beams.

[4] See paragraph 20 of Encia's Amended Reply to Green Piling's Amended Third Party Defence.

35. Mr Kane's recollection was that the reference to "*design issues*" was a reference to pile slenderness. It is difficult to see to what else it might refer, except pile numbers, which would more accurately be summarised as such. Mr Kane's evidence was that the insurance position was not raised in the context of the slenderness, as opposed to the pile head, issue.

36. Mr Valentine's recollection was that the discussion about pile slenderness came *after* the discussion about pile head design and that Mr Bates repeated his reference to Green Piling's insurance coverage at this point. Some support for this conclusion appears in Mr Bates' note. That note contains the entry *"+ slenderness ratios"* following *"Pile head details.."* and *"+ letter of indemnity + 12 yrs P.I."*. It is not, however, at all clear whether Mr Bates' note was made at or after the meeting. It appears to be a list of matters to be done and may not necessarily reflect the order in which those matters were discussed.

37. I think the likelihood is that the recollections of Mr Bates and of Mr Kane (aided by his contemporaneous note of a discussion in which he was, for the most part, a listener) are right. Mr Valentine accepted that he could not be 100% sure of the sequence of discussion but said that the sequence that he recollected was a logical sequence in engineering terms. I suspect that his recollection has been influenced more by his view of what would be logical than by recollection of the actual sequence; and I am not convinced that the sequence recalled by Mr Bates and Mr Kane was illogical.

38. Mr Valentine was concerned that the driven length of the pile would be more than 75 times the pile diameter. This was an industry rule of thumb maximum – imposed in order to avoid the risk of the pile experiencing strut buckling and excessive bending moments due to a lack of verticality of the pile shaft. He was not saying that Mr Bates was wrong on the issue but, rather, asking "*whether we* (i.e. Encia and Green Piling) *were happy*". Mr Bates assured him that a technical paper had been published which confirmed that the slenderness ratio of the piles that he intended to use was within acceptable limits and that piles with a length in excess of 75 times pile diameter could be used. He said he would forward a copy of this paper. Mr Bates expressed complete confidence in the slenderness ratio, and his ability to satisfy the NHBC of the adequacy of his design. Mr Kane was satisfied that that issue had been resolved.

39. There was also a discussion about the width of the ground beam. The drawings showed a width of 600mm, a width that Mr Valentine had used to accommodate the assumed size of the pile head (250mm square) together with an out of position pile tolerance of +/- 75mm and a further allowance. He agreed to reduce the width to 450 mm provided Mr Bates agreed, as he did, that he could install the piles with sufficient accuracy so as to fall within the width of the beam.

The topic of insurance

40. There was some difference of recollection as to precisely how the topic of insurance was raised. Mr Valentine recalled that he said that he wanted some indemnity or

assurance in relation to the pile head design; Mr Bates said that it was he who was designing the pile and that he had £1,000,000 of professional indemnity insurance to cover that. Mr Kane said that he would require that level of professional indemnity cover. Mr Bates' evidence was that, whilst he expressed confidence in his design he would not have expressed his confidence in the design and his insurance position in the same breath since that would have been an unappealing method of presentation. His recollection was that he was simply asked what Green Piling's insurance position was and confirmed that Green Piling was insured for £1,000,000 in, as he believed, the aggregate.

41. I think the likelihood is that insurance was raised in the manner set out in paragraphs 31 and 32 above, and that it was not raised at two separate points (i) in relation to the indemnity for the pile head design and (ii) in relation to the slenderness of the piles or the rest of the design of the piling work. I found Mr Bates' evidence in this respect convincing. At the same time the reference to insurance cover was clearly not casual. Encia and Mr Valentine were concerned to have confirmation as to the insurance position, for Mr Bates to check whether the £1,000,000 was for each and every loss or in the aggregate, and for that insurance to continue in place. Mr Kane envisaged that the order which he intended to send (but never did) would refer to that insurance. Further, although the insurance coverage was raised in the context of the pile head design, Encia and Mr Valentine reasonably understood from what was said that the insurance provided coverage which extended, as in fact it does, to the whole of Green Piling's design for their work.

42. It is common ground that there was no discussion of the cap. Nor was there any discussion of the impact of insurance on either the cap or the extent of Green Piling's liability. Mr Kane's understanding was that Green Piling was warranting to Encia and Hilton Jolley that its pile head design was backed by £1,000,000 worth of professional indemnity insurance.

After the meeting

43. On 9th July 2001 Green Piling wrote to Encia as follows:

> *"We thank you for your order and confirm that the agreed start date, in accordance with the terms and conditions of our tender, was 3rd July. A copy of our Safety Plan together with letter of indemnity is enclosed as requested.*
>
> *We also confirm that we have PI cover for £1m in aggregate which we intended [sic] to keep in force for the next twelve years."*

44. The enclosed letter read as follows:

> *"We hereby confirm that we will indemnify you and Hilton Jolly against your liabilities for the pile head design and enclose a sketch of the proposed detail."*

The enclosed sketch was a neater version of the sketch that Mr Bates had produced on 5th July.

45. On 16th July 2001 Mr Bates faxed Mr Kane with a copy of Green Piling's insurance details. These included:

> *"Cover: Cover to indemnify the insured for any sum or sums which the insured may become legally liable to pay arising from any claim or claims first made against them and notified to the underwriters during the period of insurance stated in the schedule as a direct result of negligence on the part of the insured in the conduct and execution of the Professional Duties and Activities as defined*
>
> *Professional Activities and Duties.*
> *Design and specification…*
> *Supervision of construction*
> *Feasibility study*
> *Technical Information Calculation*
> *Surveying*
>
> *Limit of Indemnity £1,000,000 in the aggregate.*
>
> *Excess: £2,500 in respect of each and every claim or incident."*

46. Although Green Piling did not know this at the time, on 10th August 2001 Encia provided their solicitors, Hill Dickinson, with a copy of the letters of 9th and 16th July 2001. On 13th August Hill 2001 Dickinson provided a draft sub-contractors' warranty to Encia but Encia never provided it to Green Piling.

Phase II

47. In March 2002 Green Piling were asked to submit a tender for a further phase of works at the Hart Lane site. On 28th March 2002 Green Piling submitted two alternative quotations to Encia, one utilising steel piles and one pre-cast concrete piles. The accompanying letter included the following:

> *"We thank you for your recent enquiry and have pleasure in submitting our revised offers, as detailed in the attached documents. All other terms and conditions are as previously agreed".*

48. Further revised quotations were submitted on 1st and 4th July with, in the case of the former, an accompanying letter with the same initial paragraph, and in the case of the latter, a final sentence reading "*All terms and conditions are as before"*. By letter

dated 8th July 2002 Green Piling submitted a revised quotation for 659 pre-cast concrete piles that were to be driven in during two visits to site. This stated that '*All other terms and conditions are as before'*.

49. By a fax dated 18th July 2002 Encia wrote to Green Piling stating:

> *"Further to your submissions for the quotation of piling as above please accept this letter as notice of our intention to place an order with you to pile a minimum of 10 number plots on week commencing 5 August 2002 as discussed"*

50. On 5th August 2002 Encia wrote to Green Piling inviting Green Piling to provide a price in relation to further works which would come under the scope of its Phase 2 Contract. Green Piling commenced its works on site on 8 August 2002**.** On 13th August 2002 Green Piling provided a price for all of the Phase 2 works including those requested by the letter of 5th August. The Bill of Quantities that was attached to this letter stated "*all to be read in conjunction with previously submitted quotations*".

51. On 14th August 2002 Mr Kane confirmed to Mr Bates that Encia wished Green Piling to undertake the further works that were detailed in the letter of 13th August 2002.

52. In the light of those communications it is common ground that the Phase II work was governed by the same terms and conditions as the Phase I work.

Was there adequate notice of the cap?

53. Green Piling's offer contained in its letter of 27th June was "*of £100,000 net, as detailed in the attached documents*". The attached documents included Green Piling's standard terms and conditions. There can be no doubt that those terms formed part of Green Piling's offer of 27th June.

54. Encia originally contended that inadequate notice was given of clause 4.3. and that, as a result, the cap was not incorporated into any contract, even if, looking at the matter objectively, Encia appeared to accept an offer that was subject to Green Piling's terms and conditions.

55. Mr Kane's evidence was (i) that he read and considered the terms and conditions, something which, as I infer, took place before his reply of 29th June 2001, and which Mr Kane accepted was certainly by 5th July, and (ii) that it would be reasonable for Mr Bates to have assumed that he had done so. In the light of that evidence the contention that there was inadequate notice of the cap was, as Encia recognises, no longer maintainable.

56. The contention would, in my judgment have failed, even if Mr Kane had not considered the terms for the (obiter) reasons set out in paragraphs 57 – 69.

Obiter observations

57. The general position is stated in **Chitty on Contracts** at 12-13 :

> *"**Meaning of Notice.** It is not necessary that the conditions contained in the standard form document should have been read by the person receiving it, or that he should have been made subjectively aware of their import or effect. The rules which have been laid down by the courts regarding notice in such circumstances are three in number:*
>
> *(1) If the person receiving the document did not know that there was writing or printing on it, he is not bound;*
>
> *(2) If he knew that the writing or printing contained or referred to conditions, he is bound.*
>
> *(3) If the party tendering the document did what was reasonably sufficient to give the other party notice of the conditions, and if the other party knew that there was writing or printing on the document, but did not know it contained conditions, then the conditions will become the terms of the contract between them."*

58. These are rules designed to cater for circumstances in which someone, usually an ordinary member of the public, makes use of services provided by another in exchange for a ticket, as was the case with the depositor of a bag at a cloakroom in *Parker v South Eastern Railway Company* [1877] 2 C.P. 416. Judged by those rules Green Piling's offer was sufficient to incorporate clause 4.3. Mr Kane knew that the letter of 27th June referred to conditions (" *as detailed in the attached documents*"); and, even if he had been unaware, Green Piling had done what was reasonably sufficient to give Encia Green notice that it did.

59. Encia originally sought to rely on the principle set out at paragraph 12-015 of Chitty. This states :

> *"**Onerous or unusual terms.** Although the party receiving the document knows it contains conditions, if the particular condition relied on is one which is a particularly onerous or unusual term, or is one which involves the abrogation of a right given by statute, the party tendering the document must show that it has been brought fairly and reasonably to the other's attention. 'Some clauses which I have seen' said Denning LJ, 'would need to be printed in red ink on the face of the document with a red hand point to it before the notice could be held to be sufficient'"*

60. Lord Denning's famed red hand reference is contained in his judgment in *J Spurling Ltd v Bradshaw* [1956] 1 W.R. 461. The clause in that case was the London lighterage clause which provided that the warehouseman should not be liable for any loss "*howsoever, whensoever or wheresoever occasioned in respect of any goods*"

even when occasioned by the *"negligence, wrongful act or default"* of the warehousman or its servants or agents. This clause was contained in small print among the conditions on the back of the receipt for the goods. Lord Denning and the rest of the court did not regard the clause as calling for such exceptional treatment "*especially when it is construed, as it should be, subject to the proviso that it only applies when the warehousman is carrying out his contract and not when he is deviating from it or breaking it in a radical respect*". Lord Denning placed some reliance on the fact that the receipt "*on its face told Mr Bradshaw that the good would be insured if he gave instructions; otherwise they were not insured. The invoice on its face told him they were warehoused "at owner's risk"*. He regarded the printed conditions as adding little or nothing to those two statements taken together.

61. A different result was reached in *Thompson v Shoe Lane Parking Ltd* [1971] 2 Q.B. 163 where "*a few words embedded in a lengthy clause*" in a ticket for parking space purported to exempt the defendants from liability for personal injury.

62. In *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1987] 1 QB 433, a clause in the plaintiffs' delivery note imposed a "*holding fee*" of £5 per day plus VAT for transparencies held over the allowed period of 14 days. The return of 47 transparencies 4 weeks late led to a charge, characterised by Dillon, L.J., as "*exorbitant*", of £3,783.50. Dillon, LJ, held that:

> *"..if one condition in a set of conditions is particularly onerous or unusual, the party seeking to enforce it must show that that particular condition was fairly brought to the attention of the other party"*

63. Bingham LJ considered that the term was not incorporated, stating:

> *"The tendency of the English authorities has, I think, been to look at the nature of the transaction in question and the character of the parties to it; to consider what notice the party alleged to be bound was given of the particular condition said to bind him, and to resolve whether in all the circumstances it is fair to hold him bound by the condition in question. This may yield a result not very different from the civil law principle of good faith…"*

64. In *HIH v New Hampshire* [2001] 2 Lloyds Law Reports 161, 196 Rix LJ noted

at paragraph 192 that the judge:

> *"…rejected a submission that for general words of incorporation to be effective a clause had to be well known and in common use and held that as a matter of general principle the question was whether the term was sufficiently unusual or uncommon so that it would be unfair in all the circumstances to hold the party to it…"*

The trial judge had:

> *"found that clause 8 was not standard or customary, but in no sense unique."*

It was not suggested to the Court of Appeal that the judge applied the wrong test, but that the judge should have found that the clause was "*highly unusual if not unheard of...*"

65. At paragraph 211, Rix LJ said :

> *"...I am not persuaded that the Interfoto test applies to a term that is merely unusual, at any rate in the context of a binding incorporation clause. I acknowledge that some of the dicta in previous cases mention the case of a term that is "usual", but Interfoto v Stiletto itself was concerned with a term which was not merely unusual but very onerous, unreasonable and extortionate. No one has suggested that those descriptions apply to cl. 8, however much it might increase the risk undertaken by an insurer…Lord Justice Dillon spoke of a term which is "particularly onerous or unusual (at 439A); and both he and Lord Justice Bingham went out of their way to stress the particular objections to the offending clause in that case"*

66. A limitation of a contractors' liability to the amount of the contract price is not, in my experience, particularly unusual, although I recognise that such experience may be an inadequate guide. More importantly, two of the contractors which Encia was considering had terms and conditions which limited liability to the purchase price. Clauses 12 (a) and (b) of the terms of Roger Bullivant Ltd[5] provide:

> *"WARRANTY, LIMITATION OF LIABILITY AND NOTICE OF COMPLAINT*
>
> *(a) We warrant that we shall carry out the Works in a proper workmanlike manner based upon the information provided to us and in accordance with the knowledge and standards commonly available to and used by the building industry at the date of this Contract, All other warranties, except those given in writing and signed for an on behalf of the Company , whether purportedly express or implied (whether by statute or otherwise) in relation to the quality or fitness for purpose of the Works or in relation to our performance of the Contract are hereby expressly excluded.*
>
> (b) *Our liability under the Contract shall, except for liability for (i) death or personal injury due to negligence, and (ii) delay as specified in clause 6 above, be limited to the cost of remedial or rectification work (whether carried out by ourselves or a third party) on physical defect in the Works, such cost not to exceed the Contract Price (exclusive of VAT). All liability on our part for indirect or consequential loss or economic damage*

[5] These were the terms applicable in 2000. The page of the quote to Encia containing the terms has not survived; but I infer that the 2001 terms were either the same or similar.

(including but not limited to loss of revenue or profit) is hereby expressly excluded."

67. Clause 6.6. of the Van Elle conditions provides:

> *"6.6. Where any valid claim in respect of any of the Works and Materials which is based on any defect in the quality of Works or condition of the Materials or the failure to meet specification is notified to the Company in accordance with these Conditions the Company shall be entitled to repair the Works or replace the Materials (or the part in question) free of charge or at the Company's sole discretion refund to the Customer the invoice price (or a proportionate part of the price) but the Company shall have no further liability to the Customer".*

68. If, therefore, it had been necessary to establish that the clause was "*particularly onerous or unusual*" I would not have been persuaded that the present clause falls within that category. Some piling contractors' standard terms include such a provision; some do not. I doubt however whether in a case such as this the application of the clause is wholly determined by this categorisation. The principle is that the person relying on the clause must have done what was reasonable fairly to bring the clause to the notice of his customer when the contract was made. As Bingham, LJ, put it "*…the more outlandish the clause the greater the notice which the other party, if he is to be bound, must in all fairness be given*".

69. In my judgment Green Piling did what was necessary to give Encia fair notice that their offer was subject to the condition that their liability was limited to the contract price. The letter of 27th June submitted an offer "*as detailed in the attached documents*". The attached documents, which consist of 5 items, included a one page document setting out terms and conditions. This contains, in clear and legible print, ten terms. The warranty clause – clause 4 – has 4 sub-clauses amounting to 15 lines in all. It purports to cover, in clear language, the extent and limit of Green Piling's liability.

Ground conditions

70. Clause 4.1 and Clause 10 of the terms provided as follows:

> *"4. WARRANTY*
>
> *4.1. We warrant that we shall design and carry out the Works in a workmanlike manner and exercise reasonable skill and care in accordance with these terms and conditions. This warranty is in affect (sic) from the practical completion of the Works for a period of six years, providing the contract price had been paid in full and on time.*

……

UNFORSEEN GROUND CONDITIONS

10.1 If any physical conditions or obstructions are encountered which cause delay or additional costs and were not foreseen and not expressly allowed for in our Tender we will notify the Employer as soon as reasonably practicable.

10.2 Any associated addition (sic) work will be valued as a Variation.

10.3 We will be entitled to any extension of time for any delays arising from 10.1. above"

71. In carrying out piling works a contractor may encounter ground conditions which, when quoting a price, (a) he foresaw; or (b) he did not foresee, but ought to have foreseen, or (c) he neither foresaw nor ought to have foreseen. I categorise these as "foreseen", "foreseeable" and "unforeseeable" conditions. Clause 10.1. prima facie imposes on the employer the risk of additional cost from foreseeable and unforeseeable conditions. The contractor only bears the risk of additional cost arising from conditions which he actually foresaw. But, in the light of the obligation in clause 4.1 the contractor would, in my judgment, as is common ground between the parties[6], bear the risk of extra expense from conditions that he ought to have foreseen.

72. Mr Bates was certain that at the meeting of 27th June he was not accepting that Green Piling would bear *all* the risk of ground conditions differing from what was expected because what he was making was a *qualified* lump sum offer. He believed that what he had then said was that he was accepting the risk of extra expense arising from ground conditions that were foreseeable, based on the information provided. Mr Kane accepted in cross examination that he and Mr Bates discussed where the risk lay (namely with Green Piling) if the piles had to be longer than Green Piling had assumed *based on the information that Encia had provided*. I think the likelihood is that what Mr Bates said was that his quotation was based on the information that Encia had by then provided him, with the clear (and reasonably so to be understood) implication that, if the ground conditions encountered were not such as could or should have been foreseen, there would be additional cost.

Offer and Acceptance

73. Green Piling's letter of 27th June was an offer. It is expressed as such (*"our agreed offer"*) and was treated as such in Encia's letter of 29th June ("*your offer letter*"). The last paragraph contemplated a visit to the site and the agreement of terms before the acceptance by Green Piling of an order. I do not regard that as a stipulation that either made the offer incapable of acceptance until a site visit and discussion of terms or incapable of acceptance at all because any contract would have to be made by an

[6] Discernible, with difficulty, from paragraph 16 (3) (d) of Green Piling's Amended Part 20 Defence and paragraph 13, formerly 8, of Encia's Amended Reply.

order from Encia followed by the acceptance of that order by Green Piling. I see no reason why, if Encia had replied to the fax of 27th June saying "*We accept your offer. Please start on 2nd July*" there would not have been a concluded contract.

74. Encia's letter of 29th June 2001 was, subject to one point, an acceptance of the offer letter of 27th June. It accepted the agreed lump sum price of £100,000 net for 641 piles, the number specified in the Bill of Quantities, and made a request, not amounting to a counter offer, for the installation, on Green Piling's first visit, of piles in the area of the Shepherd Homes' compound area as well as piling for the three show homes. The confirmation that any savings realised as a result of the "*value engineering*" exercise would be shared was a confirmation of what had been proposed at the meeting. The statement that a "*formal order will be forwarded to you during the course of the next few days"* did not mean that the letter could not itself be an acceptance. The letter is not expressed to be only a letter of intent; nor to be subject to formal order. It contained the substance of what was accepted; and the order was expressed as a formality. That it was such is illustrated by the fact that no order was ever sent.

75. At that stage, on the assumption that the letters of 27th and 29th were congruent, there was nothing more that needed to be agreed in order for there to be a contract. The fact that a value engineering exercise might reduce the number of piles or the width of the ground beams was a potential bonus. It did not mean that there was no contract in the first place. Nor did the fact that Encia might stipulate concrete piles have that effect. The bill of quantities offered either concrete or steel piles. Consistent with that conclusion was Mr Kane's belief was that "*we had a deal*".

76. But the fourth paragraph reads:

> *"For clarity, we confirm that you have received all AIG Borehole logs for this site, have made an assessment of likely pile depths for the scheme and as such bare (sic) all risks/retain all benefits associated with conditions varying from your initial assessment."*

77. The effect of this paragraph is to cast on Green Piling *all* the risks of ground conditions varying from those initially assessed whether foreseen, foreseeable or unforeseeable. This differs from the allocation of risk contained in the offer letter incorporating the terms and conditions. Under those terms it is only the risk of foreseen and foreseeable risks that the contractor has to bear. The difference is not trifling. Unforeseeable (or arguably unforeseeable) ground conditions can be very expensive. For this reason the letter of 29th June cannot, in my judgment be regarded as an acceptance of the offer of 27th June and must be treated as a counter offer.

78. I do not think it possible to treat the fourth paragraph as saying the same thing as the terms and conditions or as what had been discussed on 27th June (these two being to the same effect). The only route to doing so would be to derive that meaning from the words "*as such*". But those words are not apt for that purpose or for qualifying the words "*bare all risks*". I am conscious that, when giving evidence, Mr Kane

expressed the view that what was contained in this paragraph was no more than what he understood to have been agreed at the meeting of 27th. It seems to me, however, that, as a matter of language there is a difference between that paragraph and what was agreed on the 27th and contained in the terms and conditions. I reach this conclusion more readily in the light of Mr Bates' evidence that he did not spot the implications of the paragraph at the time and that, if he had done so, he would have pointed out again that the contract was a *qualified* lump sum contract.

79. But the letter of 29th June was only a counter offer in respect of the risk of unforeseen ground conditions. The letter is written "*further to ... your offer letter ...dated 27th June 2001*" which was itself subject to Green Piling's terms. The letter of 29th June 2001 made no suggestion that they were not to apply. I, therefore, regard it as an offer to contract on the terms of the offer letter of 27th subject to the qualification contained in its fourth paragraph.

The making of the contract

80. Green Piling's letter of 9th July 2001 ("*We thank you for your order...*") was an acceptance of Encia's counter offer, subject to the question as to whether that offer had itself been revised as a result of what took place at the meeting of 5th July.

Was there a revision of Encia's offer?

81. For the reasons set out in paragraphs 82-87 below I do not regard the discussions about insurance at the meeting of 5th July as constituting a revision, express or implied, of Encia's counter offer.

82. No one at the meeting suggested that Green Piling's terms were being altered, or that there was any inconsistency between Green Piling's terms (which Mr Kane had by then considered) and what was being said about Green Piling's insurance cover. Nor was the information about insurance cover given at the meeting materially different to that which had been provided in the company profile attached to the offer letter, to which the terms and conditions were also attached. No one said that the limit of Green Piling's liability under the piling contract was to be measured by the extent of the insurance cover.

83. There was no inconsistency between the existence of a cap in the piling contract and Green Piling confirming that it had (and undertaking that it would maintain in force) professional indemnity cover in the sum of £1,000,000 in the aggregate. For the reasons set out in paragraphs 84-85 below that confirmation neither was, nor could it reasonably have been thought to be, meaningless if the cap applied.

84. The discussion about Green Piling's insurance position arose in connection with the offered indemnity in respect of pile head design, to which, as it seems to me, the cap does not apply. Green Piling's obligations under the indemnity[7] are not the same as its

[7] To hold Encia and Hilton Jolley harmless against any liability for defective pile head design.

obligations under the piling contract[8]. A limitation clause in the latter (which must be construed strictly) should not be held applicable to the former and may readily be confined to liability for a breach of that contract[9]. This has two consequences. Firstly it is difficult to spell out of a statement about insurance cover in the context of an unlimited indemnity an acceptance or understanding that the cap in the piling contract should not apply. Secondly £1,000,000 of cover would have relevance and meaning in relation to the indemnity alone.

85. Further such cover would probably be needed in order for a company with Green Piling's then turnover to be able to satisfy even a liability limited to the contract price. The existence of cover in the aggregate in respect of £1,000,000 would not, as Mr Kane appreciated, necessarily be available to satisfy claims relating to this development. If there were other claims in the same year the £1,000,000 would be needed to satisfy those claims as well. Whether the £1,000,000 limit included costs is not clear, nor was there any discussion about it at the meeting. If it did the amount available for satisfying claims by Encia would be pro tanto reduced.

86. If the parties had considered amongst themselves (as they did not) the impact of the insurance on the cap (assuming that there was to be any), they would need to have decided whether the cap was to disappear, leaving Green Piling with no limit on its liability, or whether it was to be qualified. If the latter it would be necessary to consider precisely what the qualification would be.

87. Encia submitted that Green Piling's liability should be regarded as unlimited, or alternatively limited to £1,000,000. The former would be surprising. It would mean that, because Mr Bates confirmed the existence of £1,000,000 of insurance cover (a fact already revealed in the company profile) the putative contractual position changed from a liability of, at most, about £250,000 (for Phases 1 and 2) to a liability without any limit at all. The latter proposition is more attractive. But, since it relates the limit of liability to the extent of insurance cover, it begs, but does not answer, the question as to whether or not the limit is affected by the existence of other claims on the insurance, and, if so, how. The limit could be treated as £1,000,000 on the footing that, if there was to be insurance of up to £1,000,000 that sum should be treated as the maximum recoverable. Or it could be that the limit was to be such of the insurance as was in fact available to meet the claim.

88. In those circumstances I do not think that the Court should spell out some implied revision to the counter offer whereby clause 4.3 was superceded or, as Mr Black put it, "*no longer on the table*". The true analysis, as I see it, is that Green Piling made an offer on its terms; Encia accepted that offer, subject to a qualification about risk of unforeseen ground conditions, and Green Piling accepted what amounted to Encia's counter offer. In the process Green Piling gave an indemnity in relation to pile head design not affected by the cap, and confirmed (accurately) the content of its insurance cover, of which it had given details with its original offer. This provided some comfort that Encia would have funds available, not necessarily amounting to

[8] To design and carry out the Works in a workmanlike manner and exercise reasonable skill and care.
[9] Mr Bates accepted that no limit was agreed on the indemnity.

£1,000,000, to cover any liability for negligent design arising under the contract or the indemnity. On any view those funds would be far less, even if Green Piling faced no other claims, than the sort of claim that could arise (and in the event has) if the design of the piling for the development was said to be defective. There is no need to treat a confirmation of Green Piling's insurance position as anything other than that.

89. If the discussions on 5th July were not sufficient to amount to a revision of Encia's counter offer they were unlikely to be sufficient to constitute, and in my judgment they did not amount to, either a waiver by Green Piling of the cap or an estoppel, whether by representation or convention, precluding Green Piling from relying on it.

The Unfair Contract Terms Act

90. Section 3 of the **Unfair Contract Terms Act 1977** ("UCTA") provides:

> "*(1) This section applies as between contracting parties where one of them deals as a consumer or on the other's written standard terms of business.*
>
> *(2) As against that party, the other cannot by reference to any contract term-*
>
> > *(a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or*
> >
> > *(b) claim to be entitled-*
> >
> > > *(i) to render a contractual performance substantially different from that which was reasonably expected of him, or*
> > >
> > > *(ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,*
>
> *except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness.*"

91. Section 11 of UCTA provides:

> "*11.—(1) In relation to a contract term, the requirement of reasonableness for the purposes of this Part of this Act, section 3 of the Misrepresentation Act 1967 and section 3 of the Misrepresentation Act (Northern Ireland) 1967 is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.*
>
> *(2) In determining for the purposes of section 6 or 7 above whether a contract term satisfies the requirement of reasonableness, regard shall be had in particular to the matters specified in Schedule 2 to this Act; but this subsection does not prevent the court or arbitrator from holding, in*

accordance with any rule of law, that a term which purports to exclude or restrict any relevant liability is not a term of the contract.

(3) In relation to a notice (not being a notice having contractual effect), the requirement of reasonableness under this Act is that it should be fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or (but for the notice) would have arisen.

(4) Where by reference to a contract term or notice a person seeks to restrict liability to a specified sum of money, and the question arises (under this or any other Act) whether the term or notice satisfies the requirement of reasonableness, regard shall be had in particular (but without prejudice to subsection (2) above in the case of contract terms) to—

(a) the resources which he could expect to be available to him for the purpose of meeting the liability should it arise; and

(b) how far it was open to him to cover himself by insurance.

(5) It is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does."

92. Accordingly in order to determine the reasonableness of a clause caught by section 3 of UCTA the Court must consider:

a. The circumstances which were or ought to have been reasonably known to the parties at the time the contract was made; and

b. The resources which could be expected to be available to the person restricting liability to meet that liability and how far it was open to him to obtain insurance against that liability.

93. Section 11(2) of the Act makes the five guidelines laid down in Schedule 2 expressly applicable only to sections 6 and 7 of the Act only. But they are frequently regarded as being of general application: *Granville Oil & Chemicals Ltd v Davis Turner & Co Ltd* [2003] 2 Lloyd's Law Rep 356, 358; *Balmoral Group Ltd v Borealis UK Ltd* [2001] 1 Lloyd's Rep 93. These guidelines are :

"*(a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;*
(b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;
(c) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other

> *things, to any custom of the trade and any previous course of dealing between the parties);*
> *(d) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that Condition would be practicable;*
> *(e) whether the goods were manufactured, processed or adapted to the special order of the customer.*

94. Encia's essential submission in relation to UCTA was that, since the parties contemplated that Encia would have the benefit of up to £1,000,000 of insurance cover, any term the effect of which was that the full extent of such benefit would be denied them was neither a fair nor a reasonable one to have included in the circumstances, with the result that the cap was inapplicable.

95. I do not accept this submission. In 2001 Green Piling was, and was known by Encia to be, a small company, eager for business with Encia, which was, and proclaimed itself to be, part of a very large international group. Encia had a superior bargaining position. It was the customer. It could have contracted with Stent, Aarsleff Piling and Abbey Pynford (albeit at a higher price) on terms that did not contain a cap. As it was Encia secured favourable terms for an immediate start and an improvement in Green Piling's standard payment term as part of a deal which included those terms. Encia knew (as Mr Bates reasonably supposed) what Green Piling's terms were and also knew, from the quotes offered by Roger Bullivant and Van Elle, that other larger piling contractors had terms which included a similar cap. Mr Kane, their Contracts Director, was familiar with the process of negotiating standard terms whereby terms would be put forward which might or might not be accepted. He never suggested that Green Piling's terms did not apply. The fact, if it be such, that he did not give adequate consideration to the effect of the terms proferred, cannot assist Encia. Green Piling would not have been able to bear a liability for the contract price without insurance, and any insurance over and above what it had would probably have been prohibitively expensive. Its insurance did not, in any event, cover every type of claim – a claim for bad workmanship, for example, would not be covered. Encia had, or at least believed that it had, £5,000,000 insurance of its own covering SHL's claim[10]. I am satisfied that, in the circumstances, the term was a fair and reasonable one to have included in the contract between these parties.

96. I do not think that it ceased to be so because Green Piling confirmed that it had insurance cover of £1,000,000. That they did so did not, as I have held, alter the fact that the cap was to be a contractual term nor was it inconsistent with it. In those circumstances, looking at the matter objectively, I do not regard it as accurate to say that the parties must be taken to have contemplated that Encia would have the benefit of up to £1,000,000 of insurance towards a claim under the contract. The fact that Green Piling had such insurance is relevant to the reasonableness or otherwise of the term. But I see no reason to regard the cap as unreasonable because Green Piling had

[10] Now the subject of dispute in *Encia Remediation Ltd v Canopius Managing Agents Ltd* pending in the Commercial Court.

larger insurance cover, which would also be needed for claims under other contracts or under the indemnity.

97. Accordingly, subject to any submissions that Counsel may seek to make as to the form of the order, I propose to declare:

(a) that clause 4.3. of Green Piling's terms and conditions formed part of Green Piling's offer of 27th June and that the Phase 1 Contract and the Phase 2 Contract made between Green Piling and Encia included that clause;

(b) that clause 4.3. satisfies the requirement of reasonableness and is enforceable;

(c) that there was no revision of the terms offered and accepted so as to exclude clause 4.3;

(d) that Green Piling is not precluded from relying on clause 4.3. by reason of any waiver or estoppel.