Neutral Citation Number: [2007] EWHC 447 (TCC)

Case No: HT 06-212

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/03/2007

Before:

MR. JUSTICE JACKSON

- -

Between:

MULTIPLEX CONSTRUCTIONS (UK) LIMITED	**Claimant**
- and -	
HONEYWELL CONTROL SYSTEMS LIMITED	**Defendant**
(No. 2)	

- -
- -

MR. DAVID THOMAS QC and MR. MARC ROWLANDS (instructed by Fenwick Elliott, London) for the Claimant
MR. MARTIN BOWDERY QC and MR. ROBERT CLAY (instructed by Beale & Co., London) for the Defendant

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Approved Judgment

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Transcript of the Shorthand/Stenographic Notes of Marten Walsh Cherer Ltd.,
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MR. JUSTICE JACKSON :

1. This judgment is in eight parts, namely: Part 1 Introduction; Part 2 The Facts; Part 3 The Present Proceedings; Part 4 The Construction Point; Part 5 The Operational Point; Part 6 The **Gaymark** Point; Part 7 The Effect of the Settlement Agreement; Part 8 Conclusion.

Part 1. Introduction

2. This litigation has been brought in order to determine whether time has been set at large under one of the sub-contracts for the Wembley Stadium project. The claimant in this action is Multiplex Constructions (UK) Limited, to which I shall refer as "Multiplex". The defendant is Honeywell Control Systems Limited, to which I shall refer as "Honeywell".

3. Multiplex is the main contractor constructing the New National Stadium at Wembley. Honeywell is one of the sub-contractors. The employer under the main contract is Wembley National Stadium Limited, to which I shall refer as "WNSL". WNSL is a wholly owned subsidiary of the Football Association.

4. This is the sixth judgment which I have given since June of last year in various actions concerning the Wembley project. It is worth repeating some observations which I made in the first of those judgments. Multiplex, its designers and its sub-contractors are engaged upon producing a world-class sports stadium. Practical completion is now imminent. The stadium will have a capacity of about 90,000 seats. It will be used for football, rugby and all types of concerts. It will have extensive, high quality, corporate hospitality facilities and a state of the art communications system (installed by Honeywell). Long after the present legal difficulties have been forgotten all parties will justifiably take pride in what they have created.

5. The central issue in the present action is whether time has been set at large under Honeywell's Sub-Contract. Honeywell contends, but Multiplex denies, that this is the case. By "time at large", Honeywell means that its contractual obligation to complete within 60 weeks (subject to any grant of extension of time) has fallen away. Instead, Honeywell's only obligation in this regard is to complete within a reasonable time and/or reasonably in accordance with the progress of the main contract works.

6. Having identified the central issue in this action, I must now outline the facts.

Part 2. The facts

7. By a contract dated 26th September 2002 made between (i) WNSL, (ii) Multiplex and (iii) Multiplex's Australian parent company as guarantor, Multiplex agreed to design and construct the New National Stadium at Wembley. I refer to this as "the main contract".

8. Having entered into the main contract, Multiplex proceeded with the project. Multiplex engaged a number of different sub-contractors to design, construct and install the different elements of the stadium. I am told by counsel that the entirety of the works is being executed by sub-contractors.

9. Multiplex entrusted to Honeywell the design, supply and installation of various electronic systems for communication and control of the building. These comprise nine separate

systems as follows: 1. The building management system ("BMS"); 2. The fire detection and alarm system; 3. The public address and voice alarm; 4. The communications network; 5. The access system; 6. The stewards' and emergency telephones; 7. The MATV system; 8. The CCTV system; 9. The commissioning management systems. Most of these systems are self-explanatory. I should, however, briefly explain items 1, 4 and 7.

10. Item 1, the BMS, is a computerised control system for all the mechanical and electrical services such as heating, cooling, ventilation, in addition to the other Honeywell systems mentioned. The BMS control system is connected to 35,000 separate points throughout the stadium, each of which may have several individual control settings.

11. Item 4, the communications network, is a high speed data network which transfers communications between systems. For example, it reports faults from the various systems back to the head end of the BMS system; it allows third party broadcasters, such as television channels, to transfer data from the stadium direct to their own individual systems; it also provides linkage for the CCTV system to the external police systems, to enable remote control and monitoring for security purposes. The main spine of the communications network is a fibre optic cable.

12. Item 7 is the MATV system. There are many television screens distributed throughout the stadium which can accept and broadcast a variety of different input signals.

13. By way of shorthand, I shall refer to all of the above systems as "the electronic systems".

14. The sub-contract made between Multiplex and Honeywell was dated 27th May 2004. The sub-contract documents in order of precedence were as follows: (1) the Articles of Agreement; (2) the appendix; (3) the conditions; (4) the special conditions; (5) the numbered documents.

15. By the Articles of Agreement, Honeywell agreed to carry out and complete the Sub-Contract Works for the sum of £13.4 million or such other sum as should become payable in accordance with the Sub-Contract. The appendix to the Sub-Contract was divided into 16 parts. Part 4 of the appendix provided that Honeywell should commence the Sub-Contract Works on 5th April 2004 and should complete those works within 60 weeks. Part 16 set out a number of amendments to the Sub-Contract Conditions. I shall incorporate those amendments without further mention when reading out extracts from the Conditions.

16. Clause 4.2 of the Conditions provides:

> ".1 The Contractor may issue any reasonable direction in writing to the Sub-Contractor in regard to the Sub-Contract Works (including the ordering of any Variation therein).
>
> .2 Any written instruction of the Employer issued under the Contract affecting the Sub-Contract Works and issued by the Contractor to the Sub-Contractor shall be deemed to be a direction of the Contractor.
>
> .3 No variation required by the Contractor or subsequently sanctioned by him shall vitiate the Sub-Contract.

.4. The Sub-Contractor shall (subject to clause 4.2.4.4) forthwith comply with all directions issued to him by the Contractor in regard to any matter in respect of which the Contractor is expressly empowered by the Sub-Contract to issue instructions ...."

17. Clause 4.6 of the Sub-Contract Conditions provides:

"4.6.1 The Contractor may at any time, in lieu of directing a Variation under Clause 4.2, issue a request for a Variation proposal (a 'Variation Notice Proposal').

.2 In the event that the Contractor issues a Variation Notice Proposal the following procedure shall apply:

.1 The Sub-Contractor shall issue a written response to the Contractor (the 'Sub-Contractor's Variation Response') within 7 days or such other period as may be agreed between the Parties following receipt of any Variation Notice Proposal under clause 4.6.1 stating:

.1 the effect (if any) of the Variation on the period or periods for completion of the Sub-Contract Works as set out in the Appendix part 4 together, where necessary, with any proposals for modification to the programme for completion of the Sub-Contract Works.

.2 whether, in the opinion of the Sub-Contractor, the Variation should be effected and, if the Sub-Contractor is of the opinion that it should not be effected, the reasons for that opinion.

.3 either the cost of design and construction of the Variation reasonably and necessarily to be incurred by the Sub-Contractor or the saving which will arise as the case may be as a result of the Variation.

.4 the extent, if any, to which the proposed Variation will adversely affect the structure, design life or function of the National Stadium or any of the Sub-Contractor's warranties under the Sub-Contract together with the Sub-Contractor's grounds for such opinion and any proposals for modification to the Numbered Documents.

.5 the effect which, in the reasonable opinion of the Sub-Contractor, the Variation will have on:

.1 the cost of operation and maintenance of the National Stadium.

.2 the cost and timing of asset renewals; and

.3 the cost and availability of insurance; and

.6 the consents, licenses, approvals and/or permits (including any planning approval if applicable) which, in the opinion of the Sub-Contractor, will need to be obtained to give effect to the Variation and the length of time and programme for the completion of the Sub-Contract Works anticipated to be required to obtain such consents, license, approvals and/or permits.

All submissions made by the Sub-Contractor under this clause 4.6.2.1 shall be supported by all necessary documentation and calculations in writing as may be required by the Contractor. The Contractor shall have the right to specify in the Variation Notice Proposal that he considers the Variation to be one that requires urgent implementation. In such case the period within which the Sub-Contractor issues its written response under this clause 4.6.2.1 shall reflect that urgency.

.2 As soon as practicable after receipt by the Contractor of the Sub-Contractor's Variation Response (but no sooner than the Contractor has received the Employer's response to the Contractor's Change Response under the Contract) the Parties shall seek to agree acting in good faith the basis upon which the Variation will be implemented including the fair and reasonable adjustment to the period or periods for completion of the Sub-Contract Works and the Sub-Contract sum. In the event that the Sub-Contractor's Variation Response is agreed then the Contractor shall issue a notice confirming the variation ("Variation Notice"), and the Sub-Contractor shall give effect thereto. The period or periods for completion of the Sub-Contract Works and the Sub-Contract Sum shall be adjusted as agreed by the Parties provided always that if a variation notice is issued as a result of the issue of a Change under the Contract the Sub-Contractor shall be entitled to no greater adjustment to the Sub-Contract Sum or extension of time to the period or periods for completion than that which, in relation to the Sub-Contract Works, the Contractor receives from the Employer in respect of the equivalent Change under the Contract.

.3 In the event that no agreement can be reached within such period from receipt of the Sub-Contractor's Variation Response under clause 4.6.2.1 that the Contractor considers to be reasonable in the circumstances, the Contractor may adjust the period or periods for completion of the Sub-Contract Works and the Sub-Contract Sum as he considers appropriate and subject only to clauses 38A and/or 38C and the proviso to clause 4.6.2.2 issue a Variation Notice in respect of such Variation and until any contrary agreement is reached between the Contractor and the Sub-Contractor or any contrary decision is made under clauses 38 and/or 38C the Contractor's estimate shall be treated as though it was the estimate of the Sub-Contractor required by clause 46.2.1 and the Sub-Contractor shall proceed to implement the Variation.

.4 If the Contractor issues a Variation Notice Proposal no work pursuant to such notice shall be commenced until such time as the Contractor issues a Variation Notice."

18. Clause 4.7 of the Sub-Contract conditions provides:

> "Subject to the proviso to clause 4.6.2.2, Valuations for Variations which have not been agreed pursuant to the procedures under clause 4.6 shall be valued on a fair and reasonable basis consistent with the values included in the build up of the Sub-Contract Sum in the Numbered Documents for work on services of a similar character after making allowance for any significant change in the quality of the work or services carried out or in conditions under which it is to be carried out. If no work or services of a similar character are included in the build up of the Sub-Contract Sum such other basis as is fair and reasonable shall be used and such value shall be added to or deducted from the Sub-Contract Sum."

19. Clause 11 of the Sub-Contract Conditions provides:

> "11.1.1 The Sub-Contractor shall carry out and complete the Sub-Contract Works in accordance with the details in Appendix Part 4 and reasonably in accordance with the progress of the Works but subject to receipt of the notice to commence work on Site as stated in Appendix Part 4 and the operation of clauses 11 and 38A and/or 38C and any revision to the period or periods for the completion of the Sub-Contract Works in respect of a variation for which a Variation Notice has been issued.
>
> 11.1.2 The Contractor may rely on any programmes, milestone dates, durations, sequencings, or the like (time related matters) or any revisions thereto included within this Sub-Contract and/or as may be provided and agreed in writing by the Sub-Contractor from time to time in connection with the Sub-Contract Works (notwithstanding that any such time related matters may not form part of the Sub-Contract) to monitor the progress of the Sub-Contract Works or when planning its own activities or when making arrangements in relation to the Works or when making any returns required under the main Contract and the Sub-Contractor acknowledges that the Contractor could suffer loss and/or expense and/or damage if such time related matters are not complied with and the Sub-Contractor shall notify the contractor when the actual progress of the Sub-Contract Works is inconsistent with any time related matters included within this Sub-Contract or otherwise provided by the Sub-Contractor or agreed as contemplated above along with proposals to procure consistency with such time related matters.
>
> 11.1.2 In clause 11, any reference to delay, notice or extension of time includes further delay, further notice or further extension of time.
>
> 11.1.3 It shall be a condition precedent to the Sub-Contractor's entitlement to any extension of time under clause 11, that he shall have served all necessary notices on the Contractor by the dates specified and provided all necessary supporting information including but not limited to causation and effect programmes, labour, plant and materials resource schedules and critical path analysis programmes and the like. In the event the Sub-Contractor fails to notify the Contractor by the dates specified and/or fails to provide any necessary supporting information then he shall waive his

right, both under the Contract and at common law, in equity and/or to pursuant to statute to any entitlement to an extension of time under this clause 11.

11.2.1 If and whenever it becomes apparent or should have become apparent to an experienced and competent Sub-Contractor that the commencement, progress or completion of the Sub-Contract Works or any part thereof is being or is likely to be delayed, the Sub-Contractor shall forthwith give written notice to the Contractor of the material circumstances including, in so far as the Sub-Contractor is able, the cause or causes of the delay and identify in such notice any event which in his opinion is a Relevant Event.

.2 In respect of each and every Relevant Event, and identified in the notice given in accordance with clause 11.2.1, the Sub-Contractor shall, if practicable in such notice, or otherwise in writing as soon as possible after such notice:

.1 give particulars of the expected effects thereof; and

.2 estimate the extent, if any, of the expected delay in the completion of the Sub-Contract Works beyond the expiry of the period or periods stated in the Appendix Part 4 or beyond the expiry of any extended period or periods previously fixed under clauses 11 or 4.6 which results therefrom not double counting delay caused by another Relevant Event or taking into account delay to the completion of the Sub-Contract Works for which the Sub-Contractor is responsible or bears the risk which in either case is concurrent with delay caused by such Relevant Event; and

.3 the Sub-Contractor shall give further written notices to the Contractor as may be necessary or as the Contractor may reasonably require for keeping up-to-date the particulars and estimate referred to in clause 11.2.2.1 and .2 including any material change in such particulars or estimate.

11.3 If on receipt of any notice, particulars and estimate under clause 11.2 the Contractor properly considers that

.1 any of the causes of the delay is an occurrence of a Relevant Event (provided that any delay which is concurrent and caused by another Relevant Event shall not be double counted and delay which is concurrent and caused by another delay to the completion of the Sub-Contract Works for which the Sub-Contractor is responsible or bears the risk shall not be taken into account); and

.2 the completion of the Sub-Contract Works is likely to be delayed thereby beyond the period or periods stated in the Appendix Part 4 or any revised such period or periods,

then subject to the provisions of clauses and 11.8 and 11.11 and taking into account any adjustment of the period or periods for completion of

the Sub-Contract Works determined under clause 4.6 the Contractor shall in writing give an extension of time to the Sub-Contractor by fixing such revised or further revised period or periods for the completion of the Sub-Contract Works as is then fair and reasonable ....

11.7 Subject to clause 11.11, if the expiry of the period when the Sub-Contract Works should have been completed in accordance with clause 11.1 occurs before Practical Completion of the Sub-Contract Works established under clause 14.1 or 14.2, the Contractor may

and

not later than the expiry of 16 weeks from the aforesaid date of Practical Completion of the Sub-Contract Works, the Contractor shall

either

.1 fix such a period or periods for completion of the Sub-Contract Works longer than that previously fixed under clause 11 or 4.6 as the Contractor properly considers to be fair and reasonable having regard to any of the Relevant Events; or

.2 fix such a period or periods for completion of the Sub-Contract Works shorter than that previously fixed under clause 11 or 4.6 as the Contractor properly considers to be fair and reasonable having regard to any direction issued requiring as a Variation the omission of any work where such issue is after the last occasion on which the Contractor made a revision of the aforesaid period or periods; or

.3 confirm to the Sub-Contractor the periods or periods for the completion of the Sub-Contract Works previously fixed...

11.10 The following are Relevant Events referred in clause 11.3.1

.1 Force Majeure;

.2 Not used;

.3 loss or damage occasioned by any one or more of the Specified Perils;

.4 a Variation which is referred for a decision addition under clauses 38A and/or 38C pursuant to clause 4.6;

.5 compliance by the Sub-Contractor with the Contractor's instructions in relation to the following clauses:

.1 under clause 46 ....

.7 delay caused by any act of prevention or default by the Contractor in performing its obligations under the Sub-Contract ....".

20. Clause 12 of the Sub-Contract Conditions provides:

> "12.1 If the Sub-Contractor fails to complete the Sub-Contract Works or any part thereof within the period or periods for completion stated in the Appendix part 4 or any revised period or periods as provided in clauses 11 or 4.6, the Contractor shall so notify the Sub-Contractor in writing within a reasonable time of the expiry of that period or those periods.
>
> 12.2 Without prejudice to any other provision of the Sub-Contract and in particular clause 5.1, on receipt of the notice referred to in clause 12.1, the Sub-Contractor shall indemnify the Contractor for, and shall pay or allow to the Contractor a sum equivalent to, any damage, loss, cost and/or expense suffered or incurred by the Contractor and caused by the failure of the Sub-Contractor as aforesaid."

21. Clause 38A of the Sub-Contract Provisions provides for the resolution of any disputes by adjudication. Clause 38A provides:

> ".5.5 In reaching his decision the Adjudicator shall act impartially, set his own procedure and at his absolute discretion may, take the initiative in ascertaining the facts and the law as he considers necessary in respect of the referral which may include the following:
>
> .1 using his own knowledge and/or experience;
>
> .2 opening up, reviewing and revising any direction, opinion, decision, requirement or notice issued given or made under the Sub-Contract as if no such direction, opinion, decision, requirement or notice had been given or made...
>
> .7.1 The decision of the Adjudicator shall be binding on the Parties until the Dispute is finally by arbitration or by legal proceedings or by an agreement in writing between the Parties made after the decision of the Adjudicator has been given.
>
> .2 The Parties shall, without prejudice to their other rights under the Contract, comply with the decisions of the Adjudicator; and the Contractor and the Sub-Contractor shall ensure that the decisions of the Adjudicator are given effect."

22. Clause 38C provides for litigation as the final method of dispute resolution in the event that either party does not accept the adjudicator's decision.

23. Clause 38C .2 provides:

> "When any dispute or difference is to be determined by legal proceedings, then insofar as the Sub-Contract provides for the issue of a certificate or a direction, or the expression of an opinion or the giving of a decision, requirement or notice such provision shall not prevent the Court, in determining the rights and liabilities of the parties hereto, from making any finding necessary to establish whether such certificate was

> correctly issued or opinion correctly expressed or decision, requirement or notice correctly given on the facts found by the Court; nor shall such provisions prevent the Court establishing what certificate or direction ought to have been issued or what other opinion should have been expressed or what other decision, requirement or notice been given as if no certificate, opinion, decision, requirement or notice had been issued, expressed or given."

24. Clause 46 of the Sub-Contract Conditions provides:

> "The Contractor may issue instructions in regard to the postponement of any design or construction work to be executed under the provisions of the Sub-Contract."

25. One of the numbered documents which forms part of the Sub-Contract is the General Preliminaries section of the Sub-Contract package. Section 7 of the General Preliminaries deals with programming and it includes the following provisions:

> "7.2 Overall Project Construction Programme.
>
> It is the responsibility of the Contractor to maintain the Overall Project Master Construction Programme and co-ordinate/integrate the input of other team members. The Overall Master Construction Programme will be used as the basis for assessing progress, forecasting the impact of current or impending changes and reporting the overall project status.
>
> 7.3 Working Programme
>
> 7.3.1 Overall Project Construction Programme will be further developed at a level of detail that shows dates and periods of time for all of the main elements of design, procurement, construction and commissioning activities for the project. This level will subdivide the project into eight zones and phases of the project ....
>
> 7.4 Detailed Working Programme.
>
> Further development of the programme at a level that expands upon the detail contained in the Level 2 programme with design, procurement and construction activities further subdivided into trade groups and activities, e.g. Structure - Concrete, structural steel, roof etc. ...."

26. Section 7.6 of the General Preliminaries sets out certain programmes which the Sub-Contractor must prepare. Section 11.2 of the General Preliminaries sets out the Sub-Contractor's obligation to prepare fortnightly progress reports.

27. Volume 2 of the Sub-Contract Communications Package, which is also part of the numbered documents, includes the following provisions:

> "14 The subcontractor shall be the lead commissioning subcontractor and will be responsible for the commissioning management of all M&E systems installed throughout the stadium. The subcontractor shall appoint a dedicated commissioning manager as part of the subcontractor's

> management team. The commissioning manager shall have a dedicated team of engineers as required to manage the commissioning process.
>
> The commissioning management shall include
>
> a) Commissioning programme
>
> b) Sequence co-ordination of commissioning and commissioning logic flow charts
>
> c) Progress reporting against the programme
>
> d) Commissioning reports ....
>
> B. Sub-Contract programme
>
> The Sub-Contract Works shall be completed in accordance with MPX issued programme ref CP1-MEP Services Detail.
>
> Whilst the above programme indicates a completion of the Sub-Contract Works by the end of May 05 the Sub-Contractor has included for all cost implications should the completion of the Sub-Contract Works not be achieved until the end of September 2005.
>
> The Sub-Contractor has included to be flexible on the timing, durations and sequences to enable Multiplex to alter this programme to suit the specific construction requirements. The Sub-Contractor is referred to the Conditions of the Sub-Contract.
>
> The Sub-Contractor is aware that the Sub-Contract Works will be undertaken simultaneously and coordinated with other trades. The Sub-Contractor can view the master programme to establish full knowledge of the other activities that the Sub-Contract Works are to be sequenced with. The Sub-Contractor has included for any costs associated with sequencing and coordinating their works with other trades."

Programme CP1-MEP Services Details, which is referred to in that passage, showed a completion date of 31st May 2005.

28. Having entered into the Sub-Contract, Honeywell proceeded with the design and installation of the electronic systems at the stadium. Unfortunately by the time that Honeywell entered into the Sub-Contract, substantial delays to the project had already occurred. For example, there were lengthy delays in erecting the structural steelwork for reasons which are in dispute between Multiplex and the steelworks Sub-Contractor: See **Multiplex Constructions (UK) Limited v Cleveland Bridge Limited** [2006] EWHC 1341 (TCC).

29. Delays to the construction of the stadium and to the installation of the electronic systems continued to occur after Honeywell had commenced work. Honeywell is strongly critical of Multiplex's organisation and programming of the works since the summer of 2004. Honeywell maintains that Multiplex and those for whom Multiplex is responsible have caused the delay during this period. Multiplex, on the other hand, is strongly critical of

Honeywell's performance and blames Honeywell for much of the delay since the summer of 2004.

30. During 2005 Multiplex issued three revised programmes to Honeywell. On 10th February 2005 Multiplex issued programme CB7E, which showed a completion date of 31st December 2005. On 18th July 2005 Multiplex issued programme FO15, which showed a completion date of 31st March 2006. On 24th November 2005 Multiplex issued programme DC10, which also showed a completion date of 31st March 2006. Multiplex issued each of these programmes in the form of a direction under clause 4.2 of the Sub-Contract Conditions.

31. The proposed completion date of 31st March 2006 passed without completion being achieved either of the electronic systems or of a number of other trades. I am told by Multiplex's counsel that as at 31st March 2006 Honeywell had done approximately 60% of its installation work and approximately 5% of its commissioning work. I was given this information by way of background only. It is not a subject on which there is evidence before the court and I make no finding about the matter (although I had the advantage of visiting the stadium in March 2006 and being shown the work which was then in progress).

32. Multiplex did not issue any further Sub-Contract programmes after DC10. Multiplex did, however, issue a number of "look ahead" programmes which covered limited periods into the future. The adequacy of Multiplex's various programmes is a matter of substantial controversy between the parties.

33. Honeywell maintained that by reason of the issue of programmes CB7E, FO15 and DC10 it was entitled to recover prolongation costs and other financial relief. Honeywell commenced two adjudications concerning the effect and financial consequences of those three programmes. Mr. E.J. Mouzer was the adjudicator in both of those adjudications. Mr. Mouzer gave his decision in the first adjudication on 13th January 2006. In that decision Mr. Mouzer held that programme CB7E, FO15 and DC10 were issued as directions pursuant to clause 4.2 of the Sub-Contract Conditions; that Honeywell was obliged to comply with those programmes; and that each of those programmes constituted a variation under the terms of the Sub-Contract.

34. Mr. Mouzer gave his decision in the second adjudication on 28th April 2006. In that decision Mr. Mouzer awarded to Honeywell certain prolongation costs in respect of the period 1st October 2005 to 31st March 2006. Neither party has challenged Mr. Mouzer's decisions by litigation. Therefore, at least for the time being, those two decisions are binding on the parties pursuant to clause 38A.7 of the Sub-Contract Conditions.

35. A separate dispute developed between the parties as to whether Multiplex by its conduct had put time at large under Honeywell's Sub-Contract. Honeywell contended that time was at large; Multiplex contended that it was not. This dispute was the subject of a third adjudication. In this instance Mr. David Miles was appointed adjudicator. In a decision dated 6th July 2006, Mr. Miles held that time had been put at large under the Sub-Contract because (a) programmes CB7E, FO15 and DC10 had been issued under clause 4.2 and (b) clause 11 of the Sub-Contract Conditions did not contain any mechanism for extending time in respect of delay caused by a direction under clause 4.2. Mr. Miles dismissed a separate argument advanced by Honeywell to the effect that

Multiplex's failure to issue programmes after DC10 was also a matter which put time at large.

36. Multiplex was aggrieved by Mr. Miles' decision. Accordingly, in order to obtain a declaration that time was not at large under the Sub-Contract, Multiplex commenced the present proceedings.

Part 3. The present proceedings

37. By a claim form issued in the Technology and Construction Court on 18th July 2006, Multiplex claimed against Honeywell the following three declarations:

> "(1) On a true construction of the Subcontract between MPX and HCS dated 27th May 2004, Clause 11 provided a mechanism for extending the period for completion of the Subcontract Works in respect of any delay to completion caused by an instruction issued under Clause 4.2 of the Subcontract.
>
> (2) A direction issued by MPX to HCS under Clause 4.2 of the Sub-Contract would not render time at large so as to relief HCS of its obligation to complete the Subcontracts Works within the period for completion set out in the Appendix Part 4 as adjusted by Clauses 4.6 and/or 11 and/or 38A and/or 38C.
>
> (3) The Subcontract mechanism for extending the period for completion of the Subcontract Works remains in full force so that a specific period for completion of the Subcontract Works remains ascertainable."

38. Despite various amendments to the pleadings, these remain the three declarations which Multiplex is seeking.

39. Honeywell by its defence asserts that the adjudicator was correct in his conclusion that any direction under clause 4.2, which affects the completion date, puts time at large. Accordingly, Multiplex is not entitled to the declaration sought. This issue between the parties turns on the correct construction of the Sub-Contract Conditions. It is referred to in the pleadings as "the construction point." I shall adopt that terminology.

40. In case Honeywell should lose the construction point, Honeywell also advances three further arguments as to why time has been put at large. The first argument is that Multiplex has by its conduct made the extension of time machinery inoperable. This issue is referred to in the pleadings as "the operational point." I shall adopt the same terminology. Honeywell's second argument is that, even if (contrary to Honeywell's case on the operational point) the clause 11 mechanism can still be operated, nevertheless Honeywell's non-compliance with the condition precedent in clause 11.1.3 puts time at large. This argument is based upon the decision of the Supreme Court of the Northern Territory of Australia in **Gaymark Investments PTY Limited v Walter Construction Group Limited** [1999] NTSC 143; (2005) 21 Construction Law Journal 71. This argument is referred to by counsel as "the **Gaymark** point" and I shall adopt the same terminology.

41. More recently Honeywell has added to its pleadings a third argument, namely that the settlement agreement negotiated between Multiplex and WNSL in October 2006 also puts time at large. On the basis of its various arguments Honeywell counterclaims for the following declarations:

> "(1) On the true construction of the Sub-Contract there is no provision for a direction for a variation under Clause 4.2 of the Conditions in clause 11 and it cannot be a relevant event under clause 11, and put time at large.
>
> (2) Alternatively, on the true construction of the Sub-Contract, a decision to issue a direction for a variation under Clause 4.2 of the Conditions, and not to invoke the mechanism of clause 4.6 which provides for extension of time, is an option open to the Contractor which bypasses the extension of time mechanism and puts time at large.
>
> (3) The mechanism for extending time under clause 11 has broken down, and time is at large.
>
> (4) Alternatively, even if the mechanism for extending time under clause 11 has not broken down irretrievably, Multiplex has failed to operate it hitherto, the original time for completion does not apply, and no new time will bind Honeywell until such time as Multiplex operates clause 11.3 of the Conditions.
>
> (5) Alternatively, on the true construction of the Sub-Contract any failure to comply with the condition precedent under 11.1.3 after a direction under 4.2 causing delay, puts time at large.
>
> (6) Alternatively, the main contract mechanism for extending time has been superseded, depriving Honeywell of rights and benefits under the said mechanism to extensions of time, putting time at large."

42. Declarations (1) and (2) reflect Honeywell's case on the construction point. Declarations (3) and (4) reflect Honeywell's case on the operational point. Declaration (5) reflects Honeywell's case on the **Gaymark** point. Declaration (6) represents Honeywell's case on the settlement agreement between WSNL and Multiplex.

43. Multiplex has elected not to adduce any factual evidence in support of its case beyond putting before the court the relevant contractual documents. Honeywell relies upon the evidence of two witnesses, namely Mr. Angus Pearson and Mr. Craig Walter. Mr. Pearson is a quantity surveyor who has been acting for Honeywell in relation to the Wembley project. Mr. Walter is Honeywell's senior project manager at Wembley. Mr. Pearson and Mr. Walter have each made two witness statements. Multiplex has not required either witness to attend for cross-examination and does not challenge their evidence for the purposes of this action. Nevertheless, Multiplex has made it clear that the witness statements of Mr. Pearson and Mr. Walter are substantially disputed and that their evidence will be challenged in future proceedings. The essence of Multiplex's case in the present action is that, even if one accepts all of Honeywell's evidence, nevertheless, as a matter of law, time is not at large.

44. This action was originally listed for trial in the week of 9th October 2006. On the first day of that trial counsel informed me that their respective clients were minded to settle this litigation. Accordingly, by consent I made an order standing the case out of the list. Subsequently the settlement negotiations foundered and this matter was relisted for trial in February 2007.

45. The trial of this action duly commenced on Tuesday, 27th February 2007. It took the form of submissions made by counsel on the basis of the contractual documents and Honeywell's factual evidence and the authorities. Counsel's submissions lasted for three days and concluded on Thursday afternoon, 1st March. I have had the opportunity to consider those submissions since last Thursday.

46. I shall now deal with the issues in the following order: the construction point, the operational point, the **Gaymark** point and the effect of the settlement agreement.

Part 4. The Construction Point

47. The construction point turns upon the operation of the prevention principle in the context of the present Sub-Contract. The essence of the prevention principle is that the promisee cannot insist upon the performance of an obligation which he has prevented the promisor from performing.

48. In the field of construction law, one consequence of the prevention principle is that the employer cannot hold the contractor to a specified completion date, if the employer has by act or omission prevented the contractor from completing by that date. Instead, time becomes at large and the obligation to complete by the specified date is replaced by an implied obligation to complete within a reasonable time. The same principle applies as between main contractor and sub-contractor.

49. It is in order to avoid the operation of the prevention principle that many construction contracts and sub-contracts include provisions for extension of time. Thus, it can be seen that extension of time clauses exist for the protection of both parties to a construction contract or sub-contract.

50. Before tackling the present problem I must first review some authorities on the operation of the prevention principle in the construction context. In **Holme v Guppy** (1838) 3 M&W 387, the plaintiff builders agreed to carry out carpentry and joinery work forming part of a new brewery in Liverpool for £1,700. The contract specified a completion date of 31st August 1836 and provided for liquidated damages at the rate of £40 per week in the event of delay beyond that date. Delay occurred. The defendant employers withheld certain payments. The plaintiffs brought an action in assumpsit for the balance of the contract price. Evidence called at the Liverpool Assizes established that the defendant failed to give possession of the site for four weeks following execution of the contract. Other causes of delay established were certain defaults on the part of the plaintiffs and also certain defaults on the part of other contractors engaged by the defendant. Coltman J awarded £200 to the plaintiffs. That award was challenged by the defendants but upheld by the Court of Exchequer.

51. Parke B, delivering the judgment of the Court of Exchequer, said this:

> "On looking into the facts of the case we think no deduction ought to be allowed to the defendants. It is clear from the terms of the agreement that the plaintiffs undertake that they will complete the work in a given four months and a half and the particular time is extremely material because they probably would not have entered into the contract unless they had had those four months and a half within which they could work a greater number of hours a day. Then it appears that they were disabled from by the act of the defendants from the performance of that contract. There are clear authorities that if the party be prevented by the refusal of the other contracting party from completing the contract within the time limited he is not liable in law for the default ... It is clear, therefore, that the plaintiffs were excused from performing the agreement contained in the original contract and there is nothing to show that they entered into a new contract by which to perform the work in four months and a half ending at a later period. The plaintiffs were therefore left at large. Consequently they are not to forfeit anything for the delay."

52. In **Dodd v Churton** [1897] 1 QB 566, the plaintiff agreed to carry out construction work for the defendant for £664. The Contract specified a completion date of 1st June 1892 with liquidated damages of £2 per week for delay thereafter. Clause 4 of the Contract empowered the architect to order additional works or different works by way of variation. Pursuant to that clause the architect ordered additional works to the value of £22. 8s. 8d. which caused completion to be delayed beyond 1st June 1892. In the event the works were not completed until 5th December 1892. The plaintiff sued for the balance of the contract price and the defendant counterclaimed for £50 as liquidated damages for late completion. At trial in the Shropshire County Court the judge held that by ordering extra work the defendant had waived his entitlement to liquidated damages for non-completion by 1st June. That county court judgment was reviewed by the Divisional Court where the two judges differed, but on further appeal the county court judgment was upheld by the Court of Appeal. At page 566, Lord Esher MR said this:

> "It was, no doubt, part of the original Contract that the building owner should have a right to call upon the builder to do that extra work, and if he did give an order for it, the builder could not refuse to do it. The principle is laid down in Comyns' Digest, Condition L(6.), that, where one party to a contract is prevented from performing it by the act of the other, he is not liable in law for that default; and, accordingly, a well recognised rule has been established in cases of this kind, beginning with **Holme v Guppy,** to the effect that, if the building owner has ordered extra work beyond that specified by the original contract which has necessarily the time requisite for finishing the work, he is thereby disentitled to claim the penalties for non-completion provided by the contract. The reason for that rule is that otherwise a most unreasonable burden would be imposed upon the Contractor. Then this further complication arose. Contracts were entered into by which the builder agreed to do any extra work which the building owner or his architect might order. It was urged in such cases, as, for instance, in **Westwood v. The Secretary of State for India**, that the fact that the builder had contracted to do any extra work that might be ordered

prevented the application of the rule which I have mentioned. But it was held that that was not so."

Lopes and Chitty LJJ delivered concurring judgments to the same effect.

53. In **Peak Construction (Liverpool) Limited v McKinney Foundations Limited** [1970] 1 BLR 111, the plaintiffs contracted with the Liverpool Corporation to construct a block of flats within a period of 24 months. Delays were caused partly by the defaults of a nominated sub-contractor and partly by the actions of the employer. The Court of Appeal allowed the contractor's appeal against an award of liquidated damages. At pages 121-122 Salmon LJ said:

> "In my judgment, however, the plaintiffs are not entitled to anything at all under this head, because they were not liable to pay any liquidated damages for delay to the corporation. A clause giving the employer liquidated damages at so much a week or month which elapses between the date fixed for completion and the actual date of completion is usually coupled, as in the present case, with an extension of time clause. The liquidated damages clause contemplates a failure to complete on time due to the fault of the contractor. It is inserted by the employer for his own protection; for it enables him to recover a fixed sum as compensation for delay instead of facing the difficulty and expense of proving the actual damage which the delay may have caused him. If the failure to complete on time is due to the fault of both the employer and the contractor, in my view, the clause does not bite. I cannot see how, in the ordinary course, the employer can insist on compliance with a condition if it is partly his own fault that it cannot be fulfilled: **Wells v Army & Navy Co-operative Society Limited**; **Amalgamated Building Contractors v Waltham Urban District Council**; and **Holme v Guppy**. I consider that unless the contract expresses a contrary intention, the employer, in the circumstances postulated, is left to his ordinary remedy; that is to say, to recover such damages as he can prove flow from the contractor's breach. No doubt if the extension of time clause provided for a postponement of the completion date on account of delay caused by some breach or fault on the part of the employer, the position would be different. This would mean that the parties had intended that the employer could recover liquidated damages notwithstanding that he was partly to blame for the failure to achieve the completion date. In such a case the architect would extend the date for completion, and the contractor would then be liable to pay liquidated damages for delay as from the extended completion date.
>
> The liquidated damages and extension of time clauses in printed forms of contract must be construed strictly *contra proferentem*. If the employer wishes to recover liquidated damages for failure by the contractors to complete on time in spite of the fact that some of the delay is due to the employers' own fault or breach of contract,

> then the extension of time clause should provide, expressly or by necessary inference, for an extension on account of such fault or breach on the part of the employer. I am unable to spell any such provision out of clause 23 of the contract in the present case."

Edmund Davies and Phillimore LJJ expressed similar views in their concurring judgments.

54. The effect of **Dodd v Churton** was considered both by the Court of Appeal and by the House of Lords in **Trollope & Colls Limited v North West Metropolitan Regional Hospital Board** [1973] 1 WLR 601. In the Court of Appeal Lord Denning MR said this:

> "…. It is well settled that in building contracts - and in other contracts too - when there is a stipulation for work to be done in a limited time, if one party by his conduct - it may be quite legitimate conduct, such as ordering extra work - renders it impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon strict adherence to the time stated. He cannot claim any penalties or liquidated damages for non-completion in that time."

55. In the House of Lords, Lord Pearson agreed with that section of Lord Denning's judgment (see 607 E-H). Lord Guest, Lord Diplock and Lord Cross agreed with the speech of Lord Pearson.

56. From this review of authority I derive three propositions:

(i) Actions by the employer which are perfectly legitimate under a construction contract may still be characterised as prevention, if those actions cause delay beyond the contractual completion date.

(ii) Acts of prevention by an employer do not set time at large, if the contract provides for extension of time in respect of those events.

(iii) In so far as the extension of time clause is ambiguous, it should be construed in favour of the contractor.

57. The third proposition must be treated with care. It seems to me that, in so far as an extension of time clause is ambiguous, the court should lean in favour of a construction which permits the contractor to recover appropriate extensions of time in respect of events causing delay. This approach also accords with the principle of construction set out by Lewison in "The Interpretation of Contracts" (3rd edition, 2004). That principle reads as follows:

> "Where two constructions of an instrument are equally plausible, upon one of which the instrument is valid and upon the other of which it is invalid, the court should lean towards that construction which validates the instrument."

58. That principle is supported by a line of authority as set out in paragraph 7.14 and is encapsulated in the Latin maxim *verba ita sunt intelligenda, ut res magis valeat quam pereat*.

59. With those principles in mind, let me now turn to the extension of time clause in the present Sub-Contract. Clause 11.10 identifies a number of relevant events in respect of which the contractor may award an extension of time to the Sub-Contractor. These include a variation instruction under clause 4.6 and a postponement instruction under clause 46. There is no express reference to directions issued under clause 4.2.

60. Mr. Bowdery contends that the absence from clause 11.10 of any express reference to a direction under clause 4.2 means that the Contractor has no power under clause 11 to extend time in respect of a clause 4.2 direction which affects the completion date. Mr. Bowdery points out in paragraph 30 of his skeleton argument that Multiplex has the right to issue directions and variation instructions under clause 4.2 and Multiplex has the right to compel Honeywell to comply with those directions. Mr. Bowdery submits that such instructions lawfully given could not be an act of prevention within the meaning of clause 11.10.7.

61. I am not persuaded by these submissions. The correct analysis is that directions under clause 4.2 do not automatically qualify for consideration under clause 11. Many directions issued under clause 4.2 will have no effect at all upon the duration of the works. Contractors or sub-contractors frequently seek or receive directions when matters of doubt arise in the course of their works. Nevertheless, if Multiplex issues a direction under clause 4.2 which constitutes a variation and which leads to completion on a later date, then such variation prevents Honeywell from completing on the due date. Thus, such a direction constitutes an act of prevention within the meaning of clause 11.10.7. The fact that such a direction is permitted by the contract does not prevent it being an act of prevention (see **Dodd v Churton** and **Trollope & Colls Limited v North West Metropolitan Hospital Board**).

62. Mr. Bowdery submits that a direction causing delay is at most an act of hindrance, not prevention, and this falls outside clause 11.10.7. Again, I am not persuaded. If a variation instruction affects the date upon which Honeywell is going to complete by a small period, one may say that this is a hindrance; it does not in any sense make the installation of the electronic systems impossible. On the other hand, that matter does prevent completion on the due date and it should be characterised as "prevention".

63. If a direction issued by Multiplex pursuant to clause 4.2 requires Honeywell to postpone the execution of any work, such a direction may be characterised as a postponement instruction. In that event the consequences flowing from clause 46 and clause 11.10.5.1 may follow.

64. Let me now turn to the facts of the present case. Pursuant to clause 4.2 of the Sub-Contract Conditions Multiplex issued to Honeywell programmes CB7, FO15 and DC10. The issue of these programmes has been held to constitute variation instructions.

65. In my judgment, the fact that these programmes were issued under clause 4.2 rather than clause 4.6 does not prevent Multiplex from awarding such extension of time as may be appropriate. In so far as Honeywell can demonstrate that any extension of time would be appropriate in consequence of those programmes, such an extension of time can be awarded pursuant to clause 11. The issue of those programmes should be characterised as acts of prevention for the purpose of 11.10.7, or alternatively as postponement instructions under clause 46 for the purposes of clause 11.10.5.1.

66. Let me now draw the threads together. For the reasons set out above, I do not agree with the first decision reached by the Adjudicator in Adjudication Number 3. Multiplex's directions under clause 4.2 issuing programmes CB7E, FO 15 and DC 10 are Relevant Events entitling Honeywell to such extensions of time, if any, as may be appropriate under clause 11. Accordingly, the issues of those directions did not set time at large, as held by the Adjudicator. Subject to debate about the precise wording, Multiplex is entitled to the declarations which it seeks in respect of the construction point.

Part 5. The Operational Point

67. Honeywell contends that Multiplex, by its conduct, has made the extension of time machinery inoperable. Accordingly, time has been put at large. Honeywell pleads that Multiplex was in breach of its obligations in respect of programming as follows in the reamended defence and counterclaim:

> "44. In breach of the terms as to programming and the implied terms of the Sub-Contract:
>
> (1) Multiplex failed to provide a full electronic version of FO 15, in a form which could be interrogated and manipulated electronically.
>
> (2) Multiplex has failed to provide Honeywell with an updated version of FO 15, and/or
>
> (3) Multiplex has failed to provide Honeywell with any or any adequate replacement for FO 15;
>
> (4) In further breach of the terms as to programming and the implied terms of cooperation in the Sub-Contract, Multiplex has failed to provide Honeywell with detailed programmes which use the same or comparable activities as FO 15 and are linked to FO 15 so that they can be used in conjunction with FO 15.
>
> <u>Particulars of programming breaches: the use made on site of the overall programmes</u>
>
> 45. The overall programmes CP-1, PTC-1, CB7E, FO 15 and DC 10 issued by Multiplex were not used by Multiplex to programme Honeywell's works on site.

46. On site Multiplex used 3 week and 3 week look ahead programmes. The said 3 month and 3 week programmes were not in the same format as the overall programmes, and they were not linked to the overall programmes. Further, the activities in the said programmes are not comparable to the activities in the overall programmes.

47. The most important preceding trades which must have reached a certain stage of completion before Honeywell can begin its works in any given area are as follows:

(1) the structure

(2) the walls

(3) primary containment for the first and second fix.

(4) plastering for the final fix

(5) ceilings for the final fix

(6) electrical power for the final fix, and for commissioning

(7) completion of all other mechanical and electrical works for commissioning and commissioning management.

48. Where the overall programmes identified the said dependencies, Honeywell could in theory plan its works by reference to the overall programmes. However, in practice Multiplex's project managers did not use or follow the overall programmes. Honeywell was informed of when work was to be released by reference to the 3 month and 3 week look ahead programmes, rather than by reference to the overall programmes. Therefore dates and sequences in the overall programmes were not the dates and sequences which would in fact be followed in practice.

49. In the premises, although Honeywell has used some of the overall programmes to report progress, the said programmes have not given Honeywell any guidance for planning the work, or for identifying the critical path, or for identifying the future sequence.

50. In July 2005 Multiplex ceased to issue 3 month look ahead programmes and from the on the release of work areas to Honeywell proceeded solely by reference to 3 week look ahead programmes and by weekly meetings.

Particulars: Programming position in 2006

51. From January 2006 FO 15 and DC 10 were obsolete and irrelevant to future planning and programming, although Honeywell continued to refer to FO 15 in some of its reports and

> correspondence for reporting of progress. From January 2006 there has been no overall programme for the works.
>
> 52. From January 2006 the information about release of work areas and other dependencies which has been given to Honeywell has been short term, relating to the next or few weeks and has been given informally rather than by the issue of formal programmes.
>
> 53. A period of one week or 3 weeks into the future was inadequate for identifying the critical path, planing the work and estimating the impact of any delays for the purposes of any extension of time claim:
>
> (1) As at January 2006 installation was not complete, and has not yet been completed to date.
>
> (2) A realistic period for commissioning after the completion of installation of all mechanical services (including those not constructed or installed by Honeywell) is approximately 6 months.
>
> (3) It was necessary for the overall programme to identify critical dependencies and sequences over the months leading up to completion of installation, and thereafter for six months during commissioning.
>
> Thus from January 2006 to date an overall programme for identifying the critical path, planning the work, and estimating the impact of any delays needed to look ahead for a year rather than a few weeks. No such programme was issued."

68. Honeywell goes on to allege that in breach of contract Multiplex has failed to award any extension of time; alternatively, by failing to operate the extension of time mechanism, Multiplex has put time at large under the Sub-Contract. Furthermore, Multiplex's failure to provide proper programming information to Honeywell has made it impossible for Honeywell to comply with the notification requirements of clause 11, with the consequence that time must be at large.

69. The last of those points is the one upon which Mr. Bowdery has concentrated in argument. Mr. Bowdery submits that, in the absence of updated programmes and proper programming information from Multiplex, it has been quite impossible for Honeywell to comply with the condition precedent in clause 11.1.3 of the Sub-Contract Conditions. In support of this argument Mr. Bowdery relies on the witness statements of Mr. Pearson and Mr. Walter. He also points to the correspondence between Multiplex and Honeywell during 2005 and 2006.

70. Mr. Thomas, for Multiplex, submits that Honeywell's case on the operational point has a fatal flaw. Clause 11.1.3 does not impose upon the sub-contractor

an obligation to provide anything further by way of notices and particulars than he is able to provide.

71. Thus, it can be seen that the court's first task in relation to the operational point is to determine the correct interpretation of clause 11.1.3 and its inter-relationship with the surrounding sub-clauses.

72. Clause 11.1.3 states that it is a condition precedent of the sub-contractor's entitlement to an extension of time that he shall have timeously "served all necessary notices", and "provided all necessary supporting information". Clause 11.1.3 does not state what the "necessary notices" are. Nor does clause 11.1.3 state what the "necessary supporting information" is, although it does state what that information includes.

73. Mr. Thomas submits that the word "necessary" in clause 11.1.3 is a signpost to clause 11.2. The reader must turn to clause 11.2 in order to see what notices are necessary and what supporting information is necessary.

74. In the course of argument I asked Mr. Bowdery what, on his case, the word "necessary" in clause 11.1.3 means. In response to this question Mr. Bowdery made precisely the same submission as Mr. Thomas. Mr. Bowdery asserts that the necessary notices are those required by clause 11.2.1, and that the necessary information is that required by clause 11.2.2.

75. The principal difference between Mr. Bowdery and Mr. Thomas concerns the effect of the words in clause 11.1.3 "including but not limited to causation and effect programmes, labour, plant and materials resource schedules and critical path analysis programmes and the like". These words were the subject of close scrutiny and much debate during the hearing. In order to assist that process, we all underlined those words in red in our respective copies. Those words were referred to at the hearing by way of shorthand as "the red words". I shall continue to use that expression.

76. Mr. Bowdery submits that the red words set out what the contractor's information must include. Mr. Thomas, on the other hand, submits that the red words are merely words of guidance; they do not require the sub-contractor to provide any detailed information which is not available.

77. I shall approach this delicate issue from the firm foothold of what is common ground. I agree with both counsel that the word "necessary", which appears twice in clause 11.1.3, is a signpost to clause 11.2. It therefore follows that the necessary notices are those which clause 11.2.1 says are necessary. The necessary information is information which clause 11.2.2 says is necessary.

78. Clause 11.2.1 contains some important qualifications. Clause 11.2.1 does not require the sub-contractor to serve notices immediately when any delay is caused, but rather to serve notices when such delay becomes or should have become "apparent". The sub-contractor's obligation to notify the causes of a delay is not an absolute obligation but rather an obligation to do so "insofar as the sub-contractor is able".

79. Let me turn to clause 11.2.2. This clause does not require the sub-contractor to provide information which is not available to him at the time of the notice, or indeed at any later time. Clause 11.2.2 requires the sub-contractor to provide the specified information "if practicable" in his notice or otherwise "as soon as possible".

80. Standing back for a moment from the various sub-sub-clauses, I construe clause 11.2 as requiring the sub-contractor to do his best as soon as he reasonably can. I do not read clause 11.2 as requiring the sub-contractor to serve notices or to provide supporting details which go beyond the knowledge and information available to him.

81. Against that background, I turn to the effect of the red words. These words are a gloss upon the phrase "all necessary supporting information", which phrase is defined in clause 11.2. When clause 11.1.3 is considered in its context, it is impossible to construe the red words as imposing an absolute obligation. The matters set out in the red words should only be included in the sub-contractor's notice and supporting information "if practicable". Thereafter, the sub-contractor's obligation to furnish these details only arises when it becomes "possible" to do so. If the reds words are not construed in this way, then clauses 11.1.3 and 11.2 become mutually inconsistent.

82. In the result, therefore, on this particular issue, I prefer the submissions of Mr. Thomas to those of Mr. Bowdery. The obligation set out in clause 11.1.3 as a condition precedent does not comprise or include any absolute obligation to serve notices or supporting information. The obligation imposed upon the sub-contractor is an obligation to do his best as soon as he reasonably can.

83. Let me now turn to Honeywell's evidence in support of its case on the operational point. Mr. Pearson sets out in his statement the steps which Honeywell has taken to comply with its obligations under clause 11.1.3. Mr. Pearson states that Honeywell has undertaken regular surveys in order to identify all events which it must notify. Honeywell has regularly served delay notices as events causing delay have occurred. Honeywell could not identify the critical delay resulting because of Multiplex's failure to provide updated sub-contract programmes. At paragraph 21, Mr. Pearson says this:

> "In the absence of this information Honeywell notified Multiplex of the delay event and would later try to determine the combined and cumulative effect of each delay event upon the programme at such time this would become possible."

84. In his witness statement Mr. Pearson continues to go through the difficulties caused by Multiplex's breaches of contract. In paragraph 23 Mr. Pearson discusses Multiplex's changes of priority in relation to sequencing works. By way of example, he says that Multiplex switched emphasis from ceilings to communication rooms and plant rooms. At the end of paragraph 23 Mr. Pearson says this:

> "This type of change would delay Honeywell in that resources would have to be moved from one area to another without proper planning. As such and without changes to the programme in place at the time Honeywell was unable to ascertain the precise extent and duration of delay incurred."

85. In paragraph 25 Mr. Pearson explains that he gave notice of delay in respect of certain matters, delaying progress in the communication rooms. He continues to the effect that Honeywell could not ascertain the precise consequences in terms of delay at that stage, but would do so when possible at a later date.

86. It seems to me that the passages which I have referred to in Mr. Pearson's evidence (if true) demonstrate compliance with clause 11.1.3 rather than the opposite. I will not go through the rest of Mr. Pearson's witness statement because it continues in the same vein. The gist of Mr. Pearson's evidence is that Honeywell has done its best to comply with clause 11.1.3, Honeywell has served such delay notices as it properly could serve and it has provided such supporting information as was available. Honeywell intends to furnish the remaining details about causes of delay as identified in clauses 11.1.3 and 11.2, when it becomes possible to do so. In my judgment, Mr. Pearson's evidence (which is unchallenged for the purposes of the present trial) demonstrates that the clause 11 machinery is both operable and being operated.

87. Let me turn to Mr. Walter's witness statement. Mr. Walter is strongly critical of Multiplex's programming and organisation. He maintains that Multiplex has caused delay by its acts and omissions. Mr. Walter points to Multiplex's failure to provide updated or proper programmes; Multiplex's failure to provide primary containment; the delayed access to certain areas; directions issued by Multiplex which are causative of delay, and so forth. In the present litigation Mr. Walter's evidence is unchallenged, although I understand that that evidence will be substantially disputed in the substantive litigation which lies ahead.

88. For present purposes, I accept Mr. Walter's evidence and treat it as correct. The matters which Mr. Walter sets out as causative of delay are all relevant events within clause 11.10 of the Sub-Contract Conditions. Accordingly, those events entitle Honeywell to an extension of time under clause 11. What those events do not do is demonstrate that the extension of time machinery has broken down.

89. Both Mr. Pearson and Mr. Walter have served short supplemental statements. Those supplemental statements are along the same lines as their main statements and they do not lead to any different conclusion.

90. In relation to the operational point, Mr. Thomas has put forward a number of alternative arguments to justify Multiplex's position based upon the operation of clause 11.7, clause 38A and clause 38C. In my judgment, we do not reach the situation in which those arguments arise for decision.

91. For the reasons set out above, the extension of time machinery set out in clauses 11.1, 11.2 and 11.3 remains fully operational. Honeywell is entitled to receive an appropriate extension of time through the operation of those provisions.

92. Before parting with this issue I should refer to the correspondence. In numerous letters Multiplex rejects Honeywell's notices of delay and asserts that Honeywell has failed to comply with the requirements of clause 11. Although Multiplex's letters are written in robust terms, they do not go so far as to assert that the last sentence of clause 11.1.3 has been triggered. In other words, Multiplex has not argued that Honeywell has waived its right to any extension of time that might otherwise be due.

93. As Mr. Thomas points out in his submissions, it is the function of this court to determine the correct legal position. If Multiplex have sent letters which overstate their case or put it in robust terms concerning the effect of clause 11, that correspondence cannot affect the correct legal analysis.

94. Let me now draw the threads together. For reasons set out above, even accepting Honeywell's factual evidence in full, I am quite satisfied that the clause 11 machinery remains operational and is indeed being operated. I agree with the adjudicator's decision on this issue. Accordingly, Honeywell is not entitled to the relief which it seeks in respect of the operational point.

Part 6. The Gaymark Point

95. Honeywell contends that, even if compliance with clause 11 remained possible, nevertheless Honeywell's failure to comply with that clause was sufficient to put time at large. If it were otherwise, says Honeywell, then Multiplex would be able to recover damages for a period of delay which Multiplex had caused. The legal basis for this argument is the Australian decision in **Gaymark Investments Pty Limited v Walter Construction Group Limited** [1999] NTSC 143; (2005) 21 Construction Law Journal 71.

96. I must therefore begin by reviewing the **Gaymark** decision. In that case the employer claimed liquidated damages against the contractor for delay in constructing an hotel in Darwin. Clause 19.1 of the Special Conditions of Contract imposed conditions in respect of giving notice of delay. Clause 19.2 of the Special Conditions provided:

> "The Contractor shall only be entitled to an extension of time for Practical Completion where ... (b)(i) the contractor has complied strictly with the provisions of sub-clause SC19.1 and in particular has given the notices required by sub-clause SC19.1 strictly in the manner and within the times stipulated by that sub-clause."

97. The Arbitrator made the following findings:

(1) That the contractor was delayed in completing the work, including a delay of 77 days by causes for which the employer was responsible, but the contractor's application for an extension of time was barred because of its failure strictly to comply with the notification requirements for the extension of time clause.

(2) That the 77 days' delay constituted acts of prevention by the employer with the result that there was no date for practical completion and the contractor was then obliged to complete the work within a reasonable time (which the Arbitrator found that it in fact did) with the consequence being that Gaymark was prevented from recovering liquidated damages for delay.

98. The Supreme Court of the Northern Territory of Australia refused leave to appeal and upheld the Arbitrator's award. Bailey J said this at paragraphs 69-71 of his judgment:

> "69. Acceptance of Gaymark's submissions would result in an entirely unmeritorious award of liquidated damages for delays of its own making (and this in addition to the avoidance of Concrete Constructions' delay costs because of that company's failure to comply with the notice provisions of SC19). The effect of re-drafting GC35 of the contract (to delete GC35.4 and substitute SC19) has been to remove the power of the superintendent to grant of allow extensions of time. SC19 makes provision for an extension of time for delays for which Gaymark directly or indirectly is responsible but the right to such an extension is dependent on strict compliance with SC19 (and in particular the notice provisions of SC19.1). In the absence of such strict compliance (and where Concrete Constructions has been actually delayed by an act, omission or breach for which Gaymark is responsible) there is no provision for an extension of time because GC35.4 which contains a provision which would allow for this (and is expressly referred to in GC35.2 and GC35.5) has been deleted.
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> 70. In **Peak Construction (Liverpool) Limited v McKinney Foundations Limited** [1970] 1 BLR 111, Salmon LJ held:
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> 'The liquidated damages and extension of time clauses and printed forms contract must be construed strictly contra preferentum. If the employer wishes to recover liquidated damages for failure by the contractors to complete on time in spite of the fact that some of the delay is due to the employer's own fault or breach of contract, then the extension of time clause should provide, expressly or by necessary inference, for an extension on account of such a fault or breach on the part of the employer'.
>
> 71. In the circumstances of the present case, I consider that this principle presents a formidable barrier to Gaymark's claim for liquidated damages based on delays of its own making. I agree with the arbitrator that the contract between the parties fails to provide for a situation where Gaymark caused actual delays to Concrete Construction's achieving practical completion by the due date coupled with a failure by Concrete Constructions to comply with the notice provisions of SC19.1. In such circumstances, I do not consider that there was any 'manifest error of law on the face of the award' or any 'strong evidence' of any error of law in

> the arbitrator holding that the 'prevention principle' barred Gaymark's claim to liquidated damages."

99. In reaching this conclusion Bailey J took a different view from that expressed obiter by Cole J in **Turner Corporation Limited (Receiver and Manager Appointed) v Austotel Pty Limited** (2nd June 1994); 1997 13 BCL 378 at 12. In that earlier judgment Cole J had said:

> "If the Builder, having a right to claim an extension of time fails to do so, it cannot claim that the act of prevention which would have entitled it to an extension of time for Practical Completion resulted in its inability to complete by that time. A party to a contract cannot rely upon preventing the contract of the other party where it failed to exercise a contractual right which would have negated the effect of that preventing conduct."

100. The correctness of the **Gaymark** decision has been a matter of some debate. The editors of Keating on Building Contracts (8th edition 2006) note that there is no English authority on the matter but incline to the view that **Gaymark** was correctly decided (see paragraph 9-025). The editor of Hudson on Building Contracts, the late Ian Duncan Wallace QC, argues that **Gaymark** was wrongly decided (see paragraph 10.026 of the first supplement to the 11th edition of Hudson). Professor Wallace (a formidable commentator on construction law, who is now sadly missed) also wrote a trenchant article on this subject. See "Prevention and Liquidated Damages: a Theory Too Far" (2002) 18 Building and Construction Law, 82. In that article Professor Wallace refers to the **Turner** case, which I have previously mentioned, and certain other authorities. He points out the useful practical purpose which contractual provisions requiring a contractor to give notice of delay serve. Professor Wallace argues that both the arbitrator and the judge came to the wrong conclusion in **Gaymark**. In Professor Wallace's view, **Gaymark** extends the prevention theory too far.

101. In **Peninsula Balmain Pty. Limited v Abigroup Contractors Pty. Limited** [2002[NSWCA 211, the New South Wales Court of Appeal declined to follow **Gaymark** and preferred the reasoning of Professor Wallace. Hodgson JA gave the leading judgment with which other members of the court agreed. At paragraph 78 Hodgson JA said this:

> "I accept that, in the absence of the Superintendent's power to extend time, even if a claim had not been made within time, Abigroup would be precluded from the benefit of an extension of time and liable for liquidated damages, even if delay had been caused by variations required by Peninsula and thus within the so-called 'prevention principle'. I think this does follow from the two **Turner** cases and the article by Mr. Wallace referred to by Mr. Rudge."

102. A year after **Peninsula**, the Second Division of the Inner House of the Court of Session gave judgment in **City Inn Limited v Shepard Construction Limited** 2003 SLT 885. In that case the employer contended that the contractor was not

entitled to any extension of time, because the Contractor had not complied with clause 13.8 of the contract in relation to notices. The court held that the contractor could not obtain an extension of time if it did not comply with that provision (see paragraph 23 of the Opinion of the court). It appears, however, that the Australian cases were not cited.

103. I am bound to say that I see considerable force in Professor Wallace' criticisms of **Gaymark**. I also see considerable force in the reasoning of the Australian courts in **Turner** and in **Peninsula** and in the reasoning of the Inner House in **City Inn**. Whatever may be the law of the Northern Territory of Australia, I have considerable doubt that **Gaymark** represents the law of England. Contractual terms requiring a contractor to give prompt notice of delay serve a valuable purpose; such notice enables matters to be investigated while they are still current. Furthermore, such notice sometimes gives the employer the opportunity to withdraw instructions when the financial consequences become apparent. If **Gaymark** is good law, then a contractor could disregard with impunity any provision making proper notice a condition precedent. At his option the contractor could set time at large.

104. Although I have considerable doubts that **Gaymark** represents the law of England, nevertheless that is not a question which I am required finally to decide. This is because **Gaymark** should readily be distinguished from the present case. In **Gaymark** non-compliance with the notice clause exposed the contractor to an automatic liability for liquidated damages (if the liquidated damages clause were upheld). In the present case, non-compliance with clause 11.1.3 has no such automatic consequences. Even if (contrary to Mr. Thomas' submissions) Honeywell forfeits any entitlement to extension of time, that does not automatically make Honeywell liable to pay damages for delay. Under clause 12 of the Sub-Contract Conditions, Multiplex can only recover in respect of loss or damage "caused by the failure of the Sub-Contractor". If in reality the relevant delay was caused by Multiplex, not Honeywell, then (whatever the position under clause 11) Multiplex cannot recover against Honeywell under clause 12.

105. Let me now draw the threads together. If the facts are that it was possible to comply with clause 11.1.3 but Honeywell simply failed to do so (whether or not deliberately), then those facts do not set time at large. Honeywell is not entitled to the relief which it seeks in respect of the **Gaymark** point.

Part 7. The Effect of the Settlement Agreement

106. It is a matter of public knowledge that WNSL and Multiplex were in dispute about delays to the construction of Wembley Stadium and the financial consequences of those delays. Indeed, some of the issues in that dispute were ventilated in litigation in this court in Action HT-06-271.

107. It is also a matter of public knowledge that the dispute between WNSL and Multiplex was the subject of a negotiated settlement in October 2006. The press release issued by the parties following that settlement reads as follows:

> "The parties involved in the Wembley Stadium project today announce that they have agreed a comprehensive settlement of all outstanding issues. The agreement follows successful talks chaired by Lord Carter between the FA, Wembley National Stadium Limited (WNSL) and the constructors Multiplex. This agreement will avoid a lengthy and expensive legal dispute and all parties are committed to working together to ensure that the stadium opens for business as early as possible in 2007. Multiplex's chief executive, Andrew Roberts, said:
>
> 'We are very pleased to have reached agreement with WNSL and the FA and to put our past differences behind us and put all our joint efforts into completing the Wembley Stadium at the earliest opportunity'.
>
> The FA chief executive, Brian Barwick, said this:
>
> 'The agreement secures the process of getting the new Wembley Stadium up, running and open to the public. We look forward to staging major events at the stadium next year and consider this agreement with Multiplex to represent the beginning of the end of the construction phase. Everyone's target is now to complete what will be the finest stadium in the world.'
>
> WNSL chief executive, Michael Cunar, said:
>
> 'This is very welcome news for everyone involved with the stadium. This project was founded on the shared desire of WNSL and Multiplex to create a truly special stadium and it is very appropriate that we should enter the final stages of the project working together to get the stadium operational. Multiplex played and intrinsic part in getting this stadium project up off the ground and I am delighted to be working together to achieve our original vision.'
>
> Multiplex is pleased to announce that it has resolved all variations and reached a comprehensive settlement of all disputes with its client at the Wembley Stadium project WNSL. The agreement is conditional on a consent to be obtained by WNSL from its financiers. Multiplex and WNSL have agreed a streamlined process whereby the works and activities that are the responsibility of WNSL will be completed in parallel with other works. This should ensure that the stadium is able to complete its test events earlier than envisaged in previous progress updates."

108. On the basis of information in the public domain Honeywell amended its pleadings to allege that the settlement agreement was a further reason why, under the sub-contract, time was now at large. In paragraph 81I of its reamended defence and counterclaim Honeywell asserted as follows:

> "At the date of the Completion Contract Honeywell was entitled to an extension of time in respect of variations to the Sub-Contract Works which were changes to the Main Contract Works. By the terms of clause 4.6.2 of the Sub-Contract Conditions any extension of time is limited to the extension granted under the main contract. By reason of the Completion Contract no such extension will ever be given, so the said variations cannot be accommodated by any extension under clause 4.6 of the Sub-Contract, or by reason of relevant event 11.10.4 and time is at large."

109. This is the argument upon which Mr. Bowdery has concentrated in the present trial. Mr. Bowdery's argument runs as follows. Assume that variations were instigated by WNSL which caused substantial delays. These variations would entitle Multiplex to a substantial extension of time under the main contract and would entitle Honeywell to a substantial extension of time under the sub-contract. Assume also the settlement agreement is a commercial deal under which Multiplex has abandoned its entitlement to an extension of time in respect of those variations. The consequence of that commercial deal is that the guillotine contained in the proviso to clause 4.6.2.2 of the Sub-Contract Conditions comes down. The Contractor does not "receive" the extension of time to which he is entitled. Accordingly, the Sub-Contractor is unable to claim the extension of time which the Sub-Contractor should receive in respect of those variations. Thus, the abandonment of the mechanism for extension of time under the main contract prevents the mechanism for extension of time under the Sub-Contract from operating properly.

110. On behalf of Multiplex, Mr. Thomas submits that that line of argument is flawed. If the mechanism for extending time under the main contract has been abandoned or replaced by the settlement agreement, then the cap or the guillotine imposed by the proviso to clause 4.6.2.2 falls away.

111. In my judgment, Mr. Thomas' argument is correct. If Multiplex has entered into a settlement agreement with WNSL under which Multiplex waives its right to extension of time, then Multiplex cannot rely upon that fact to deprive Honeywell of extensions of time otherwise due. The last sentence of clause 4.6.2.2 of the Sub-Contract Conditions cannot apply to a situation in which the relevant main contract provisions have been abandoned and Multiplex has voluntarily foregone extensions of time which would be due.

112. Having listened to counsel's submissions about the effect of the settlement agreement, both at this trial and at earlier hearings, it seems to me that, whatever the terms of the settlement agreement may be, Multiplex cannot rely upon those terms in order to deprive Honeywell of its rights under the Sub-Contract. Furthermore, Multiplex has expressly disclaimed any intention of doing so. I conclude that the settlement agreement between Multiplex and WNSL does not set time at large under the Sub-Contract.

113. Everything which I have said so far has been based upon what is in the public domain concerning that settlement agreement and Honeywell's submissions about that matter. The actual terms of the settlement agreement between Multiplex and WNSL are confidential. I was persuaded by counsel that it was

appropriate for the court to sit in private when the settlement agreement was produced and its detailed terms were examined and debated. Having seen those detailed terms, I remain of the view that the confidentiality of that document should be maintained.

114. Nevertheless, I am not prepared to give any part of this judgment in private, since the construction of the New National Stadium at Wembley is a matter of legitimate public interest. Furthermore, it is in the interests of justice that, so far as possible, all judicial decisions should be given openly and that the proceedings of this court should be scrutinised by all who have an interest in the outcome.

115. I shall therefore deal with the terms of the settlement agreement in this way. Having examined those confidential terms with the assistance of counsel, I see nothing in the settlement agreement which displaces the conclusions reached earlier and which I have set out above. The terms of the settlement agreement between WNSL and Multiplex cannot and do not set time at large under the Sub-Contract.

116. Let me now draw the threads together. For the reasons set out above, Honeywell is not entitled to declaration 6 as formulated in its counterclaim.

Part 8. Conclusion

117. For reasons set out in Parts 4, 5, 6 and 7 of this judgment, I conclude that time is not at large under the Sub-Contract. The mechanisms of clause 11 remain effective and operational.

118. I reach these conclusions by reference to what might be called the primary contractual provisions. It has not been necessary to examine Mr. Thomas' alternative arguments based on clause 11.7, clause 38A and clause 38C.

119. I should, however, place on record certain submissions which Mr. Thomas has made about those provisions. In relation to clause 11.7, Mr. Thomas stated Multiplex's position on instructions and in clear terms. Multiplex accepts that, following practical completion, it will be under a duty to grant such extensions of time to Honeywell as may be fair and reasonable having regard to any relevant events. Multiplex will not at that stage be constrained by any deficiency in the notices or supporting information served by Honeywell pursuant to clauses 11.1 and 11.2. I welcome that submission or concession made by Multiplex, which represents a responsible approach to its duties as main Contractor. It is also based upon a fair reading of clause 11 as a whole.

120. In relation to clauses 38A and 38C, Mr. Thomas submits that neither the adjudicator nor the court will be constrained by any deficiency in Honeywell's notices and supporting information. Instead the adjudicator or the court, as the case may be, should allow such extension of time as is fair and reasonable having regard to any relevant events. Again I welcome this approach which is beneficial to Honeywell and no doubt to other sub-contractors as well. Also, this approach seems to me to be based upon a fair reading of clauses 38A and 38C of the Sub-Contract.

121. Having noted Multiplex's position in relation to clauses 11.7, 38A and 38C, I do not base my judgment upon those matters. The rationale of this judgment is as set out in Parts 4, 5, 6 and 7 above.

122. Finally, I thank the solicitors on both sides for their efficient conduct of this litigation. I thank counsel on both sides for the excellence of their oral and written submissions. I invite counsel to agree the precise wording of the declarations to which Multiplex is entitled in respect of the construction point. Honeywell's counterclaim for declarations in respect of the other issues is dismissed.

(**For proceedings on the permission to appeal: see separate transcript**)

MR. JUSTICE JACKSON:

123. This is an application for permission to appeal. Mr. Clay puts the application for permission on both of the limbs identified in CPR Part 52, namely real prospect of success and some other compelling reason. So far as real prospect of success is concerned, Mr. Clay points out that the operational point is perhaps the principal arm of Honeywell's case. Mr. Clay points out that this court's interpretation and construction of clause 11.1.3 and clause 11.2 play a crucial role in the reasoning process. Mr. Clay submits, courteously and moderately, that a different view might be taken on that point of construction by the Court of Appeal and if the Court of Appeal does take a different view that really is the key which unlocks the door to success for Honeywell.

124. I agree with Mr. Clay that the interpretation of clauses 11.1.3 and 11.2 do play a crucial part in the reasoning process of Part 5 of this court's judgment. However, it seems to me that, when the provisions of clause 11.1.3 and 11.2 are examined with care, it is unlikely that another court will arrive at a different interpretation. I say that because it seems to me that the interpretation of those clauses which counsel for Honeywell urged upon me, attractively though the submissions were put, was an interpretation which would make clause 11.1.3 inconsistent with clause 11.2.

125. I agree with Mr. Clay that construing those clauses is not an easy exercise. I agree with Mr. Clay that the interpretation of the red words is a crucial matter in that exercise. However, it also seems to me that one has to construe the contractual provisions in a manner which makes them mutually consistent. One has also got to construe them in a commercially sensible way which makes sense, rather than in a destructive way which renders them useless for all practical purposes.

126. Accordingly, I am not persuaded that Honeywell has crossed the threshold of demonstrating real prospect of success in the Court of Appeal.

127. I come now to the second limb of this application. Mr. Clay points out that there are some 30 Sub-Contracts in a similar form to Honeywell's Sub-Contract. Some Sub-Contractors other than Honeywell are likely to be in dispute with Multiplex and those disputes will involve a resolution of similar issues to those which have arisen between Multiplex and Honeywell in this case.

128. For my part I can understand that the outcome of this case will be of importance to some other Sub-Contractors at Wembley. On the other hand, it is not suggested that the provisions of this particular Sub-Contract, which have given rise to difficulty, are in any wider use. The Wembley project is now drawing to a close. I do not consider that the wider interest or the public interest that there may be in the correct interpretation of the provisions scrutinised in this litigation is such that the second test for giving permission to appeal has been surmounted. I do not think that there is "some other compelling reason" why the proposed appeal should be allowed to go forward. It goes without saying that, although I refuse permission, it is, of course, open to Honeywell to apply to the Court of Appeal and then it will be a matter for that court to decide whether permission should be granted on either or both of the limbs set out in Part 52.

129. The fact that an application for permission to appeal has been made triggers the obligations of this court set out in paragraph 4.3A of the Practice Direction supplementing Part 52. That paragraph requires the judge to answer four questions:

(1) whether or not his judgment or order is final;

(2) whether an appeal lies from the judgment or order and, if so, to which court;

(3) whether the court gives permission to appeal; and

(4) if not, the appropriate appeal court to which any further application for permission may be made.

130. My answer to those four questions is as follows: The judgment or order made by this court today is final. As to question (2), an appeal does lie from that judgment or order, namely to the Court of Appeal. As to question (3), the answer is that this court does not give permission to appeal. As to question (4), the answer is that the appropriate appeal court to which any further application for permission may be made is the Court of Appeal.

131. I am sure that the solicitors drawing up the order of this court from today's hearing will bear in mind the provisions of rule 40.2(4) of the Civil Procedure Rules. That rule requires those same four matters to be set out in the order of the court, bearing in mind the fact that an application for permission has been made.
