

Neutral Citation Number: [2009] EWHC 2634 (TCC)

Case No: HT-09-238

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/10/2009

Before :

THE HON.MR.JUSTICE RAMSEY

Between :

MAYHAVEN HEALTHCARE LIMITED

- and -

(1) **DAVID BOTHMA**

(2) **TERESA BOTHMA**

(Trading as DAB Builders)

Ian Pennicott QC and Krista Lee (instructed by **Michelmores LLP, Exeter**) for the **Claimant**

Richard Stead (instructed by **Curtis Solicitors, Plymouth**) for the **Defendants**

Judgment

The Hon.Mr. Justice Ramsey :

Introduction

1.

This is an appeal pursuant to [s.69\(2\)\(a\)](#) of the [Arbitration Act 1996](#) (“the 1996 Act”) in which the Claimant (“Mayhaven”) seeks to appeal questions of law arising out of an award of an arbitrator dated 30 April 2009 (“the Award”).

2.

The dispute arises from a building contract dated 1 June 2005 (“the Contract”) by which the Defendant (“DAB”) agreed to carry out and complete work to Down House Nursing Home in Plymouth. The Contract was in the JCT Intermediate Form of Building Contract (1998 Edition) incorporating amendments 1 to 5.

3.

It is now accepted by DAB that Clause 9B.4.2 of the Contract constitutes an agreement pursuant to [section 45\(2\)\(a\)](#) and [Section 69\(2\)\(a\)](#) of [the 1996 Act](#), so that either party may appeal on any question of law arising out of an award. Consequently leave/permission to appeal is not required.

4.

The appeal concerns five questions which arise out of the Award. Mayhaven contends that they are questions of law; DAB contends that the questions are attempts by Mayhaven to attack the findings of fact of the Arbitrator.

Background

5.

The work to be carried out under the Contract consisted of the demolition of part of the nursing home and the construction of a three-storey extension to increase the number of beds from 43 to 49 and provide new facilities. That work has been referred to as Phase 1. Mayhaven also intended to carry out Phase 2 which consisted of building an extra storey above an existing wing to increase the number of beds to 75.

6.

Under the contract Mr Robin Hancock was named as the Contract Administrator. He was replaced by Davis Langdon LLP from about 7 April 2006. The date for commencement was 1 June 2005 and the original date for completion was 31 December 2005.

7.

Disputes arose between the parties which were referred to adjudication. In an adjudication decision issued on 12 June 2006 the adjudicator directed Mayhaven to pay DAB certain sums. DAB contended that Mayhaven had failed to pay those sums. It transpires that, in fact, those sums had been paid to DAB in a subsequent valuation. However, on the basis of its contention that the sums had not been paid, DAB suspended work on 20 July 2006. By a letter dated 20 July 2006 Mayhaven's solicitor, Michelmores, notified DAB's solicitor, Mr Mercer, that the suspension was wrongful and constituted a repudiatory breach of contract which Mayhaven said they accepted by that letter.

8.

By notice of arbitration issued on about 13 May 2007 DAB commenced an arbitration against Mayhaven which, in due course, led to the arbitrator issuing the Award on 30 April 2009. The time for lodging this appeal was extended by the Court to 11 June 2009 and Mayhaven issued an Arbitration Claim Form on that date. Directions were given on 15 June 2009 leading to a hearing which was subsequently re-arranged for the convenience of the parties.

9.

Mayhaven raises five questions of law. In this judgment I deal, first, with the relevant principles relating to the contention that each question is not a question of law. I then consider each of the questions in turn.

Question of Law

10.

Mr. Richard Stead who appears on behalf of DAB has referred me to the decisions of this Court in *Penwith DC v VP Developments Ltd* [2007] EWHC 2544 (TCC) at [29] and [30]; *Benaïm (UK) Ltd v Davies Middleton & Davies* [2005] EWHC 1370 (TCC) at [107] and *London Underground Ltd v Citylink Telecommunications Ltd* [2007] EWHC 1749 (TCC) at [57] to [59] in which the court has reviewed the principles to be applied in considering whether questions are properly described as questions of law.

11.

As set out in those decisions and as is common ground in these proceedings, an appeal on a question of law under [s.69](#) of [the 1996 Act](#) may arise if an arbitrator incorrectly ascertains the law or may arise by inference if the application of the law to the facts by an arbitrator shows that the arbitrator has not properly understood the law. Otherwise when an arbitrator makes findings of fact or applies the law to those findings of fact, those decisions cannot give rise to appeals on questions of law under [the Act](#).

Question 1

If a Contractor under a construction contract breaches that contract by wrongfully suspending the works, does such conduct amount to a repudiatory breach of contract?

12.

In the arbitration there was an issue as to whether DAB's suspension of the works on 20 July 2006 gave rise to a repudiatory breach of contract by DAB. This question seeks to appeal a question of law arising from the arbitrator's decision on that issue.

13.

It was accepted by DAB that there was an improper suspension of the works on 20 July 2006 based on grounds of non-payment because DAB had, in fact, been paid the relevant sums. The question was whether that improper suspension amounted to a repudiatory breach.

14.

The Arbitrator held that the improper suspension of the works did not amount to a repudiatory breach. As summarised in paragraph 50.2.5 of the Award, Mayhaven's position was as follows:

"Mayhaven's primary case is that DAB's wrongful suspension of work on 20 July 2006, which was accompanied by a complete clearance of and withdrawal from site, amounted to repudiatory breach.

Alternatively, Mayhaven submits that DAB's entire conduct and breaches of contract up until 20 July 2006, including wrongful suspension, amounted to a repudiation of the contract"

15.

The Arbitrator set out the law as follows in paragraph 50.6.41 of the Award: "Both parties point out that breaches of contract are repudiatory if they go to the root of the contract". The Arbitrator then set out the essence of his findings on this issue at paragraphs 50.6.42 to 50.6.43. At 50.6.54 he referred to the decision of the House of Lords in *Woodar v Wimpey* [\[1980\] 1 WLR 277](#) and the reference in Mayhaven's submissions to what is evidently the well-known passage in the speech of Lord Wilberforce at 283:

"I would only add that it would be a regrettable development of the law of contract to hold that a party who bona fide relies upon an express stipulation in a contract in order to rescind or terminate a contract should, by that fact alone, be treated as having repudiated his contractual obligations if he turns out to be mistaken as to his rights. Repudiation is a drastic conclusion which should only be held to arise in clear cases of a refusal, in a matter going to the root of the contract, to perform contractual obligations. To uphold the respondents' contentions in this case would represent an undesirable extension of the doctrine. "

16.

At 50.6.57 to 50.6.62 the Arbitrator said:

"DAB issued a Notice of Intention to Suspend on 12 July and suspended work on 20 July 2006.

This suspension was not valid under Clause 4.4.2 as set out previously.

Mayhaven on 20 July 2006, knowing DAB had received the money that they claimed, wrote to DAB's solicitors, bringing the contract to an end on the ground of wrongful suspension.

The Contract Administrator, also was aware that DAB had received the monies claimed and failed to inform DAB

DAB had expressed a willingness to complete the work in their suspension letter dated 20 July 2006

I have considered the matters raised by Mayhaven relating to DAB's suspension being a repudiatory breach and the additional justification set out in paragraph 115A and I find that at 20 July 2006 DAB's action was not a repudiatory breach."

17.

It can be seen that the Arbitrator summarised the principles of law correctly at paragraph 50.6.41 of the Award. This reflects what Lord Upjohn said in *Suisse Atlantique* [1967] AC 361 at 421 to 422:

"...there is no magic in the words "fundamental breach"; this expression is no more than a convenient shorthand expression for saying that a particular breach or breaches of contract by one party is or are such as to go to the root of the contract which entitles the other party to treat such breach or breaches as a repudiation of the whole contract. Whether such breach or breaches do constitute a fundamental breach depends on the construction of the contract and on all the facts and circumstances of the case."

18.

In applying that law he had to consider whether there was a breach of a fundamental term or a fundamental breach of a term of the Contract.

19.

Mr Ian Pennicott QC, who appeared with Miss Krista Lee, submits on behalf of Mayhaven that DAB's wrongful suspension of the work under clause 4.4 A of the Contract amounted to a breach of DAB's obligation under clause 2.1 of the Contract which provided that DAB shall "regularly and diligently proceed with the Works." He says that the suspension is a clear breach of this condition which permits immediate termination of the Contract. Alternatively he says that the breach by DAB went to the root of the contract because a refusal to carry out the work or an abandonment of the work, without lawful excuse, before it is substantially completed is sufficiently serious to amount to a repudiation. Mr. Pennicott submits that the Arbitrator had to consider the terms of the contract and the nature of the breach. In doing so, he submits that the Arbitrator wrongly came to the conclusion that the letters of 20 and 25 July 2006 indicated, as the Arbitrator found, that DAB were willing to complete the work.

20.

In relation to *Woodar v Wimpey* Mr Pennicott submits that the decision can be distinguished because in that case the parties had agreed to abide by the determination of the Court as to whether purchasers were entitled to operate a clause rescinding the Contract. He submits that the circumstances of this case are different and that DAB's breach was repudiatory.

21.

Mr Richard Stead submits on behalf of DAB that Mayhaven are seeking to challenge the Arbitrator's findings of fact and his conclusion based on the application of the law. He says that the Arbitrator asked himself the correct question. He refers to Mayhaven's submissions in the arbitration where they

contended that, in assessing whether there was a repudiatory breach, the Arbitrator had to “look at the whole combination of circumstances that existed at the time that the employer sought to determine the builder’s contract.”. Mr Stead says that is what the Arbitrator did and that his findings based on his findings of fact do not give rise to a question of law.

22.

In this case it is evident that the Arbitrator correctly set out the correct principle of law that a breach of a contract will be repudiatory if it goes to the root of the contract.

23.

I do not accept Mr Pennicott’s submission that a wrongful suspension of the work under Clause 4.4A of the Contract which gives rise to a failure to proceed regularly and diligently under Clause 2.1 amounts to a breach of a Condition or fundamental term so that every such breach amounts to a repudiation of the Contract. A wrongful suspension which gives rise to a failure to proceed regularly and diligently will vary in seriousness, depending on the circumstances. I do not accept that every wrongful suspension which leads to a breach of Clause 2.1 will automatically be a repudiatory breach. Rather, whether such a suspension and a consequent breach does amount to a repudiation depends on the breach and the facts and circumstances of the case.

24.

Mr Pennicott refers to a passage in Keating on Construction Contracts (8th Edn.) at paragraph 6-070 where it states:

“Refusal or Abandonment. An absolute refusal to carry out the work or an abandonment of the work before it is substantially completed, without any lawful excuse, is a repudiation.”

25.

As the cases cited in support of that proposition show, whether there had been a repudiatory breach will depend in each case on the breach and the facts and circumstances of the case. In this case there was no absolute refusal or abandonment of the type referred to in those cases.

26.

In this case, can it be inferred from the way in which the Arbitrator applied the law to facts that he misunderstood the law? In my judgment it cannot. As Lord Wilberforce said in Woodar vWimpey a party who bonafide relies on an express provision of the contract, in the present case to suspend performance, is not by that fact alone to be treated as having repudiated his contractual obligations if he turns out to be mistaken in his rights. Rather, that is one factor. The suspension must be viewed in the light of all the facts and circumstances of the case.

27.

In the Award the Arbitrator took into account the fact that DAB made a genuine mistake, believing that the monies awarded by the adjudicator had not been paid. In fact, whilst the adjudicator awarded the sums on the basis of valuation 9, the sums awarded were paid by Mayhaven in subsequent certificates for valuations 10 and 11. The Arbitrator found that Mr Bothma believed that the monies had not been paid relying on a letter from Mayhaven’s Solicitors in which they said that Mayhaven “will not be making any payment to your client pursuant to the Decision”. The arbitrator also found that Mayhaven, their Solicitors and the Contract Administrator knew that the sums had been paid before DAB suspended the works but did not inform them of this mistake and that the suspension would have been avoided if DAB had been informed of their mistake.

28.

I accept Mr Stead's submission that the Award could take into account the effect of DAB's conduct on Mayhaven. He referred to the passage in the speech of Lord Scarman in Woodar v Wimpey where he said at 299 C-D:

"The law requires that there be assessed not only the party's conduct but also, "objectively considered," its impact on the other party.

...

The learned Lord Justice was, with respect, concentrating too much attention on one act isolated from its surrounding circumstances and failing to pay proper regard to the impact of the party's conduct on the other party".

29.

The Arbitrator also relied on DAB's expressed willingness to complete the work which he derived from DAB's letters of 20 and 25 July 2006. Mr Pennicott submits that the Arbitrator fell into error in this respect. He refers to Chitty on Contracts (30th Edition) at 24-018 where the authors said:

"Short of such an express refusal or declaration, however the test is to ascertain whether the action or actions of the party in default are such to lead a reasonable person to conclude that he no longer intends to be bound by its provisions. The renunciation is then evidenced by conduct. Also the party in default "... may intend to fulfil (the contract) but may be determined to do so only in a manner substantially inconsistent with his obligations" or may refuse to perform the contract unless the other party complies with certain conditions not required by its terms. In such a case, there is little difficulty in holding that the contract has been renounced. Nevertheless not every intimation of an intention not to perform or of an inability to perform some part of a contract will amount to a renunciation."

30.

He says that the Arbitrator could not draw any comfort from the letters of 20 and 25 July 2006 because the offers to complete the work were subject to payment which was not due. I do not accept that submission. First, whether a refusal to perform unless the other party complies with an invalid condition amounts to a repudiation depends on the circumstances and not every indication of an intention not to perform or not to perform under an invalid condition will amount to a repudiation.

31.

Secondly, the letters of 20 July and the subsequent letter of 25 July 2006 are relevant to considering whether the conduct should be viewed as an absolute refusal or a repudiatory act. The letter of 20 July 2006 included the passage: "Our client will not return to site until it has been paid the balance of Valuation Number 9 as confirmed by the Adjudicator's decision dated 12 June 2006. Our Client, however, remains willing and able to return to site and confirms to us that it has approximately two weeks worth of work left on site to do to complete the contract"

32.

I consider that, in having regard to all the circumstances, the Arbitrator was as a matter of law entitled to take the contents of the letters into account and come to the conclusion he did as to the intention of DAB as a matter of fact.

33.

As a result, in my judgment, the Arbitrator set out the correct general principle of law and there is no inference from the way in which he applied the law that he misunderstood the law. He was entitled to come to the conclusion he did that, taking account of DAB's breach and all the factors and circumstances of the case, DAB's suspension of the work was not a repudiation.

34.

In any event, the question posed by Question 1 is this: If a Contractor under a construction contract breaches that contract by wrongfully suspending the works, does such conduct amount to a repudiatory breach of contract? As I observed in argument, the answer to that question whether a contractor's wrongful suspension of the works amounts to a repudiatory breach will depend on the terms of the contract, the breach or breaches of contract and all the facts and circumstances of the case. The question is not capable of a simple answer, as a matter of general principle.

Question 2

(a) Having found that:

(1) the Claimant had a fixed intention to house YPD patients in Phase 1 and that this was not subject to a "special contract" within the meaning of Victoria Laundry (Windsor) Limited v Newman Industries Limited[1949] KB 528 and (2) that the Defendants knew that the Claimant operated Down House as a business and a care home,

did the Arbitrator err in assessing damages on a false basis, i.e. that the loss of profits arising from delay should be assessed on the basis that only elderly clients were housed in Phase 1?

(b) Further, or in the alternative, once loss of profits, associated with using Down House as a care home, was identified as "loss of a kind" that was within the parties' contemplation, does it follow from the test in Czarnikow v Koufos (the Heron II)[1969] 1 AC 350 HL, that a Claimant can recover the full extent of its loss of profits or is the Claimant's recovery limited to the Defendant's knowledge of that Claimant's Business plan?

35.

Mayhaven claimed loss of profit in respect of the loss of use of rooms at the nursing home because of a delay in the completion of the works under the contract, caused by the need to carry out remedial works. The Arbitrator has awarded Mayhaven loss of profit/damages for that delay. In doing so he has calculated those damages on the basis that the rooms would have been occupied by elderly physically disabled rather than young (aged 18-65) physically disabled people ("YPD") who would have led to a higher rate of income.

36.

Mr. Pennicott submits that the Arbitrator's application of the law to the facts shows that he misunderstood the principles in Hadley v Baxendale(1854) 9 Ex 341. He submits that Mayhaven should receive loss of profits on the basis of provision of rooms for YPD and should do so under the first limb of Hadley v Baxendale because they only need to establish that the nursing home was a profit making business in the care industry and that loss of profit was likely to result if delay occurred. They say that DAB did not need to have actual knowledge of provision of YPD, as damages for that loss were foreseeable under the first limb of Hadley v Baxendale.

37.

Mr Pennicott refers to paragraph 116.51 of the Award where the Arbitrator said:

"In this case, Mayhaven are developing a business plan, moving into the provision of care for YPD; in my opinion, this is not a special contract referred to in Victoria Laundry, nor are the circumstances similar to those in the Czarnikow case which related to a cargo of sugar. The circumstances relating to this case are a change in the provision of care to produce a significant increase in profit, to which Mayhaven were privy, and I find it is most unlikely that DAB could have discovered this possible change in Mayhaven's business plan."

38.

Mr Pennicott submits that in this passage the Arbitrator was saying that this was not a case of a special contract as in the Victoria Laundry case or the circumstances in Czarnikow v Koufos which required knowledge under the second limb of Hadley v Baxendale and therefore the case came within the first limb. On that basis the Arbitrator, he submits, found that special knowledge was not required to make the loss of YPD income recoverable and the loss should be recoverable under the first limb.

39.

Mr Stead submits that, when properly read, the Arbitrator was not concluding in paragraph 116.51 of the Award that the second limb in Hadley v Baxendale did not apply but merely saying that there was no "special contract" as in the Victoria Laundry case and no change in the price of sugar as in Czarnikow v Koufos. Rather, he points out that the Arbitrator had been referred to the following passage in Czarnikow v Koufos [1967] 2 LLR at 464 which he set out at para 116.7 of the Award:

"The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation."

40.

At paragraph 116.49 he had applied that question in the following passage:

"Referring to the words of Lord Reid in Czarnikow Ltd v Koufos as set out above, I do not consider that at the time when the contract was made, sufficient information was available to DAB, or a reasonable man in the same position to have realised "that such a loss was sufficiently likely to result from the breach..." or a loss of that kind should have been within his contemplation."

41.

Mr Stead submits that from this passage it is evident that the Arbitrator had found that damages were not recoverable under first limb in Hadley v Baxendale.

42.

He says that the Arbitrator held that "profit levels of Down House can be expected to increase significantly when the resident basis is changed from "elderly" to YPD" (para 116.42); that DAB were aware that Down House was a business, being a care home and that Mr Bothma considered that the home was for the elderly (para 116.43) and that Mr Bothma was not aware of the "change to care for YPD" (para 116.44). On this basis Mr Stead submits that para 116.51, properly read, was a conclusion that the "circumstances" were a change in the provision of care to produce a significant increase in profit and that DAB were unaware of this special profit so that damages on that basis were not recoverable under the second limb.

43.

As a result Mr. Stead submits that the Arbitrator properly referred to and applied the law. He found at para 116.49 that the loss based on YPD occupancy was not recoverable under the first limb of Hadley v Baxendale and in para 116.51 that it was not recoverable under the second limb.

44.

I accept Mr Stead's submissions. Whilst the reference to the Victoria Laundry case and to Czarnikow v Koufos in para 116.51 of the Award appears to suggest that this is not a case where the first and not the second limb applies, when read in the context of paras 116.7 and 116.49, it is evident that the Arbitrator came to the conclusion on the facts that loss based on YPD occupancy was not recoverable under the first limb, applying the test expressed in Czarnikow v Koufos. He also found in the second sentence of para 116.51 that DAB did not have knowledge about loss arising from YPD occupancy so as to bring the case within the second limb of Hadley v Baxendale.

45.

In those circumstances, I consider that the Arbitrator properly cited the relevant law and that his application of the law to the facts does not disclose any misunderstanding of the relevant legal principles. There is therefore no question of law which gives rise to an appeal.

46.

I was also referred to the more recent decision of the House of Lords in Transfield Shipping Inc v Mercator Shipping Inc [2008] 3 WLR 345 in which it was held that whilst loss of profits because of late redelivery of a vessel and loss of a follow-on fixture were recoverable based on a difference between the charter rate and any higher market rate during the period of overrun, the loss of profits claimed in that case by the owner in excess of that amount had been caused by volatile market conditions and was "a type or kind of loss for which the charterer was not assuming responsibility".

47.

This authority was cited to the Arbitrator but he did not base his Award upon the distinction drawn by Lord Hoffmann, which might have applied if, say, a rate above market rate was being claimed for elderly occupants. Rather in this case the Arbitrator held that the damage was outside the first limb, not that it was within the first limb but excluded because it was loss for which a party had not assumed responsibility.

48.

In relation to the specific question posed, I consider that the reference to question 2(a) to the Arbitrator's finding that there was not a "special Contract" within Victoria Laundry case does not mean, as the question assumes, that this is a case under the first limb in Hadley v Baxendale, for the reasons set out above.

49.

In relation to question 2(b), "loss of profits" is not to be equated to "loss of a kind" so as to make all profits recoverable. As Lord Hoffmann said in Transfield at para 22, the loss of profits in the Victoria Laundry case are not a single type of loss. Some may fall within the first limb and some within the second limb. In this case the Arbitrator found that loss of profit for the use of the care home for the more lucrative YPD occupants was not recoverable under the first limb of Hadley v Baxendale and was not recoverable for lack of actual knowledge under the second limb. I do not consider that there was any error on a question of law in that conclusion.

Question 3

Having found that delay in completion of Phase 1 necessarily involved delay in the commencement and completion of Phase 2 and that the Defendants were aware of the Claimant's plans to build Phase 2 after Phase 1, was the Arbitrator wrong to refuse to assess delay damages on the basis of the loss of profits consequent upon the delay to the completion of Phase 2?

50.

This is, again, a question relating to loss of profits. Mayhaven made a claim for loss of profits arising from the delay to Phase 2 caused by delay to Phase 1. On this claim Mayhaven claimed loss of profit on the rooms based on YPD occupancy. The Arbitrator rejected this claim saying that "the loss of profit relating to Phase 2 has not been established." (para 118.21)

51.

Mr Pennicott submits that the Arbitrator fell into error in his conclusion because he was wrong to reject the claim for damages on the basis set out in para 118.23 that "Mayhaven have not established a date when the work could have commenced and the period of construction for Phase 2."

52.

Mr Stead submits that the Arbitrator was entitled to find, on the evidence, that Mayhaven had failed to establish loss of profits arising from Phase 2 and that this was a question of fact not one of law.

53.

The Arbitrator made a number of findings about Mayhaven's intentions in relation to Phase 2. At paras 117.8 to 117.13 he dealt with the question of the relationship between the income generated on Phase 1 and the need to use that income to service borrowings to develop Phase 2. He observed that the period between completion of Phase 1 and commencement of Phase 2 was not defined. At para 117.13 he said this: "Doing the best I can with the evidence received I consider and find that Mayhaven could have commenced the Phase 2 after a twelve month period following completion of Phase 1."

54.

Then at para 118.21 he set out the following conclusion : "I find, based on the evidence placed before me that, the loss of profit relating to Phase 2 has not been established."

55.

His reasoning for this conclusion is set out in para 118.22 where he says this:

"Mayhaven have expressed an intention as dealt with earlier, however, no tender/contract documents were adduced in evidence, which, in my opinion could have been expected if Mayhaven had intended to proceed as quickly as stated: the absence of this evidence highlights the fact that the true extent of the defects was not known at the time of contract termination."

56.

Mr Pennicott submitted that the Arbitrator's conclusions at paragraph 117.13 gave a commencement date for Phase 2 and that, in any case, this and the period of Phase 2 were irrelevant. The delay to Phase 2, he contends, would be the same as the delay to Phase 1.

57.

Mr Stead submits that the Arbitrator's conclusion that loss of profit relating to Phase 2 had not been established was entirely justified on the basis that there was no satisfactory evidence to show, when

or if, Phase 2 would be commenced. Mr Stead accepts that DAB knew of the probability of Phase 2 being commenced some time after completion of Phase 1.

58.

In my judgment there is no question of law which arises on this question. In order to assess any damages recoverable for the delay to Phase 2, the Arbitrator had, in my judgment, to know when Phase 2 would commence. In paragraph 117.8 to 117.13 I consider that he was considering when Phase 2 might commence in terms of the availability of finance. That however would not establish when Mayhaven might actually commence Phase 2. If, it were to be a long time after completion of Phase 1, then there would be no connection between delay to Phase 1 and the commencement of Phase 2. The Arbitrator says he would have expected documents to have been produced "if Mayhaven had intended to proceed as quickly as stated". Unless Mayhaven established a date when they would have commenced Phase 2 and showed that it was, in fact, linked to delay to Phase 1, then I consider the Arbitrator was entirely justified in saying that Mayhaven had not established loss of profits on Phase 2. I also consider that he would need to know the period of construction of Phase 2. If an extended period was envisaged then delay to commencement might cause no delay to completion.

59.

I therefore accept Mr Stead's submission that no question of law arises in respect of question 3.

Question 4

Under the terms of the JCT Intermediate Form of Contract 1998 Edition, is a Contractor excused from compliance with his contractual obligation to carry out the works in accordance with the Contract Drawings by reason of the Contract Administrator's failure to require the Contractor to remedy defective works?

60.

This question arises in the context of claims for defects in the nursing home. The particular defect in item 1.1 to Schedule 4 to the Counterclaim. The allegation is that DAB did not construct foundation pads and a foundation strip in accordance with the required details.

61.

At para 54.0 of the Award the Arbitrator deals with this defect. He makes the following findings:

(1)

That Drawing 2241.25 was a contract drawing and it states "Form pad foundations to support structural columns to size and detail nominated by Structural Engineer." (paras 54.9);

(2)

That DAB did not construct the foundations in accordance with the Structural Engineer's Drawing J2500.01 (para 54.2, 54.3 and 54.17).

62.

The Arbitrator held at para 54.25 that DAB were not liable for the foundations not being constructed in accordance with the Structural Engineer's drawing. There were clearly particular factual circumstances which led to the foundation not being constructed to the Structural Engineer's drawing, in particular, the foundation was constructed by DAB before the issue of that drawing.

63.

However the ground on which the Arbitrator held that DAB were not liable was that the Contract Administrator impliedly approved the work, as appears from para 54.19 to 54.24 of the Award.

64.

Mr Pennicott submits that the Arbitrator in his Award held that DAB had not constructed the foundation in accordance with their obligations under the Contract. Although the Arbitrator did not expressly make a finding that DAB was in breach of contract, he submitted that such was evidently the Arbitrator's finding because otherwise he would not have needed to find that DAB were relieved of liability by the implied approval of the Contract Administrator. In coming to this conclusion, Mr Pennicott submits that the Arbitrator erred in law because implied approval of defective works by a Contract Administrator does not relieve a contract of liability for defective works. He referred to passages in Hudson's Building and Engineering Contracts (11th Edn.) at para 2.057 to 2.060.

65.

Mr. Stead accepts that if the Arbitrator had found that there was a breach of contract then, as a matter of law, the implied approval of defects by the Contract Administrator would not relieve DAB of liability. This is therefore common ground.

66.

He submits however that the Structural Engineer's drawing only set out details of structural steel elements and not foundations and he referred me to the terms of the letter from the Contract Administrator to DAB by which the drawing was issued to DAB on 4 August 2005. He says the foundations were constructed to the details in the Contract Drawing. Whilst this submission might give an arguable ground, based on the facts, for DAB not to be liable for constructing the foundation in accordance with the Structural Engineer's drawing, that was clearly not the finding of the Arbitrator who held that DAB had failed to construct the foundations in accordance with the Structural Engineer's drawing, as I have set out above.

67.

I consider that Mr Pennicott is correct in his submission that the Arbitrator's Award was based on there being a breach by DAB in failing to construct the foundations in accordance with the Structural Engineer's drawing but that DAB was relieved from liability by the implied approval of the Contract Administrator.

68.

The law on this aspect is robustly set out by the late author of Hudson (11th Edn.) at para 2-058 where he said that, in the absence of express authority. "It cannot be too strongly emphasised that the A/E [Architect/Engineer] .. will have no authority whatever to waive strict compliance with the contract". At para 5-021 in relation to allegations that the owner has waived or is estopped from claiming damages by reason of the fact that the breaches of contract were visible during the course of routine visits to the site, the author said "It is clear, it is submitted, that no estoppel or waiver could arise unless some matter was expressly brought to an A/E's attention by the contractor and he was expressly asked for and gave his approval."

69.

I accept that these passages summarise the law and are consistent with what was said by Lord Upjohn in East Ham Corporation v Bernard Sunley[\[1966\] AC 406](#) at 444:

“It seems to me most unlikely that the parties to the contract contemplated that the builder should be excused for faulty work at an early stage merely because the architect failed to carry out some examination which would have disclosed the defect.

...

For my part, to reach that result I should want to find quite clear words in clause 24(f) relieving the builder of liability.

...

I cannot see why he should be allowed to escape from the ordinary consequences of his negligence when discovered years later, a consequence which would undoubtedly flow if the building owner had not appointed an architect for his, the building owner’s protection.”

70.

It follows that in this case the Award does in my view disclose an error of law. A contractor who is in breach of contract in carrying out defective works is not to be relieved of liability for those defective works by any implied approval derived from the Contract Administrator’s failure to draw the Contractor’s attention to defective works which should have been apparent when the Contract Administrator attended the site.

71.

I therefore answer Question 4 in these terms: Under the terms of the JCT Intermediate Form of Contract 1998 Edition, a Contractor is not excused from compliance with his contractual obligation to carry out the works in accordance with the Contract Drawings by reason of the Contract Administrator’s failure to require the Contractor to remedy defective works.

Question 5

When it is found that the Contractor is liable for significant structural defects, what test should be applied in determining whether the Claimant is entitled to the cost of demolition and rebuild as opposed to the cost of remedial works?

72.

At the hearing it became apparent that Mayhaven could not or were not challenging the findings of the Arbitrator on this matter. Rather Mr Pennicott submitted that depending on the view of the Court on Questions 1 and 4, it might be necessary for the Arbitrator to review his conclusions on whether remedial work or demolition and rebuilding was the appropriate way to remedy the defects. I have held that the Arbitrator did err on a question of law in relation to Question 4. Whether and to what extent when he takes account of my answer to question 4 that affects his decision on the appropriate way to remedy the defects, is a matter for him to consider.

Conclusion

73.

Subject to any further submission from the parties as to the relief which should be ordered, I find that:

(1)

The Arbitrator did not err in any question of law arising in respect of questions 1, 2(a), 2(b) or 3 and the appeal on those questions is dismissed.

(2)

The Arbitrator did err on the question of law arising in respect of question 4 and the appeal is allowed on this matter.

(3)

There is no error of law in respect of question 5 and whether the arbitrator comes to any different conclusion on this question in the light of my answer to question 4 is a matter for him to consider.

74.

I therefore propose to remit the award to the arbitrator on the issue of whether or not DAB were liable for the foundations not being constructed in accordance with the Structural Engineer's drawing J2500.01 and any consequential effect on other findings in the Award. I do so on the basis of the statement of the law as set out in paragraph 71 above.