IN THE HIGH COURT OF JUSTICE **CLAIM NO: HT-02-322**

QUEEN'S BENCH DIVISION

TECHNOLOGY AND CONSTRUCTION COURT

MR RECORDER COLIN REESE Q.C.

B E T W E E N :

HURST STORES AND INTERIORS LIMITED

Claimant

and

M.L. EUROPE PROPERTY LIMITED

Defendant

J U D G M E N T

This is the official Judgment of the Court and I direct that no further note or transcript be made.

25th June 2003

COLIN REESE QC
(Recorder – sitting as a Deputy Judge of TCC)

Mr MARCUS TAVERNER QC appeared for the Claimant, instructed by Walker Morris (Leeds)
Mr PAUL DARLING QC appeared for the Defendant, instructed by Wragge & Co (Birmingham)

BACKGROUND

1. The Defendant, M.L. Europe Property Limited, a Cayman Island company "MLEP", is the corporate vehicle used by Merrill Lynch for the development of its new European headquarters buildings in the City of London. The development is located on a site bounded by Giltspur Street (West), St Bartholomew's Hospital (North), King Edward Street (East) and Newgate Street (South). The project comprised the construction of two substantial new buildings the "main building" and the "west building", and the refurbishment of certain existing buildings, namely the Public Office Building ("POB") and No's 114 to 124 Newgate Street ("Newgate Street buildings").

2. The professional team assembled by MLEP for the project included Mace Limited ("Mace"). Mace was the "Construction Manager" named in the trade contracts which MLEP made with various "Trade Contractors". It is common ground that at all material times Mace acted as leader and co-ordinator of all the Trade Contractors and carried out all administrative functions in respect of the Trade Contractors (see paragraph 5 of the Defence and paragraph 3 of the Reply). The particular member of Mace's staff who features in this case is Mr David Rumsey. In the early months of 2001 he was the person dealing with accounting/payment matters for the Claimant, Hurst Stores and Interiors Limited, ("Hurst").

3. Hurst contracted to undertake extensive toilet fit-out works. The "Trade Contract Sum" stated in the contract for these works was £2,397,884.17. This sum included "preliminaries" of £556,688, the breakdown of which can be found at page 35 of the annex to the Trade Contract. The contract was negotiated at the end of

1999 but the formal contract under seal was not made until 18th October 2000, months after the works had begun. The contract operated retrospectively to govern the relationship of the parties from commencement of the works.

The two particular members of Hurst's personnel who feature in this case are Mr Michael Grant, Hurst's Commercial Director, and Mr James Mell, Hurst's Project Manager.

The contract provided for the works originally required to be carried out between 10th January 2000 and 11th December 2000, with commissioning continuing thereafter up to 5th February 2001.

Mace, as Construction Manager, was empowered to issue formal contract instructions ("CMIs") to Hurst. These instructions were sequentially numbered. By CMIs 51 and 288, especially the latter, extensive additional works were instructed. CMI 51 dated 28th February 2000 (Bundle 10, pages 326 to 326B) reinstated a gym changing room which had been included in Hurst's original tender and which had then been omitted as a tender adjustment in December 2000. The £11,000 which had been deducted from the "preliminaries" when it was omitted was added back to the Trade Contract Sum as part of the value of this CMI. CMI 288 dated 28th September 2000 (Bundle 11, pages 295 ff) added extensive additional works which I describe in more detail later (see paragraph 11 below). At this point, I simply note that this CMI recognised that time for completion of the contract works, including the additional works, needed to be extended by about 4½ months. The Trade Contract Sum increased by £832,631.45 which included an addition of £233,462.90 for "preliminaries".

4. The Trade Contract Works were not in fact completed until about the end of October 2001. Hurst prepared a "Final Account" dated 26th November 2001 which claimed a total of £6,466,205.78 for the works. That sum included a claim for "loss and expense" £2,820,413.02, which was broken down into "additional preliminaries" of £241,040.31 and "disruption" of £2,579,372.71.

The additional preliminaries claim was computed by reference to actual (or deduced) contract rates which were then applied (in most instances) to the 95 weeks of Hurst's site involvement. The sums which had been included for preliminaries in the original contract sum, in CMI 51 and in CMI 288 were deducted to leave an unrecovered balance, which Hurst claimed, of £241,040.31.

The disruption claim was computed by calculating the "total cost of site labour" and then deducting amounts recovered elsewhere plus an amount for work which Hurst accepted it had been at fault. Hurst thereby arrived at an extra over sub-total of £1,473,927.26. An uplift of 75% was then applied, on the basis that this was the tender allowance for overheads and profit, to produce the claim of £2,579,372.71 (see Bundle 3 at pages 37 to 43 for details). In the context of the present case, the factual merit of this very sizeable claim does not fall to be considered but, the method adopted to calculate the claim should be noted. What was claimed was the calculated shortfall in recovery of labour costs over the whole period of Hurst's involvement on site. The claim was not limited to disruption costs incurred after 27th April 2001 – the significance of that date is explained below.

5. Hurst justified its Final Account claims on the basis that it works had been delayed/disrupted because preceding works, particularly the external walls to the

toilet blocks, had not been completed on time; because there had been a late release of a large number of toilet blocks in a short space of time (around September 2000) which had caused planning and resourcing problems; and because of on going problems with the provision of services being installed by other Trade Contractors who did not comply with Mace programmes. In summary, Hurst contended –

> "The delayed releases and failure of Mace to manage other Trade Contractors involved frustrated all attempts made by Hurst to implement the Works in an efficient, economic, sequential and continuous manner, the result was enforced fragmentary implementation of the Works. The same factors also compelled the deployment of substantial additional and extended resources, including labour, site supervision, plant and equipment.
>
> Relative to the productivity achieved (which is a reflection of the above factors) the labour resources actually and necessarily deployed upon the works resulted in major loss emerging from the consequential reduction in productivity……..
>
> It is a matter of record that Toilet B2.3, the last toilet to be fitted out, was the only one where the other Trade Contractors complied with the programme. B2.3 was completed less than eight weeks after Hurst were given possession of it verifying that if the other Trade Contractors had been properly managed by Mace, and programmes adhered to, Hurst could have carried out their works in an economic and cost effective manner."

The reference to the toilets at B2.3 was to part of the works added to the contract by CMI 288. On any view (see paragraphs 28 and 29 of the Defence for MLEP's case), through no fault of its own, Hurst was not able to complete these toilets by 23rd April 2001. According to Hurst's claim, the area concerned was not made available until 10th September 2001 and the works were completed by 31st October 2001.

6. Hurst's Final Account was hand delivered to Mace on 27th November 2001. Mace refused to accept it. Mace returned it the same day with a covering letter which, in closing, Mr Paul Darling QC, who appeared for MLEP, submitted contained "colourful and on one view flippant language." I agree; so far as material and worthy of being quoted, the letter made the following point –

> "We had already got an agreed and signed final statement of account for all works up to 27th April 2001, as agreed with [Mr Mell]……."

Faced with the rejection of its Final Account, on 18th December 2001, Hurst referred the matter to adjudication. Clause 31.3 of the contract gave either contracting party the right to refer any dispute arising in connection with the Trade Contract to adjudication under the TeCSA (Technology and Construction Solicitor's Association) Adjudication Rules. The 1999 version of the TeCSA Rules provided –

> - that the Adjudicator's decisions should be binding until the disputes between the parties were finally resolved (Rule 14); and
> - that although the Adjudicator's decision(s) was (were) to be in writing, it (they) should not give reasons (Rule 27).

7. Mr Matthew T Molloy was appointed as the Adjudicator. He received voluminous written submissions. He convened a hearing on legal issues and a meeting with factual witnesses before he made and published his Decision on 7th February 2002. As Mr Darling conceded in the course of his final submissions, Mr Molloy's Decision does not bind the Court but, in order to understand the rationale for and the form of these proceedings, it is necessary to note which particular aspects of the Decision the Court is (in effect) being asked to reconsider.

8. The differences between Hurst and MLEP which Mr Molloy identified concerned the value of variations (just under £72,000 was in issue), the claims for additional preliminaries and disruption (which were totally in issue) and Hurst's entitlement to interest on unpaid sums. He summarised the rival contentions in this way –

> "[MLEP's] primary case is that, as Hurst have not complied with the notice provisions contained within Clause 17.2 of the contract in respect of extension of time and/or loss and expense, Hurst's claim for additional preliminaries and disruption must fail. Further [MLEP] **contend that Hurst has compromised its claims by virtue of Hurst's Project Manager, Mr Mell, signing a Stage 1 Final Statement of Account on 27th April 2001 ("the 27th April 2001 Document")** and the existence of an Interim Statement of Account dated 4th September 2001 ("the 4th September 2001 document"). In reply to [MLEP's] primary case in relation to

notices, Hurst contends that:-

(i) Hurst did comply with the notice provisions contained within Clause 17.2 of the contract,

(ii) alternatively that the detailed notice provisions contained within Clause 17.2 of the contract were varied,

(iii) alternatively that, by virtue of a letter dated 11th February 2001 sent to Hurst by Mace ….. [MLEP] is estopped from relying on the detailed notice provisions contained within Clause 17.2 of the contract or

(iv) alternatively, that Hurst is entitled to the sums claimed as damages arising from [MLEP's] breaches of contract.

In respect of the 27th April 2001 Document, Hurst contends that the document is limited to the valuation of Construction Manager's Instructions (CMIs") 1 to 399 inclusive and does not compromise its claim for additional preliminaries and disruption. In respect of the 4th September 2001 document, Hurst contends that it cannot compromise its claims as it is not signed.

[MLEP's] secondary case is that, even if Hurst were able to ignore the notice provisions contained within the contract in respect of extension of time and/or loss and expense, Hurst's claim is global and that, as it does not evidence cause and effect, it must fail. In reply, Hurst contends that its claim is not a global claim or, alternatively, if it is a global claim, that this is not fatal to its claim for additional preliminaries and disruption."

[my emphasis and, for convenience, I shall also adopt the expression "the 27th April 2001 Document"]

Mr Molloy mentioned in his decision that MLEP had requested that he gave reasons but Hurst had not agreed that he should. In the absence of agreement between the parties, he said that he was obliged by Rule 27 of the TeCSA Rules not to give reasons. The decision indicates that although Mr Molloy appears to have been unimpressed by MLEP's reliance on the notice provisions contained in Clause 17.2 of the contract, he accepted MLEP's contentions that Hurst had compromised the claims for additional preliminaries and disruptions. The relevant part of his decision was –

"**THE 27th April 2001 Document**

Does the 27th April 2001 Document constitute a binding agreement between Hurst and [MLEP] ?

34. I find that the 27th April 2001 Document does constitute a binding agreement between Hurst and Merrill Lynch.

If so, what is its nature, scope and effect ?

35. I find that the nature of the 27th April 2001 Document is that of a compromise agreement.

36. I find that the scope of the 27th April 2001 Document is that it covers the valuation of work covered by CMIs 1 to 399 inclusive and Hurst's claims (other than VAT) arising out of or in connection with the Trade Contract Works which had accrued up to and including 27th April 2001.

37. I find that the effect of the 27th April 2001 Document is to prevent Hurst from making a further claim for any additional costs directly or indirectly associated with CMIs 1 to 399, inclusive and from making a claim for any cause of action which had accrued up to and including 27th April 2001.

Does it prevent Hurst from making any of the claims in Referral Notice and, if so, which?

38. I find that the 27th April 2001 Document prevents Hurst from making the following claims in the Referral Notice:

(i) The claim for additional monies in respect of CMIs 176, 177 and 225.

(ii) The claim for 19 weeks of additional preliminary associated with the additional works instructed under CMI 288.

(iii) The claim for 19 weeks of additional preliminaries associated with the delay in handover of areas affected by CMI 288.

(iv) The claim for disruption arising from events which had occurred up to and including 27th April 2001……

EXTENSION OF TIME

What is Hurst's entitlement in respect of its claim for an extension of time ?

45. I find that Hurst is entitled to an extension of time of 47 weeks to 31st October 2001.

DISRUPTION

Was Hurst disrupted by events for which it is entitled to recover loss and expense and/or damages and, if so, what events and where ?

46. I find that, having regard to my findings in relation to the 27th April 2001 Document, Hurst was disrupted by events which it is entitled to recover damages in [respect of certain identified areas/events].

What is Hurst's entitlement in respect of its claim for additional preliminaries ?

48. I find that Hurst is entitled to the gross sum of £59,867.65 in respect of its claim for additional preliminaries in respect of the 7-week delay caused by the late handover of B2.3.

What is Hurst's entitlement in respect of its claim for disruption ?

49. Whilst I have found that Hurst has been disrupted, I am unable to find that the effect of the disruption events, taken as a whole, was to either have such a complex interaction thereby rendering a specific relation between event and money consequences impossible or impracticable, or that the events, taken as a whole, have caused the losses claimed. Further, I am unable to make an assessment on the recoverable losses based on the material set out and contained in the Referral. I therefore make no finding as to Hurst's entitlement in respect of its claim for disruption.

What is the gross valuation of Hurst's final account ?

50. I find that the gross valuation of Hurst's final account excluding interest is £3,640,570.72 exclusive of Hurst's recoverable losses in respect of disruption.

What is Hurst's entitlement in respect of its claim for interest ?

51. I find that Hurst is entitled to the sum of £1,596.47 in respect of its claim for interest.

The overall result of the adjudication was that MLEP was ordered to pay a further £65,110.58 (net of a 1½% retention on the value of the contract works) to Hurst.

ISSUES

9. These proceedings were begun by Hurst in August 2002. The claim was for four declarations. The first three declarations require the Court to consider whether the conclusions stated by the Adjudicator at paragraphs 35 and 36 of his Decision, which are provisionally binding on the parties, should be overruled. The fourth declaration represents Hurst's ultimate fall back position. It requires the Court to consider whether MLEP is estopped from relying on the 27th April 2001 Document as a binding compromise agreement which (ex hypothesi) the Court has agreed it is. During the course of closing submissions on 6th May 2003 Mr Marcus Taverner QC, who appeared for Hurst, informed me that the claim for the fourth of the declarations was "not pressed" but it was not formally withdrawn and, accordingly, I must deal with it – albeit, I do so as briefly as I can in view of what I perceive to be its self evident lack of merit if (which must be assumed) all of Hurst's other claims have failed.

Hurst also claimed rectification of the 27th April 2001 Document. This claim followed on as the logical consequence if Hurst's unilateral mistake case, which was the third of the declarations claimed, succeeded. The declarations which Hurst claims are –

(1) a declaration that the 27th April 2001 Document was not a binding compromise agreement because consideration was absent and/or because it was not signed by either MLEP or by Mace – see paragraph 27 of the, Particulars of Claim; further or alternatively,

(2) a declaration that Mr Mell did not have authority (actual, implied or ostensible) to make a binding compromise agreement in the terms of the 27th April 2001 Document because it was outside the terms of the Trade Contract. Hurst admitted that Mr Mell had authority to make agreements as part of the contractual mechanism but, Hurst contended that he could not bind the company outside the terms of the Trade Contract - see paragraph 28 of the Particulars of Claim; further or alternatively,

(3) a declaration that the 27th April 2001 Document was entered into on the basis of a unilateral mistake – the mistake being Mr Mell's mistake; he believed that the process upon which he was engaged between January and early April 2001 involved his agreeing only labour, plant and materials costs for CMI's 1 to 399; after agreement on those matters had been reached with MLEP (Mr Rumsey), MLEP prepared the 27th April 2001 Document containing additional terms. This document was then presented to Mr Mell without expressly drawing his attention to these additional terms. Mr Mell signed the 27th April 2001 Document without reading it and/or paying little attention to it because he believed that it did no more than confirm what had already been agreed. If this declaration were to be made then Hurst contends that the 27th April 2001 Document should be rectified so as to remove the reference to its being made in full and final settlement of all claims arising out of or in connection with the Trade Contract Works which had accrued up to and including 27th April 2001 - see paragraph 29 of the Particulars of Claim; further or alternatively,

(4) a declaration (which as I have said Mr Taverner did not press) that MLEP was estopped from contending that the 27th April 2001 Document was a binding compromise agreement otherwise than in relation to the direct costs of CMI's 1-399 -

see paragraph 30 of the Points of Claim.

10. MLEP does not accept that Hurst is entitled to any of the declarations or the rectification which is claimed. MLEP contends that, as Hurst's project manager, Mr Mell had authority to deal with all matters concerning progress and payment under the Trade Contract; that he had authority to sign the 27th April 2001 Document on behalf of Hurst or in the alternative he was "clothed with such authority"; that he compromised Hurst's claims (up to a point in time) by signing the 27th April 2001 Document on Hurst's behalf; that there was consideration for the compromise agreement recorded in the 27th April 2001 Document; and, that Hurst is estopped from denying that compromise and from attempting to bring additional claims for loss and expense for events prior to 27th April 2001 (the representation relied upon being the signing of the 27th April 2001 Document – the detriment relied upon being payment of the agreed sum, being unable or in a worse position to assess Hurst's claims and being deprived of the opportunity, which timely notification would have provided, to take steps to avoid the disruption) – see, in particular, paragraphs 7, 12, 36, 41, 42, 45, 46 and 49 of the Defence. MLEP contends that in about January 2001 it asked Hurst to prepare a draft final account. MLEP pleaded the motivation for the request and the sequence of material events which occurred between January and April 2001 and the effect of the 27th April 2001 Document as follows –

> "14. ……. It is admitted that in or about January 2001, [MLEP] asked [Hurst] to prepare a draft final account. It is denied that [MLEP] wished to agree a figure for labour, plant and material costs only for CMI's 1-399 ……. . Such final account was to include all sums/claims owing to [Hurst] up to a given date.
>
> 15. The reason for [MLEP's] request was to be in a position to agree [Hurst's] final account up to a point in time (agreed with [Hurst]) and not have to revisit any aspect of those work costs up to that point in time. Although it is referred to as a final account it would only be so if no further CMI's were issued after CMI 399. It is [MLEP's] case, therefore, that this was no more than a statement of account as at 27 April 2001…..

17. ……under cover of a letter dated 12 January 2001, Mr Mell submitted a document to MACE that was entitled "Final Account Toilet Fit Out Package 4200" but was referred to in the covering letter as the "Draft Final account".

18. ……on or about 22 February 2001 and 9 April 2001, meetings took place between Messrs Mell and Rumsey in relation to submitted draft final account.

19. ……at the meeting of 22 February 2001, Mr Rumsey was able to agree the value of certain variations with Mr Mell but requested certain additional information to be able to agree the remainder of the items.

20. Such further information was submitted under cover of [Hurst's] letter dated 16 March 2001. At the meeting on 9 April 2001 the value of the further variations were agreed. A cut off date for these purposes was agreed at CMI No 399.

21. Having concluded the agreement of the final account up to CMI No 399 with [Hurst], Mr Rumsey prepared a Change Request for [MLEP] to agree his recommendation for the final account value. The Change Request was subsequently approved and accordingly Mr Rumsey prepared a final statement of account headed Stage 1 FSA ready for endorsement by [MLEP].

22. Save that……

    (b) It is noted that Mr Mell did not read and/or paid little attention to the [27th April 2001 Document];

    paragraph 21 [of the Particulars of Claim – see paragraph 17 below] is admitted. It is averred that the whole purpose of the two meetings referred to above (as was known to Mr Mell, or ought to have been known) was not simply to agree the final value of the CMI's 1-399 but in addition to include all claims for additional costs as provided for by the contract. Indeed, in signing ISAs [Hurst] was taken to agree and accept "the final valuation of the instruction detailed in the interim statement of account" (see clause 23.6.4 of the Trade Contract……which in certain circumstances gives interim statements final effect).

23. ……..[27th April 2001 Document] as provided to Mr Mell following the aforementioned meetings, was signed by Mr Mell on behalf of [Hurst] on 27 April 2001 "in full and final settlement of all claims arising out of or in connection with the Trade Contract Works which have accrued up to and including the date of this statement".

24. Further, the [27th April 2001 Document] itself refers to the fact that the Final Payment is accepted by [Hurst] in full and final settlement of <u>all</u> claims. It is [MLEP's] case that the specific exclusion of claims in respect of Value Added Tax is evidence that the sum covered must be taken to include all other claims, including any which might have existed for loss and expense or disruption. As such Mr Mell was signing nothing more than what he must always have had the power to sign. Each agreed ISA was a settlement of all claims the contractor had up to the date of that ISA. There is no obligation in clause 23.6.4 for either the Defendant or Mace to sign such an interim statement.

25. The fact that the rights of [Hurst] were reserved in respect of seeking adjustments for any further CMIs subsequent to 399 (the latest CMI at that date) is evidence that the [27th April 2001 Document] was intended to encompass all sums due to [Hurst] up to 27th April 2001. This exercise took place with all 90 plus contractors so as to give Mace and [MLEP] cost

certainty.

26. Further [MLEP] places reliance on the fact that the existence of the compromise agreement is found in, or evidence by, the [27th April 2001 Document] being in effect a written memorandum of agreement. In the premises, it is [MLEP's] case that it is not difficult to discern whether the parties have in fact concluded an agreement; the parties' negotiations have crystallised into a contractually binding agreement dated 27th April 2001.

46. …… It is [MLEP's] case that Mr Mell was aware, or ought to have been aware, that the document he was signing on behalf of [Hurst] was in full and final settlement of all of [Hurst's] claims arising out of or in connection with the Trade Contract Works up to 27 April 2001. Mr Mell's alleged failure to read the [27th April 2001 Document] when signing is noted but irrelevant."

As can be seen, MLEP contends that Mr Mell's failure to read the 27th April 2001 Document - a fact which was "noted" at paragraph 22(b) of the Defence but said to be "alleged" at paragraph 46 of the Defence - was a matter of no legal relevance.

THE TRADE CONTRACT

11. As I have already said, at paragraph 3 above, Hurst contracted to undertake toilet fit-out works, the extent of which was significantly increased by CMI 288. A little more flesh needs to be put on the bones. At the time the original Trade Contract works were priced not all of the toilet facilities required by MLEP had been sufficiently designed/defined. In particular those required in the basement of the Main Building (in the area identified as B2.3) and in the buildings which were to be refurbished had not been sufficiently designed/defined. Hurst was required to price only the designed/defined works required in the Main Building and the West Building.

Drawings/specifications for the toilet fit-out works in the POB, Newgate Street buildings and the area B2.3 were forwarded to Hurst in June 2000. Negotiations in respect of these proposed additional works continued until the end of September 2000 when they were formally added to the Trade Contract Works by CMI 288. The additional works instructed by CMI 288 were to begin during the initial contract period but, at the time they were priced, it was recognised that time needed to be extended as shown on Mace's completion programme dated 24th August 2000. The negotiated and agreed sum of £832,631.45 (the value of CMI 288) included "preliminaries" of £233,462.90 in recognition of, inter alia, an extended contract period up to 23rd April 2001.

12. By Clause 4.10 of the Trade Contract Hurst was required to engage an adequate number of competent/suitably qualified/experienced personnel to carry out the works. In addition, Hurst was required to use its best endeavours to procure that

identified "key personnel" retained their involvement with the project (unless otherwise agreed with Mace) through to completion. Key personnel were not to be dismissed without Mace's prior approval (not to be unreasonably withheld) and any replacements had to be approved by Mace (again, approval was not to be unreasonably withheld). The two persons identified as key personnel were Mr Michael Grant, who, as I have said, was Hurst's Commercial Director and Mr James Mell, who, again as I have said, was Hurst's Project Manager.

13. Clause 17 of the Trade Contract provide for commencement, completion and extensions of time.

By clause 17.2, Hurst was required to give prompt written notices of delay, or likely delay, to whole or part of the Trade Contract Works and to provide details of causes/expected effects (including an estimate of the expected delay). The giving of the required notices and details was expressed to be a condition precedent to Hurst's entitlement to an extension of time and/or loss and expense.

By clause 17.3, after receipt of due notification from Hurst, if Mace was of the opinion that the regular progress of the whole or part of the Trade Contract Works had been, or was likely to be, delayed by any of the reasons stated in that clause, Mace had either to issue an instruction to accelerate or grant a fair and reasonable time extension. The list of events which might give rise to such a time extension entitlement included acts of prevention or impedance by MLEP or those for whom MLEP was responsible (Clause 17.3.4) and the issuing of CMI's which included a variation to the works (Clause 17.3.6).

By clause 17.4, if Mace granted an extension of time or issued an instruction to accelerate, it was required to issue a revised Trade Contract programme with which Hurst was then to comply.

14. Clause 20 of the Trade Contract provided for variations to the Trade Contract Works. By clause 20.1 Mace was empowered to issue instructions requiring a variation. Clauses 20.2 to 20.9 contained detailed provisions concerning the ordering and valuation of variations. Clauses 20.3 and 20.4 contemplated the value and effect of variations being agreed between Hurst and Mace in advance of the varied work being executed. Clauses 20.5 and 20.6 enabled Mace to instruct variations without first seeking agreement on value/effect or where agreement on either or both of those matters had not been reached and, if that was done, their value/effect remained to be ascertained. Clause 20.9 provided for effect to be given to the measurement and valuation or variations in payment certificates and by adjustment of the Trade Contract sum. In view of the significance which they assumed during the course of evidence/argument I set out below clauses 20.3 and 20.4 -

> **20.3 Provisos on Variations or Instructions**
>
> Unless otherwise instructed by [Mace] pursuant to clause 20.6, [Hurst] shall not execute any Variation required by [Mace] nor comply with any instruction issued by [Mace] (save where Clause 3.10 applies and subject to the Clauses 20.5 and 20.6) unless [Hurst] shall have first submitted to [Mace] in writing within 5 Working Days of [Mace's] Instruction:
>
> 20.3.1 an assessment of the value thereof (including all necessary calculations by reference to the Trade Contract Documents);
> 20.3.2 an assessment of the time within which the Variation is proposed to be executed;
> 20.3.3 an assessment of the length of any extension of time to which [Hurst] might be entitled under Clause 17;
> 20.3.4 an assessment of the amount of any direct disruption costs to which [Hurst] might be entitled;
> 20.3.5 such other information as [Mace] may reasonable require.

20.4 Agreeing Trade Contractor's assessments

> [Hurst] and [Mace] shall thereupon take reasonable steps to agree [Hurst's] assessments. Subject to the approval of the Cost Consultant, any agreements so reached shall be binding on [Hurst] and [MLEP] and if agreement is reached on all matters referred to in Clauses 20.3.1 to 20.3.4 [Hurst] shall then execute the Variation in accordance with [Mace's] Instruction.

15. Clause 21 of the Trade Contract provided that the Trade Contract Sum should not be adjusted or altered in any way whatsoever otherwise than in accordance with the express provision of the Trade Contract.

16. Clause 23 of the Trade Contract provided for payment and certification. Although most of the clause takes a conventional and fairly standard form, included within it, as part of clause 23.6 under the heading "Use of Retention", are two sub-clauses which appear to contemplate a rather different payment mechanism to the conventional standard form provisions. When construing Clause 23 of the Trade Contract I have in mind that by Clause 1.2.4 all headings are to be ignored, that by the final paragraph of Clause 1.2, the words in the Trade Contract are to bear their natural meaning; and, that by Clause 1.3 if there are ambiguities or discrepancies between the Trade Contract and its annex, the terms of the Trade Contract are to prevail.

By Clause 23.1 Hurst was to submit to Mace interim applications for payment by stipulated dates. Within 14 days of receipt of a duly submitted application Mace was to issue a "payment certificate". On receipt of the "payment certificate" Hurst was to raise a VAT invoice (in the sum certified) directed to MLEP. MLEP was then to pay that invoice within 14 days of receipt. In Clause 23.2 the amount which was to be stated as due in a payment certificate was expressed in conventional terms. In Clauses 23.4 to 23.6.3 retention (before and after practical completion) was dealt with in conventional terms, with the final release of retention monies being made after the

issue of a Certificate of Making Good Defects. And, in Clause 23.7, final certification/payment were also dealt with in conventional terms. However, superimposed on this conventional payment regime were two further Clauses viz 23.6.4, dealing with "interim statements of account" ("ISA's") and 23.6.5, dealing with "a final statement of account" ("FSA"). Again, in view of the significance which these Clauses assumed during the course of evidence and argument, I set them out in full –

> 23.6.4 [Mace] will issue to [Hurst] interim statements of account which will detail all instructions issued to [Hurst] which will entitle [Hurst] to an adjustment to the Trade Contract Sum under the terms of this Trade Contract. [Hurst] will value the interim statements of account and shall return the interim statements of account within seven days of receipt to [Mace] accompanied by all necessary information, measurements and calculations in substantiation thereof. Following agreement by [Mace] [Hurst] will be required to signify his agreement and acceptance of the final valuation of the Instructions detailed in the interim statements of account.
>
> 23.6.5 Either before or within 28 Working Days after completion of the Trade Contract Works, [Hurst] shall send to [Mace] all further documents necessary for the purposes of the final measurement and valuation of the Trade Contract Works which will be completed within [one month following completion of the Trade Contract Works]. A final statement of account for the Trade Contract Works shall be provided to [Hurst] by [Mace] and [Hurst] shall signify his agreement by signing and returning such statement within seven days of receipt thereof and such signature shall be conclusive evidence that the amounts shown therein are accepted by him in full and final settlement of the amount of the Trade Contract Sum.

Paragraph 7 of the Annex to the Trade Contract contained further provisions relating to the matter of "accounting in connection with the works". Paragraph 7.1 stated that interim application dates would be monthly on dates stipulated by Mace. Hurst would receive a disk in Excel 7.0 containing all data required "To submit application and agreed works carried out" (sic). Paragraph 7.3 consisted of a detailed schedule of application and payment dates, column 2 of which set out the application dates stipulated by Mace. Paragraph 7.2 provided further in relation to ISA's in the following terms –

Interim Statement of Accounts

[Hurst] is to return on a monthly basis priced Interim Final Accounts (in the format and using the forms supplied by [Mace] which schedules instructions issued to [Hurst]. Supporting details of the sum claimed in respect of any instruction issued are required within 5 working days of given instruction. Monies will be deducted if this process is not rigorously adhered to.

A cash flow should be submitted with each application, which reflects anticipated value of all future applications.

The ISA Forms which Mace supplied contained the following wording on the last page:

> We have examined the above Interim Statement of Account and we agree:
>
> The items shown represent a complete list of instructions issued to us under our Trade Contract at the current date.
>
> The values shown represent the full and final value of all the work so instructed and nothing further remains to be charged against them.
>
> The total for the list represents the full and final value of our contract works at the date of his statement.
>
> Current ISA total £[ ]
>
> Specified Excepted Items……..

17. Clause 32 of the Trade Contract dealt, inter alia, with a number of general matters. These included Clauses 32.3 and 32.5 which provided –

Variation and Waiver

This Trade Contract may not be varied except by an agreement in writing signed by the parties. No waiver by either party of any default by the other shall operate or be construed as a waiver of any other or further default whether or not of a similar nature.

Complete Trade Contract

This Trade Contract constitutes the complete understanding of the parties concerning the Project and supersedes all prior negotiations and agreements (written or otherwise) between them.

THE 27th April 2001 Document

18. At this point it is convenient to introduce the 27th April 2001 Document. (Bundle 1, pages 230 to 239 or with other accounting documents in sequence at bundle 10, pages 156 to 165). It was produced by Mace and dated 26th April 2001. The title given to it by the Adjudicator, which I have adopted, derives from the date placed on the document by Mr Mell alongside his signature. Although the document contemplated that it would also be signed by someone on behalf of Mace, this was not done. Formal admission of this fact came at paragraph 60 of the written closing submissions where Mr Darling stated that MLEP accepted that this was so.

The 27th April 2001 Document was a variant of the monthly ISA statements contemplated by Clause 23.6.4 of, and Paragraph 7.2 of the Annex to, the Contract (see paragraph 16 above). It showed CMIs 1 to 474 with computer generated ticks against each entry in the "Agree? Value" column for CMIs 1 to 399 and unticked "0.00" entries for each of CMIs 400 to 474. The intended significance of the computer generated ticks as part of the interim contractual accounting procedures is explained at paragraph 25 below.

The 27th April 2001 Document differed from the monthly ISA statements in two significant respects. First, the bold headings at the top of each page were changed; the word "final" was substituted for "interim" in the typescript; the word "draft" was added to the typescript but it was crossed through in manuscript and the words "Stage 1" were added in manuscript. Secondly, in place of the standard wording which was included as the last page of each of the monthly ISAs (see paragraph 16 above for the text of this) there was a very obviously different last page for this document. It read:

Total of Final Account	3,445,815.06
Less total of sums previously paid to the Trade Contractor	2,839,960.90
THE FINAL PAYMENT payable to the Trade Contractor	£605,854.16

In consideration of the agreement that final payment is to be made by the Client, we hereby agree that payment to us of THE FINAL PAYMENT will be accepted by us in full and final settlement of all our claims (other than claims in respect of Value Added Tax) arising out of or in connection with the Trade Contract Works which have accrued up to and including the date of this statement.

We agree that nothing contained in this statement shall relieve us of any of our obligations pursuant to the Trade Contract including, but not limited to, our obligations set out under clause 8 ("Practical Completion and Defects Liability") of the Trade Contract.

We agree that, notwithstanding the provisions of the Complete Trade Contract clause (clause 32.5) of the Trade Contract, the instructions listed in this statement (whether agreed before or after the date of the Trade Contract) form part of the contract between the Client and the Trade Contractor in relation to the Trade Contract Works.

If any instructions are issued to us under the Trade Contract after instruction Nr 399 which entitles us to an adjustment to the Final Contract Sum, we reserve our rights to seek such an adjustment in accordance with the terms of the Trade Contract.

We hereby agree to the value of the adjusted Trade Contract Price as shown above.

Mr Mell routinely signed and dated the monthly interim statements for Hurst and, as I have already said, he signed the "Final Statement of Account….Stage 1" giving the date "27.04.01" alongside his signature. At paragraph 21 of the Particulars of Claim Hurst allege that Mace's Mr Rumsey gave that document to Mr Mell who "did not read and/or paid [it] little attention….. proceeding on the basis that it merely reflected….. agreements [already reached between the two of them]".

EVIDENCE

19. Hurst called Mr Michael Grant and Mr James Mell to give evidence. During the course of closing submissions I was told that Hurst and MLEP had agreed that I should be supplied with a transcript of their evidence. This was done and I have had the advantage of reading through the transcript (which is generally accurate but there are some errors and/or omissions) as well as being able to make my own assessment of the witnesses, having seen them and heard them cross-examined. They were the only witnesses and gave evidence. At the close of Hurst's case Mr Paul Darling QC (Counsel for MLEP) said that MLEP elected not to call evidence. Arising therefrom two points should be noted –

(1) Mr Darling invited Mr Marcus Taverner QC (Counsel for Hurst) to consider whether he wished to put in, as hearsay evidence, any of the five witness statements which MLEP had served – see CPR 32.5(5). Mr Taverner stated that he did not; and

(2) prior to hearing oral closing submissions I confirmed with Mr Darling that MLEP understood that it was put to its election whether or not to call evidence.

Accordingly, I now have to consider whether, by the evidence which is before me (including the "Statement of Facts" at Bundle 1, pages 38 to 42 insofar as it records agreed facts) Hurst has established its case on one or more of the issues raised in these proceedings – see generally CPR 32.1.6 and in particular the observations of Mance L.J. in **Miller –v- Cawley** [2002] EWCA 1100 at paragraph 11.

20. In its closing submissions MLEP expressly and implicitly criticised some

aspects of Mr Grant's evidence (e.g. it was submitted that there was no satisfactory evidence provided by Hurst of the circumstances in which Mr Mell's authority was conferred on him; and it was submitted that there were no discussions which limited Mr Mell's authority – see paragraph 18 of the written closing submissions) but he was not personally criticised.

In contrast, in those same submissions, MLEP expressly criticised Mr Mell who was said to be a "deeply unsatisfactory witness" – see paragraph 30 of the written closing submissions. MLEP submitted that his evidence was of "little value" because he could recollect so little of the events of early 2001 apart from that which could be reconstructed from contemporary documents; because of his inability to give fluent/articulate answers on some matters (e.g. the meaning of the term "cut-off date" in his letter of 12th January 2001); and, because of significant discrepancies between parts of his statement(s) made in the adjudication and his witness statement in the present proceedings – see in particular, paragraphs 30, 31, 33, 35 and 38 of the written closing submissions.

I do not accept the personal criticisms of Mr Mell and I did not find him to be an "unsatisfactory witness". In my judgment, he was an honest witness, entirely lacking in guile who did his best to recollect what had happened in the early months of 2001. Without the aid of contemporary documents he was unable to recollect the sequence of events and, even with the assistance which they gave, he did not pretend to have a detailed recollection of the discussions which he had had with Mace's Mr Rumsey. He could, however, be sure that certain things were not raised by Mr Rumsey at any time during the discussions which took place between January and April 2001 and, as to that, I believe his memory is reliable – had these matters been raised not only

would they have stuck in his memory but, more importantly he would have acted differently at the time; most significantly, I think he would have informed Mr Grant and involved him in the ongoing process.

The chronology to which Mr Mell testified was supported by the contemporary documents and it was obviously correct – that which had been given in the witness statement which he signed in the adjudication was equally obviously misleadingly truncated. I do not think that Mr Mell had the contemporary documents in mind when he made his earlier statement. Insofar as MLEP drew attention to the wording of paragraph 5.1 of Mr Mell's witness statement of 29th January 2003 and contrasted it with that to be found at paragraph 25 in his adjudication witness statement of 11th January 2002, I do not believe that Mr Mell's unaided recollection had changed over the course of the year. I do not think that the personal criticism levelled at him in cross-examination and in closing was justified. To my mind, paragraph 5.1 of the witness statement was carefully drafted to keep open a possible line of defence and, from paragraph 38 of MLEP's written closing submissions this was something which was well understood. I am sure that Mr Mell did not personally decide on the phraseology used but, when shown the draft, he saw no reason to object and was content to adopt it.

21. Given MLEP's election not to call evidence, I do not know whether Mr Rumsey has a better, and possibly different, recollection than Mr Mell has of the discussions which they had in the early months of 2001 and I have not heard anything of events which took place internally, within Mace or between Mace and MLEP between 9th April 2001 and 27th April 2001. I draw attention to this latter point because, notwithstanding the inclusion of a "Statement of Truth" (signed by MLEP's

project director) at the end of the Defence, factual allegations made therein do not prove themselves at the trial of the action. Unless a factual allegation made in the Defence has been admitted (in the Reply), formally agreed in the Statement of Facts (Bundle 1, pages 38 to 42) or accepted by Hurst during the trial (e.g. because it is apparent from a disclosed document), evidence must be called to prove what was alleged. Specifically, I have in mind allegations made at paragraphs 21 and 25 of the Defence (cited at paragraph 10 above), most particularly those at paragraph 21. There MLEP alleges that, after the meeting between Mr Rumsey and Mr Mell on 9th April 2001 ─ the meeting itself being an agreed fact (see paragraph 22 of the Statement of Facts) ─ Mr Rumsey prepared a Change Request for MLEP to agree his recommendation for the final account value and that the Change Request was approved by MLEP prior to his preparing [the document which Mr Mell was to sign on 27th April 2001] ready for endorsement by MLEP. Hurst did not admit any of these allegations in its Reply and I was informed during the trial that no documents evidencing and/or supporting them had been disclosed. In the absence of any such disclosure, Hurst did not accept any of these alleged facts and I note that, in the absence of evidence these allegations remain unproven.

FACTS/FINDINGS

22. A number of uncontroversial facts have already been set out above. Here I set out my findings in relation to unadmitted and/or controversial matters which are (or may be) relevant to the issues I have to decide. I begin with the positions/status and/or authority of Mr Grant and Mr Mell. In my judgment, their respective positions and authorities are clearly stated in the Organisation Chart and the accompanying "further details" which, in their final form, were faxed to Mace on 8th December 1999 (Bundle 1, pages 106 to 109).

Mr Grant was a director of Hurst and he was notified to Mace/MLEP as the Account Director with overall responsibility for the project. He had full authority to act for Hurst in all matters, including if it were to arise, agreeing on Hurst's behalf to a variation to the terms of the Trade Contract and signing the necessary written agreement (see Clause 32.2 cited at paragraph 17 above). In my judgment the fact that Hurst notified Mace in July 2000 that Mr Grant was one of the authorised contract signatories neither enhanced nor detracted from the authority which he would have as a director of the company in any event and/or the general authority which the company had specifically conferred on him in relation to this particular project and notified to Mace/MLEP.

Turning to Mr Mell, he was a freelance Project Manager who had previously been engaged by Hurst on other jobs. His intended/actual employment status was not notified to Mace – and, in my judgment, there was no reason why it should have been. This was a matter of indifference to MLEP. When the Trade Contract was being negotiated, Mace were informed (by what was said in the Organisation Chart and the

"further details") that, if awarded the contract, Hurst intended that Mr Mell would be its Project Manager. He was to be site based and he was to be responsible for successful execution of the project. His position was described in the "further details" document which accompanied the Organisation Chart –

> **"<u>Jim Mell, Project Manager</u>**
>
> Jim will be based on site and will be responsible for the successful delivery of the project to the specified quality, in accordance with the programme and within budget constraints, and for producing method statements in accordance with Health and Safety requirements.
>
> He will be team leader and chief point of contact with Mace…**"**

I agree with Mr Darling's submission that it is also relevant to note the functional description given for the Quantity Surveyor in the same document –

> "**<u>Quantity Surveyor</u>**
>
> One of our Quantity Surveying staff will be allocated to this project **to assist Jim Mell**. He will be head office based with site visits."
>
> (my emphasis)

After Hurst was awarded the contract, terms of engagement were agreed between Hurst and Mr Mell. Mr Mell was engaged as Hurst's Project Manager from the intended commencement of the Trade Contract works. In my judgment, the extent of his authority as Project Manager for this project was stated in the Organisation Chart and the accompanying "further details" and/or it is to be deduced from the statements made therein (read in the context of the Trade Contract as a whole).

I do not accept the plea at paragraph 7 of the Defence that Mr Mell "… was furnished with all the powers and responsibilities **traditionally held by a Project Manger**" or the further plea at paragraph 42 of the Defence that Mr Mell "……. was clearly held out as having been appointed by his principal [Hurst] to carry out **the duties of a**

project manager" (my emphasis). In my judgment, the title "Project Manager" does not, of itself, confer any particular extent of either power or responsibility; it is necessary to look at the particular facts of the particular case to see what authority has been given to a person with the title "Project Manager". When that is done in this case, I agree with the summary which appears at the end of paragraph 7 of the Defence - Mr Mell had "express and/or implied power to deal [on Hurst's behalf] with all matters concerning progress and payment **under the Trade Contract**" (my emphasis). He was Hurst's team leader and its chief point of contact with Mace; insofar as the extent of his authority was not expressly stated, it was implicit (given the details of his rôle and the stated fact that the Head Office based quantity surveyor would be **assisting him**) that he had full authority to act for Hurst, in respect of the financial aspects of the Trade Contract viz. all accounting requirements and all payment matters **required by the terms of the Trade Contract**, as well as being responsible for the proper execution of the Trade Contract Works **in accordance with the terms of the Trade Contract**.

In my judgment, the emboldened words in the previous paragraph are crucial. Mr Mell was not engaged by Hurst to act generally on the company's behalf in the management of its business nor did anyone with actual authority to manage Hurst's business (e.g. Mr Grant) hold him out as having that authority. Mr Mell was engaged by Hurst to act on the company's behalf in the management of a particular project undertaken on contractual terms agreed between MLEP and Hurst. It is well established that, persons engaged by a contracting party to act on its behalf in the fulfilment of a contract, are not to be taken to have power to vary the terms of the contract – see **Sharpe v San Paulo Railway Company** (1873) LR 8 Ch App 597 where the extent of the authority of the Railway Company's engineer-in-chief in

relation to the construction of a railway in Brazil was considered. The point was succinctly dealt with by Lord Romilly M.R. at page 605, where he contrasted the engineer's power to give directions "within the limits of the contract" with his inability to vary the contract itself. Of course, a power to agree to vary some or all of the contract terms might be expressly given to a particular Project Manager in a particular case but, in this case, when Mr Mell's job description is examined no such power was expressly given to him and I cannot see any possible basis for its implication. Clause 32.2 of the Trade Contract provided for variations to the terms of the Trade Contract to be written and signed by the contracting parties; a director of the company, Mr Grant, was actively involved with the project and he was notified to Mace/MLEP as the person with overall responsibility for it; it was Mr Grant, not Mr Mell, who had a general authority to act for the company in the management of its business.

23. During evidence and in argument I was referred to a "contract procedures" document which Mr Grant had prepared for Hurst's use from 10th November 1997 onwards. However, this was not a document of which either Mr Mell or Mace had knowledge in 2000 and 2001 and, I do not consider that either its existence or its contents has any bearing on any of the issues I have to decide. In its Defence, MLEP had noted that Mr Mell was one of Hurst's two "key personnel" for the purpose of the Trade Contract. I have noted at paragraph 12 above what Clause 4.10 of the contract provided in respect of such persons. I accept with Mr Taverner's submission that Mr Mell's designation as one of the "key personnel" does not connote any particular degree of authority nor can it enhance the authority otherwise given to Mr Mell as the Project Manager for this particular project.

24. In evidence, both Mr Grant and Mr Mell said that Mr Mell was not authorised to deal with delay and disruption claims.

Looking at Clause 20.3 (see paragraph 14 above) Mr Mell said that he had authority to deal with the assessment of the labour plant and materials value (i.e. Clause 20.3.1) and, had it arisen, to provide other information which Mace might require (i.e. Clause 20.3.5). He said that he was not authorised to deal with time and/or disruption issues (i.e. Clauses 20.3.2, 20.3.3 and 20.3.4) – Transcript 45/40-49. He was asked if he had ever informed Mace of his authority was so limited. He said he had not; the issue "never raised its head" – Transcript 45/50 to 46/4. I have no hesitation in accepting that last part of his evidence. Earlier, Mr Grant had explained that Mr Mell had estimating experience but he had no experience of dealing with loss and expense claims. Looking at Clause 20.3 he said that whilst Mr Mell was able to value CMIs involving variations on the basis of the contract rates as required by Clause 20.3.1, he would not have been able to deal with the assessment required by Clause 20.3.4. However, in Mr Grant's view, Mr Mell's authority was more extensive than Mr Mell himself thought it was. In Mr Grant's view Mr Mell was authorised to deal with the time issues addressed in Clauses 20.3.2 and 20.3.3 as well as the assessment of value required by Clause 20.3.1 – Transcript 6/31 to 13/19.

Mr Grant said that he thought MLEP and Mace were aware of the limitations on Mr Mell's authority – Transcript 13/42 to 46 – but, when the basis for that statement was explored, it became apparent that Mr Grant was unable to support it. Not only did the terms of the Organisation Chart and the accompanying "further details" go against the suggestion but, when the sequence of events leading up to the issue of CMI 288 was examined in some detail and when the pricing of CMI 177 was reviewed, it became

obvious that, so far as Mace was concerned, Mr Mell was the person dealing with all aspects of the pricing of these proposed additional works on behalf of Hurst. Mr Mell appears to have been personally involved in calculating the extended "preliminaries" of £233,462.90 which formed part of the agreed value of CMI 288 (see particularly the letter of 6th September 2000 at Bundle 1, page 149 and Mr Mell's evidence – Transcript 47/10 to 43, 67/1 to 68/29 and 70/23 to 72/3) and he was also involved in calculating the direct disruption costs claimed for unproductive time when CMI 177 was priced (see Bundle 10, pages 129 and 130, Transcript 60/39 to 45 and for further details see paragraph 27 below). These examples demonstrate very clearly that, in their evidence, both Mr Grant and Mr Mell were misunderstanding the nature and extent of Mr Mell's authority. The fact that he needed to and/or was expected to consult internally if and when time or disruption issues arose whereas he was well able to deal with pricing by reference to established contract rates without needing to and/or being expected to consult internally, did not mean that he lacked authority to act, so far as Mace/MLEP was concerned, on Hurst's behalf. In my judgment, whatever may have happened internally within Hurst (e.g. assistance provided to Mr Mell and/or approvals given by Mr Grant) had no impact of any sort on the ambit of the authority conferred on him as Project Manager – see paragraph 22 above.

25. The operation of the interim contractual accounting and payment mechanism, throughout 2000 and into 2001 was described by Mr Grant and Mr Mell during the course of evidence - Transcript 32/21 to 33/33, 47/45 to 50/19 and 55/35 to 57/33. Any month could have been taken as an example but Mr Darling selected the documents relating to March 2001, which were dealt with in April 2001 – see Bundle 12, pages 166 to 189. As envisaged by Clause 23.6.4 of the Trade Contract, the process began on 6th April 2001 when Mace wrote to Hurst (Mr Mell) enclosing an

ISA which listed all the CMIs issued to date. CMI 1 stated the original Trade Contract Sum of £2,397,884.17. Many of the CMIs had a typescript "0.00" valuation. A comparatively small number of the CMIs had a typescript value (either positive or negative) shown against them. A computer generated tick against the value shown for the CMI indicated that this value had previously been agreed between Hurst and Mace. When forwarded to Hurst, the ISA did not contain any manuscript figures, comments or ticks. These were added by Mr Mell to indicate the following –

- a sum was stated against a CMI with a stated "0.00" value but no computer generated tick if Hurst claimed that sum as the value of the CMI.

- "to follow" was stated against such a CMI if Hurst intended to claim that it should be valued but Mr Mell did not yet have a figure to put forward.

- a manuscript tick was placed against the stated "0.00" value of such a CMI if Hurst was prepared to agree that any action required by the instruction did not require any adjustment to the Trade Contract Sum.

26. When cross-examined, Mr Grant was asked about the significance of the ticks on the ISA Forms – Transcript 32/21 to 50. He said that he understood that a computer generated tick meant that agreement had been reached on the value of the CMI. He was prepared to agree with Mr Darling's suggestion that, once agreement had been reached the figure was something which was finally established for contractual purposes. The exchange between Mr Darling and Mr Grant was –

> Mr Darling Was it your understanding that, once that agreement was reached, the figure was therefore final?

Mr Grant	In respect of that particular CMI, yes.
Mr Darling	So you were aware of, and operating on the basis of, something being finally agreed. Whatever it was that was being agreed, the agreement was final?
Mr Grant	The price for carrying out the CMI was agreed. That's my view.
Mr Darling	And was therefore final. You could not come along and say it should be more. Mace could not come along and say it should have been less?
Mr Grant	Yes, that's correct.

(Transcript 32/40 to 50)

This finality point was also considered in cross-examination, by reference to the standard wording which was to be found on the last page of each of the monthly ISA statements, which I have set out at paragraph 16 above. Mr Darling drew Mr Grant's attention to the middle paragraph – "The values shown represent the full and final value of all the works so instructed and nothing further remains to be charged against them" – and invited his agreement to the proposition that an agreed value would include any entitlement which Hurst might have to "direct disruption costs" under Clause 20.3.4 of the Trade Contract. Mr Grant did not agree. In his view, under the system which Mace adopted for dealing with CMIs, disruption costs were not included in the agreed values – Transcript 31/43 to 32/10.

27. These issues were explored further with Mr Mell when he was cross-examined. He was questioned about CMI 177. This CMI was dated 1st June 2000. It required the incorporation of disabled toilets within certain locker rooms. An agreed value of £8,324.28 had been established. This first appeared as one of Mr Mell's manuscript additions to the ISA dated 2nd June 2000 (Bundle 12, page 433) and it was incorporated by Mace into the typescript of the ISA dated 10th July 2000 with a computer generated tick beside the figure (Bundle 12, page 413). It was then included in each monthly ISA thereafter and, given the suggestion of "finality" (put to Mr

Grant and accepted by him) this figure should simply have continued to be shown on the monthly ISAs and, in due course, been shown as part of the FSA – see Clause 23.6.5 of the Trade Contract at paragraph 16 above.

The figure of £8,324.28 was the amount shown in Mr Mell's letter dated 25th May 2000 (Bundle 10, pages 129 and 130). What, to my mind, is self-evidently the Clause 20.3.1 valuation which Mr Mell said he "put together", was £3,646.24 for the work involved in each of the two disabled toilets required plus £172.00 for the additional design work i.e. £7,464.48 in total. In addition, Hurst claimed £860.00 for the unproductive time involved in relation to one of the two areas where this work was required. To my mind, this part of the quotation was a claim for "direct disruption costs" covered by Clause 20.3.4 of the Trade Contract. Mr Mell explained that the £860 was the charge proposed for 40 hours of actual unproductive time rather than an advance assessment of the likely unproductive time which would be involved – Transcript 60/3 to 49.

28. CMIs 177 and 288 were the only ones where the make up of the agreed value shown on the ISA Forms was explored at the trial. CMI 177 included a figure for "direct disruption costs". CMI 288 included a figure for the additional preliminaries costs which were agreed between Hurst and Mace to cover the extended contract period shown on the programme produced by Mace in August 2000 – Transcript 47/1 to 33 and see also paragraph 3 above and Bundle 1, pages 149 to 153. The justification for these sums is to be found in Clauses 20.3.3 and 20.3.4 of the Trade Contract (read together with Clause 17). In his witness statement Mr Mell stated that the value agreed for CMI 51 also included a sum for additional preliminaries. He said this had been agreed by others on behalf of Hurst and Mace prior to January 2001.

This part of his evidence was not explored/challenged in cross-examination but, the make up of the additional preliminaries of £11,000 which were included in the value of CMI 51 is apparent from the documents and I have dealt with this at paragraph 3 above. I have not attempted to find the make up documents relating to other CMIs – they are probably somewhere in the voluminous documentation (originally prepared for the adjudication) which was placed before the Court – to see if any of the other values included sums in addition to a Clause 20.3.1 valuation of the work involved. I do not think this matters. In my judgment, consideration of CMIs 51, 177 and 288 is sufficient to illustrate the principles, which are:

(1) contrary to Mr Grant's stated view, an adjustment to the Trade Contract Price, made in respect of varied work (whether agreed in advance as Clauses 20.3.3 and 20.3.4 envisaged or agreed at some later time), was required to take into account additional preliminaries costs (most significantly time related additional costs if a time extension was agreed to necessary) and "direct disruption costs" (whether estimated in advance or computed after the event), as well as the measured value of the works;

(2) the quotations put forward by Hurst for these CMIs demonstrate that the point made at (1) above was in fact understood by Hurst in 2000;

(3) the variation pricing code set out in Clause 20.3 of the Trade Contract must be read in context. In particular, it must be read together with Clause 17 of the Trade Contract which, in appropriate circumstances, would allow Hurst to claim loss and expense arising from some cause(s) other than the requirement to carry out varied work. In other words, claim(s) based on events covered by Clause 17.3.4 happening

after the variation had been instructed were not excluded (nor was the amount claimable restricted) because agreement had been reached on the adjustment to be made to the Trade Contract Price in respect of the work itself.

29. Returning to Mr Mell's marking up of the ISA Forms supplied to him at monthly intervals, once he had marked up all the items which had not previously been agreed, he calculated his figure for the "current ISA total". He substituted his figure for that which Mace had stated and he signed and dated the ISA Form (Bundle 12, page 176). At the same time as he dealt with that on-going accounting exercise, he also prepared the "Trade Contractor Application for Payment" (Bundle 12, page 177). To arrive at the payment which was to be claimed, it was necessary to assess the progress that had been achieved in respect of each area of the original Trade Contract Works and the progress that had been achieved in respect of each of the additional works covered by a CMI – to do this percentage assessments were applied to the agreed contract values or, where there was no existing agreement, to Hurst's estimated contract value. Hurst also calculated a figure for the value of "materials on site". The working documents which supported this particular application for payment are at Bundle 12, pages 178 to 189. Once Mr Mell had marked up the ISA and prepared the Application for Payment, he would put them in an envelope and leave it in Mace's site correspondence tray for Mr Rumsey to collect. That was the end of Mr Mell's involvement with the accounting and interim payment process – paragraph 2.4 of his witness statement at Bundle 1 page 63 and Transcript 57/18 to 30. Copies of these documents, for which Mr Mell had responsibility were kept on site and not sent to Hurst's head office.

The interim payment certificates issued by Mace after Hurst's application had been

considered were generally sent direct to Hurst's head office for Mr Grant's attention. The invoice, addressed to MLEP, was prepared at Hurst's head office. That invoice was sent to Mace who authorised payment and forwarded it to MLEP. BACS payments were made by MLEP to Hurst – Transcript 21/16 to 22/27 see e.g. Bundle 12, pages 374, 392 and 393.

30. In view of disagreement as to the nature of the "one-off" accounting exercise which was undertaken by Mr Rumsey and Mr Mell between January and April 2001, I think it useful to note the financial position shown on the returned ISA Forms, and in the back up documents to the "Trade Contractor Applications for Payment" that were current at the time i.e. the December ISA which was issued by Mace on 30th November 2000 and returned by Hurst on 8th December 2000 together with the Trade Contractor Application for Payment No 37 (Bundle 12, pages 278 to 300 – particularly pages 290 and 293 to 300) and the January ISA which was issued by Mace on 5th January 2001 and returned by Hurst on 15th January 2001 together with the Trade Contractor Application for Payment No 38 (Bundle 12, pages 245 to 277 – particularly pages 246 to 253, 266 and 269 to 277). These documents show that the vast majority of the CMIs listed – a total of 354 CMIs were listed in the December ISA and a total of 373 CMIs were listed in the January ISA – had an agreed "0.00" value.

Twelve CMIs were shown in each of these ISAs with agreed monetary values; in the January ISA, a thirteenth CMI – CMI 331 – was added to the list of those where the value was agreed because Mace accepted a figure which Mr Mell had stated on the December ISA. The CMIs where the value was agreed were –

CMI No.	Brief Description	Agreed Value (£)
1	Appointment of Hurst	2,397,884.17
58	Certain screeding works	7,569.90
97	Additional ironmongery	3,217.09
98	Saving (soap dispensers)	(1,587.20)
106	Telephone charges to Hurst	(260.56)
165	Saving (changes to Specification)	(5,300.00)
168	Addition (changes to Specification)	2,241.45
176	Saving (changes to Specification)	(31,059.00)
177	Addition (disabled toilets)	8,324.48
273	Addition (stainless steel mirror surrounds)	2,163.00
282	Addition (drylining works)	1,160.44
288	The major additional works	832,631.45
331	Addition (alterations to lockers/ showers)	12,450.30

In addition, a number of CMIs were shown as having unagreed "0.00" values. As would be expected the latest CMIs, which were featuring on the ISA Form for the first time, were shown with such unagreed "0.00" values and these can largely be ignored. CMI 274 can also be ignored - here the lack of a computer generated tick appears to have arisen either from an error, or from uncertainty on Mace's part as to the meaning of Mr Mell's earlier observations. CMI 51 which Hurst had priced at £159,110.65 appears in this list. As I have said at paragraph 3 above, this CMI concerned the reinstatement of a Gym Changing room. It was dated 28th February 2000 and the price had appeared in Mr Mell's manuscript on face of the ISA dated 2nd June 2000 (Bundle 10, page 431). If what Mr Mell said about this CMI in his witness statement was correct (see paragraphs 3.2 and 3.3 at Bundle 1, page 64) this figure should have appeared in typescript in both the December 2000 and January 2001 ISA Forms with a computer generated tick beside it. The only other point that need be noted in respect

of the twelve of these unagreed "0.00" value CMIs that fall to be considered in this litigation, relates to the two of these CMIs which appeared for the first time in the December ISA, CMI 331 and CMI 333. These were priced by Hurst in Mr Mell's manuscript - CMI 331 at £12,450.30 and CMI 333 at £19,290.37 As I have said above, when Mace issued the January ISA the value for CMI 333 was shown to be agreed. The twelve CMIs that need to be considered are:

CMI No.	Brief Description	Mr Mell's Value (£) or Comment
51	Reinstatement gym changing room	159,110.65
108	Additional walls	2,106.78
140	Plasterboard linings	27,908.00
209	Additional wash hand basin	to follow
210	Mosaic floor sample	1,082.00
233	Return of submittal	to follow
248	Screed shuttering	562.00
249	Remedial works to openings	to follow
263	Stop ends to screeds	3,852.20
285	Installation of rebate kits	2,701.75
289	Additional screeding	800.00
333	Variations – Executive Area	19,290.37

The figures or comments for all these CMIs up to and including CMI 289 had all been established by September 2000. They were repeatedly included on the returned ISA Forms and used in the payment application calculations (see e.g. Bundle 12, pages 336 to 341 and 352).

31. Some time early in January 2001, there was a conversation between Mr Rumsey and Mr Mell which resulted in Mr Mell preparing a document which he

entitled "Final Account" which he sent to Mr Rumsey under cover of a letter dated 12th January 2001. At paragraph 18 of the Particulars of Claim Hurst alleges that "…. Mr Rumsey ….. asked Mr Mell if it would be possible to agree a figure for labour, plant and material costs for CMIs 1 – 399 which [Hurst] was in the process of carrying out". MLEP denied this version of the conversation. At paragraph 14 of the Defence, cited at paragraph 10 above, MLEP alleges that Hurst was asked to prepare a draft final account which was to include "all sums/claims owing to [Hurst] up to a given date". No record of the conversation (if any was made) has been produced by either Hurst or MLEP. Mr Mell's evidence did not support all the facts alleged by Hurst at paragraph 18 of the Particulars of Claim. In particular, Mr Mell's evidence did not support a request which specified CMI 399 as the last of the CMIs that was to be dealt with as part of a proposed accounting exercise and, for reasons that will become apparent, in my judgment the initial request must either have specified an earlier CMI number or been couched in a less precise way. I have not heard evidence from Mr Rumsey in support of MLEP's pleaded case but it was fully explored with Mr Mell in cross-examination.

I turn to the letter which Mr Mell wrote in consequence of the conversation. The letter read:

> "Further to our discussions we herewith enclose draft final account in respect of the above.
>
> The cut off date is still to be agreed.
>
> I trust that the information provided meets with your approval."
>
> (Bundle 1, page 185A)

The enclosed "Final Account" was a simple document which read:

Merrill Lynch Financial Centre

Toilet fit-out

Package 4200

FINAL ACCOUNT

CMI No. 1 Original Contract Value		2,397,884.17
CMI No. 51		159,110.65
CMI No. 58		7,569.90
CMI No. 97		3,217.09
CMI No. 98	1,587.20	
CMI No. 106	260.56	
CMI No. 108		2,106.78
CMI No. 140		27,908.00
CMI No. 165	5,300.00	
CMI No. 168		2,241.45
CMI No. 176	31,059,00	
CMI No.177		8,324.48
CMI No. 209		TO FOLLOW
CMI No. 210		1,082.00
CMI No. 233		TO FOLLOW
CMI No. 248		562.00
CMI No. 249		TO FOLLOW
CMI No. 263		3,852.20
CMI No. 273		2,163.00
CMI No. 274		SEE CMI No. 288
CMI No. 282		1,160.44
CMI No. 285		2,701.75
CMI No. 288		832,631.45
CMI No. 289		800.00
CMI No. 331		12,450.30

CMI No. 333			19,290.37
Totals		38,206.76	3,476,822.18
			38,206.76
			3,438,615.42
Additional Items, Requiring CMIs			
1.00	Ceiling Height Reductions		825.00
2.00	Additional walls Disabled West Core 3 Levels		486.18
3.00	Ground Out wall West Building 3 levels		729.27
4.00	Wall reinstatement Level 1 – 4 East Core		2,176.000
Total to Final Account			**£3,442,831.87**

(Bundle 1, pages 185B and 185C).

When this "Final Account" is compared with the December 2000 and January 2001 ISA Forms, it is apparent that Mr. Mell had done nothing more than list, in numerical order, the CMIs which had had values attributed to them (either agreed values or a Hurst value), the CMIs where the words "to follow" had been included and, in the case of CMI 274, where it had been indicated that its value was included in CMI 288. The only additional and possibly new information shown was that given below the list, where Mr Mell noted four further items which were said to require CMIs.

32. The explanation for the production of these documents given by Mr Mell in his witness statement was, that he had been approached by Mr Rumsey:

> "…..who asked whether it would be possible to agree a cost for a number of the CMIs. Whilst there was no particular need for me to do this whilst they were being dealt within the interim applications, I did appreciate that Mace were faced with the task of doing this with numerous other trade contractors and therefore it would be of assistance to them if we could tie up these items. It was certainly of no disadvantage to [Hurst] and it was my understanding that David Rumsey was to leave the Project at some stage and certainly it was to Mace's advantage that someone with first-hand knowledge was able to deal with this ….

> At Mr Rumsey's request, I submitted a document to Mace headed "draft Final Account" on 12 January 2001. It was clear that the document could not be a "final" account given that we were still on site and so intervening events could effect our actual carrying out of the works. Further, there were further CMI's to price which would be included in the final account. **However, the document was what could be described as the first element of the final account as it finalised the cost to carry out CMI's 1 to 399 in terms of labour, plant and material together with the additional preliminary costs agreed within CMI's 51 and 288.**
>
> (paragraphs 3.1 and 3.5 of Mr Mell's witness statement – my emphasis)

Apart from the erroneous reference to CMI 399 rather than CMI 333 in paragraph 3.5 of the witness statement, the last sentence of this paragraph conveniently encapsulates one of the essential submissions which Hurst makes. The description given by Mr. Mell to the sum of £3,442,831.87 at which he had arrived as "**Total to Final Account**" is consistent with his believing that the exercise being undertaken was that described in this final sentence. Certainly, at the start of the exercise it does not appear to have registered with Mr. Mell that he was embarking upon an accounting exercise of a markedly different kind to the consideration he had had to give each month to the value of the CMIs in order to complete the ISA Form.

Although Mr Grant was the senior representative of Hurst with whom Mace/MLEP had regular dealings, he stated in his reply witness statement that the concept of a "final account Stage 1" was never confirmed in writing to him nor was it ever announced at the Director's meetings that were held (paragraph 1 of Mr Grant's Reply witness statement). This seems surprising if what was being embarked upon was an accounting exercise of potential significance and of a markedly different kind to the established monthly interim accounting exercises.

33. A number of matters concerning the nature of the exercise upon which Mr Mell and Mr Rumsey embarked were explored with Mr Mell in cross-examination. On several of occasions during the course of the cross-examination Mr Mell repeated

his point that the initial discussion (and the subsequent discussions) with Mr Rumsey concerned simply valuing CMIs with the purpose of putting the CMIs, up to a certain number, "to bed" – Transcript 42/31 to 33, 43/23 and 24, 53/12 and 13 and 63/41 to 43. Mr. Mell said that at no stage in their discussions had Mr Rumsey stated that he was looking for CMIs 1-399 to be priced to include all disruption/loss and expense claims. He said that he had regarded the discussions as routine/day to day events at which values of some only of the CMIs which, in the overall context, involved only comparatively minor sums had been raised. What Mr Mell said appears to me to be consistent with what MLEP stated at paragraphs 19 and 20 of the Defence (cited at paragraph 10 above).

Mr Mell was asked why he had used the expressions "draft final account" or "final account". He said that he had done so because Mr Rumsey had encouraged the use of it – Transcript 42/35 and 36, 43/26 to 50 and 45/12 to 38 – and, at one stage, he was prepared to agree with the suggestion made to him by Mr Darling that the likely reason why he had used the expression was that Mr Rumsey had asked him to provide a final account – Transcript 61/47 to 50.

He was also asked what he had meant when he had said in his letter "the cut-off date is still to be agreed" – Transcript 50/21 to 53/13. Before I heard this part of the cross-examination, I had thought I understood this expression. Although I still believe that its meaning (objectively ascertained) is clear, it seems that Mr Mell was using language rather inappropriately; he appears to have had in mind uncertainty as to the last numbered CMI which was to be "put to bed" as part of the exercise which he was undertaking with Mr Rumsey. This uncertainty arose in his mind because it was Mr Rumsey who would call the necessary meeting(s) to carry the process forward and he

(Mr Mell) did not know when it (they) would be. I have also noted in this context that in the last sentence of paragraph 20 of the Defence MLEP refer to a cut-off date being "agreed at CMI 399" (see again paragraph 10 above). This appears to be consistent with Mr Mell's usage of the expression.

However, having noted what Mr. Mell had said in his witness statement and all that he said when cross-examined, the overwhelming impression which I had was that Mr. Mell was unable to recollect in any detail the conversation which he and Mr Rumsey had which had resulted in the letter of 12th January 2001 being written. In my judgment, the answers given by Mr Mell to the effect that, beyond being able to recall (because he had re-read his letter of 12th January 2001), that it had been preceded by some discussions he had no detailed recollection, accurately reflect the position – Transcript 53/11 to 41.

For convenience I also mention at this point that Mr. Mell was equally unable to recollect in any detail the follow-up meetings of 22nd February 2001, and 9th April 2001 and/or the explanatory letters that he wrote on 16th March 2001 and 9th April 2001.

34. Mr Mell and Mr Rumsey met to consider this "Final Account" document on 22nd February 2001. Mr Mell recollected Mr Rumsey making notes at that meeting and he was content to accept the note which is at Bundle 1 pages 96 and 97. Mr Mell made his own notes (so that he would be able to deal with matters raised by Mr Rumsey) which he did not retain after he had prepared his letter dated 16th March 2001 – Transcript 54/8 to 55/11. Beyond recollecting that they went through the "Final Account" item by item, Mr Mell recalled little of the meeting. However, to my

mind, four things are obvious from the notes themselves – first, they support Mr Mell's evidence and what is pleaded at paragraph 19 of the Defence in that Mr Rumsey and Mr Mell appear to deal only with CMI valuations – there is no apparent attempt to deal with outstanding/potential contractual claims or to obtain confirmation that none existed; secondly, it is obvious that whilst some CMI values were agreed at the meeting or it was agreed that Mace would be recommending them [presumably to MELP], others were to be the subject of further investigations by Mace or further substantiation by Hurst; thirdly, it is obvious that Mr Rumsey did not consider that previous agreement to a CMI value, as indicated by a computer generated tick on the monthly ISA Forms, prevented him from investigating (or further investigating) Hurst's prices – see the comments made concerning CMIs 58, 97, 168, 177 and 273; and, fourthly, it is obvious that Mr Rumsey did not consider that the value of CMI 51 had previously been agreed (although he was prepared to recommend the figure which Mr Mell had been consistently putting in the monthly ISA Forms and which was shown in the "Final Account" of 12th January 20012). Those last two matters may be contrasted with the suggestion made to Mr Grant in cross-examination, with which he agreed, concerning the finality of an agreement to the value of a CMI (see paragraph 26 above) and with Mr Mell's unexplored and unchallenged evidence concerning prior agreement to the value of CMI 51 (see paragraph 28 above).

35. Mr Mell wrote to Mr Rumsey on 16th March 2001 providing details/answers in respect of matters raised at the meeting he had had with Mr Rumsey on 22nd February 2001 (Bundle 1, pages 210 and 211). The details provided, apparently without protest, included details relating to previously agreed CMI values shown on the ISA Forms, where Mr Rumsey had requested these.

It was common ground that Mr Mell and Mr Rumsey met again on 9th April 2001 for

a further discussion of matters which remained outstanding from 22nd February 2001. Although the date when this important second meeting took place was agreed between Hurst and MLEP, no file note (if any was made) was produced and there was no direct evidence concerning the meeting itself. Mr Mell did not remember the date of the second meeting or any of the discussions which took place. Mr Mell simply had a general recollection that at some stage he and Mr Rumsey had decided to stop the exercise at CMI 399. He said:

> "…. My best recollection is that we stopped at CMI 399, as at the time I was not in a position to estimate the cost of CMI 400 due to lack of information on the scope of works involved. I note that at paragraph 20 of the Defence, the Defendant's state (*sic*) that it was at the meeting of 9 April 2001 that the cut off of CMI 399 was agreed. I must say that my recollection is that the cut off at CMI 399 was agreed earlier than this."
>
> (paragraph 3.7 of his witness statement)

What he said there about CMI 400 is supported by the "to follow" observation which had been included on the returned ISA Forms for February 2001 and March 2001 and, on that point, I accept his evidence. It does not matter whether his recollection concerning the timing of the decision to stop the exercise at CMI 399 is correct; it is sufficient to say that agreement on this point was reached, at latest, at the meeting on 9th April 2001.

36. Mr Mell wrote a further letter to Mr Rumsey dated 9th April 2001 (Bundle 1, pages 228 and 229). The main matter dealt with in the letter was a breakdown of the value of £5,384.00 – which Hurst wished to put on CMI 391. This CMI, which covered some additional screeding work, had first appeared on the ISA Form dated 2nd February 2001 which Mr Mell had returned on 9th February (Bundle 10, pages 216 to 224). It appears that the work covered by this CMI had been completed before the price was agreed since it was included in the Trade Contractor Application for

Payment No. 39, as being 100% complete. (Bundle 10, page 237). The same details had been included in the ISA Form dated 28th February 2001 which Mr Mell had returned on 9th March 2001 (Bundle 10, pages 201 and 205 to 214).

37. It was Hurst's pleaded case (see paragraph 20 of the Particulars of Claim) that at the February and April meetings Mr Mell and Mr Rumsey had reached agreement on the figures which were appropriate for CMIs 1 to 399 (inclusive). This appeared to be admitted at paragraphs 19 and 20 of the Defence and, in closing Mr Darling submitted that at the meeting on 9th April 2001, final agreement on the figures appeared to have been reached. However, in his further letter to Mr Rumsey dated 9th April 2001 Mr Mell had referred to "our conversation". It is not clear to me whether this was a letter prepared before the meeting, and discussed at it or whether it was a letter prepared very promptly after the meeting, as a result of a request made at it. In the latter case the agreement at the meeting must have been conditional upon Mr Mell's supplying further information which Mr Rumsey would find satisfactory. In my judgment, it does not matter whether all figures were finally agreed at the meeting on 9th April 2001 or whether Mr Mell's letter followed the meeting, with the agreement being finalised once Mr Rumsey had received it and accepted what was said.

38. Documentary support for the fact that agreement was reached prior to 26th/27th April 2001 is to be found in Mr Rumsey's annotated version of Mr Mell's "Final Account" (Bundle 1, pages 212 and 213). Mr Mell was asked in cross-examination whether this annotated version of his "Final Account" which had been placed in the Court papers immediately behind his letter of 16th March 2001 had been sent as an enclosure with that letter (Bundle 1, pages 210 to 211). He said that he did not know

– Transcript 55/16 and 17. I did not follow that answer up at the time because I thought Mr Rumsey would be giving evidence and the annotations seemed to be in the same hand as Mr Rumsey's note of the meeting of 22nd February 2001. Looking at the second page of the annotated document (Bundle 1, page 213) it is apparent that CMI 391 has been added to Mr Mell's primary list of CMIs, with a tick against the value of £5,384.00. In my judgment, the probability is that the annotations were made (or at least completed) by Mr Rumsey after he received an acceptable breakdown of the sum Hurst was claiming for CMI 391 i.e. after he received Mr Mell's letter dated 9th April 2001. The annotated document also includes what appears to be Mr Rumsey's manuscript total of £3,445,815.06. This appears beneath Mr Mell's primary list (with the figures adjusted by Mr Rumsey) and the CMI 391 value. This is the same figure that appears as the "total of final account" at the top of the final page of the 27th April 2001 Document (cited at paragraph 18 above) and, in my judgment the probability is that this annotated version of Mr Mell's "Final Account" was the working paper used by Mr Rumsey, after he had reached agreement on all the figures with Mr Mell, in the preparation of the 27th April 2001 Document.

39. There is no evidence before the Court of the events which happened between 9th April 2001 and 26th/27th April 2001. The 27th April 2001 Document appears to have been finalised (ready for signature by Hurst and Mace) at some time during 26th April 2001 because that is the date shown in the typescript on the first page. It must have been provided to Mr Mell on either 26th or 27th April 2001. In paragraph 5.1 of his witness statement, Mr Mell said that he did not remember receiving or signing the 27th April 2001 Document. When cross-examined he readily accepted that he must have signed it, because it was obviously his signature on it but he said he had no recollection of having done so – Transcript 58/14 and 52. He said at paragraph 5.2 of

his witness statement that whilst he now appreciated the significance of his having signed the document, "I must stress that at the time, this was not a significant event." Mr Mell said that he had no recollection of Mr Rumsey explaining to him that the final page of the 27th April 2001 Document was different to the final page of the monthly ISA Forms or of his explaining to him the intended effect of the document. He also said that he had no recollection of dealing with the 27th April 2001 Document after signing it. It can be seen that the agreed figures for CMIs 1 to 399 (inclusive) were all shown on the monthly ISA forms which were sent to Mr Mell on 4th May 2001 and 31st May 2001 (Bundle 12, pages 129 to 138 and 105 to 115) and that, in contrast to the position with all earlier ISA forms, his manuscript comments on those forms begin at CMI 400.

40. At paragraph 21 of the Particulars of Claim, Hurst alleged that Mr Mell "did not read and/or paid little attention to the 27th April 2001 Document" before signing it because he proceeded on the basis that it merely reflected the agreements of the values of CMIs 1 to 399 (inclusive) which he previously reached with Mr Rumsey. At paragraph 22 of the Defence, MLEP "…..noted that Mr Mell did not read and/or paid little attention to the [27th April 2001 Document]". Whereas at paragraph 46 of the Defence MLEP stated, "Mr Mell's alleged failure to read the [27th April 2001 Document] when signing is noted but irrelevant".

Mr Mell said, in respect of a statement Mr Rumsey had made – that he (Mr Rumsey) had personally handed over the 27th April 2001 Document to him (Mr Mell) – that he had no recollection of Mr Rumsey's handing him the document. He questioned whether this suggestion was correct. He wondered why Mr Rumsey would have departed from the established internal mailing system (paragraph 5.4 of his witness

statement). At paragraph 23 of the Defence, it is simply stated that the document was "provided to" Mr Mell. Given Mr Mell's lack of recollection I am not able to make any finding as to the method by which the document was provided to him.

Whilst Hurst contends that, when Mr Mell signed the document, he believed it merely reflected the agreement on CMI values which had previously been reached with Mr Rumsey, MLEP's very different view of the nature of the exercise which was undertaken and of the agreement between them is apparent from paragraphs 14 and 22 of the Defence (see paragraph 10 above). Although at paragraphs 19 and 20 of the Defence MLEP accepted that, at the meetings on 22 February 2001 and 9th April 2001 it was the value of variations that was agreed, MLEP contended that the final account which Mr Rumsey had wished to receive from Hurst was an account including "all sums/claims owing up to a given date"; and, that the whole purpose of the February and April meetings "as was known…..or ought to have been known [to Mr Mell] was not simply to agree the final value of CMIs 1 – 399 but, in addition to include all claims for additional costs as provided for by the Contract."

41. Having considered these very different views, I prefer Hurst's case. Save to the extent that I have expressly questioned some aspects of Mr Mell's evidence, I accept the evidence which he gave and which I have summarised. I also accept the evidence given by Mr Grant which I have summarised. Looking at matters in the round, the probability is that if, prior to or on 9th April 2001, something had been said to Mr Mell which had alerted him to the fact that Mr Rumsey wished to embark upon an accounting exercise of a quite different nature from a routine consideration (or reconsideration) of the values to be attributed to individual CMIs for ISA purposes, it is likely he would have remembered that, as something unusual/out of the ordinary

and, and perhaps this is the more important point, at the time he would have reported the matter to Mr. Grant. If, on the other hand the exercise was nothing more than a routine consideration (or reconsideration) of the values to be attributed to individual CMIs with a view to those values being finalised ready to become part of the FSA when that came to be prepared, it is unsurprising that no-one should have thought it necessary to inform Mr Grant and quite understandable that Mr Mell should have regarded it as nothing more than a (useful) routine accounting exercise which, once completed, could be placed on the file as a matter of formal record.

In my judgment, when Mr Mell prepared his "Final Account" of 12th January 2001, when he met with Mr Rumsey in February and April 2001, and when he signed the 27th April 2001 Document, he did not understand that he was being requested to deal generally with the issue of contractual claims and to allow for them, and there was no reason why he should have thought that he was. Mr Mell can be criticised for not reading the 27th April 2001 Document with some care before he signed it, copied it (or arranged for someone else to copy it) and placed the copy in the site files. However, in my judgment the fact is that he did nothing more than glance at it before he signed it. He did not appreciate at the time that he was being invited to do more than "firm up" valuation figures which would continue to be included on the ISA forms for the remainder of the project and then be taken into the FSA in due course. He did not appreciate that, by the terms included on the last page, Mace was inviting Hurst to forego any and all as yet unrecognised contractual claims for additional costs that it might have. These terms had been included, without any prior hint that they were to be there and they were, unfortunately, overlooked by Mr Mell.

42. Mr Mell left the project of his own accord at the end of June 2001. Mr Grant

telephoned him at the end of November 2001 and asked him about the 27th April 2001 Document. He was then told that Mace had referred to it in correspondence and it had been found in Hurst's site files. Mr Grant said that he was unaware of the existence of the 27th April 2001 Document until after Hurst's final account had been submitted and rejected. As the responsible Director of Hurst he had full access to the files kept on site if he wished to inspect them, but he had not become aware of this document whilst the contract was on-going and the site files remained at the site. I accept this evidence.

43. There was a significant body of evidence before the Court concerning events which happened on the project between May and October 2001. There was discussion between Mr Grant and Mr Lewis (Mace's project director) concerning the timing of work required in the area designated B2.3 and the appropriate amount which should be recognised in respect of extended preliminaries for the work in that area (Mace's position), or more generally in respect of extended preliminaries for Hurst's ongoing site presence beyond April 2001 (Hurst's position). So far as the issues which I have to decide are concerned, these later events (discussions/correspondence) were said to be relevant to the estoppel issues but, in my judgment, even if I found in Hurst's favour on all matters where there were differences, the pleaded estoppel case could not possibly succeed. In the circumstances I decline to make any findings in respect of the differences of emphasis and recollection which were identified. I do however note that the correspondence from Hurst in 2001, see in particular the letter dated 17th September 2001 (Bundle 1, page 246), suggests that Hurst considered that considerable disruption costs had been caused to its Trade Contract works between May 2001 and August 2001.

THE DECLARATIONS

44. I have set out the declarations which Hurst seeks at paragraph 9 above. In view of the findings which I have made I think it convenient to take the legal issues in the following order – unilateral mistake, Mr Mell's authority to bind Hurst in the terms of 27th April 2001 Document, the absence of a signature on behalf of MLEP or Mace, consideration and estoppel.

Unilateral Mistake

45. I take it to be settled law that a mistake made by one contracting party as to the terms of a contract may, in appropriate circumstances and if the mistake is known to the other party, be a ground upon which enforcement of the agreed terms (objectively understood) may be resisted.

Mr. Taverner and Mr. Darling were agreed that, for the purposes of this case, the legal principles could be taken from the decision of the Court of Appeal in **Commission for the New Towns v. Cooper (Great Britain) Ltd.** [1995] Ch 259 at pages 277 to 282 in the judgment of Lord Justice Stuart-Smith and page 292 in the judgment of Lord Justice Evans. There the Court of Appeal reaffirmed that in cases of unilateral mistake rectification is not ordinarily appropriate because, in general, contracts fall to be objectively construed and it is inequitable to compel a contracting party to accept the other's mistaken view. But the Court will intervene if there are "additional circumstances that render unconscionable reliance on the document by the party who has intended that it should have effect according to its terms" **Spry, Equitable Remedies**, 4th Edition at page 599, cited by Lord Justice Stuart-Smith at page 277.

The debate in this case, as in that case, can be said to turn on what amounts to unconscionable conduct. Knowledge of the other's mistake is clearly established to be such an additional circumstance but it may be that this is simply a paradigm example. Mr Derek Wood QC (who appeared for the Commission) submitted the Defendant in that case had been guilty of such sharp and unconscionable practice that rectification should be granted. He submitted that the original "bargain" should be undone so as to render enforceable the intention which, the mistaken party had if two questions received the necessary answers. The questions were –

(1) Is it unjust and inequitable to hold the mistaken party to the terms of the contract ?

(2) Is it unjust and inequitable to compel the other party to execute a contract in the terms that the mistaken party believed to exist ?

If the answer to the first question is "Yes" and the answer to the second question is "No" then, Mr Wood submitted, the Court would rectify the contract. Lord Justice Stuart-Smith stated that he saw "great force in this submission" (and in the suggested application to the facts of that case). If such an approach were to be adopted, it may be that rectification might be ordered in a somewhat wider category of cases than those in which it has previously been thought appropriate but, it seems to me that this is a case which simply turns on whether Mr Rumsey knew of the mistake which Mr Mell had made.

The Judge in the **Commission for New Towns v. Cooper (Great Britain) Ltd** case had decided that nothing less than proven actual knowledge of the other party's

mistake was sufficient for rectification. The Court of Appeal disagreed. The Court of Appeal drew attention to the careful consideration that had been given to the various mental states which might constitute "knowledge", by Mr Justice Peter Gibson in **Baden v Société Générale pour Favoriser le Développement du Commerce et de L'Industrie en France SA** (Note) [1993] 1 WLR 509 which was cited by Mr Justice Millett J in **AGIP (Africa) Ltd v Jackson** [1990] Ch 265 at page 293:

> "Knowledge may be provided affirmatively or inferred from circumstances. The various mental states which may be involved were analysed by Peter Gibson J. in *Baden's* case [1993] 1 W.L.R. 509 as comprising: (i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; and (v) knowledge of circumstances which would put an honest and reasonable man on inquiry. According to Peter Gibson J., a person in category (ii) or (iii) will be taken to have actual knowledge, while a person in categories (iv) or (v) has constructive notice only. I gratefully adopt the classification but would warn against over refinement or a too ready assumption that categories (iv) or (v) are necessarily cases of constructive notice only. The true distinction is between honesty and dishonesty. It is essentially a jury question. If a man does not draw the obvious inferences or make the obvious inquiries, the question is: why not ? If it is because, however foolishly, he did not suspect wrongdoing or, having suspected it, had his suspicions allayed, however unreasonably, that is one thing. But if he did suspect wrongdoing yet failed to make inquiries because 'he did not want to know' (category (ii)) or because he regarded it as 'none of his business' (category (iii)), that is quite another. Such conduct is dishonest, and those who are guilty of it cannot complain if, for the purpose of civil liability, they are treated as if they had actual knowledge."

Lord Justice Stuart-Smith cited this passage at pages 280 to 281 and stated that categories (i), (ii) and (iii) of Mr Justice Peter Gibson's list all constituted actual knowledge in law in the context of an allegation of unilateral mistake. At page 292 Lord Justice Evans expressly agreed with that view. Lord Justice Farquharson simply expressed his agreement in the result. I am bound to follow that decision.

46. In this case Hurst contends that, if Mr Mell's signature on the 27th April 2001 Document suffices to bind it, the document should be rectified to remove the reference to the agreement being made in full and final settlement of all claims arising out of or in connection with the Trade Contract works which had accrued up to and

including 27th April 2001. In practical terms what Hurst seeks is the deletion of first paragraph of the text appearing below the figures on the last page of the 27th April 2001 Document viz. the paragraph beginning "In consideration" and ending "this statement" and the deletion of the last two paragraphs of that text viz the paragraphs beginning "If any instructions" and ending "as shown above". The full text of these paragraphs can be seen in the citation at paragraph 18 above.

47. Mr Taverner and Mr Darling were agreed that, in order to apply the principles endorsed by the Court of Appeal in **Commissioner for the New Towns v Cooper (Great Britain) Limited** (supra), it was necessary for the Court to address three questions. In view of the findings which I have made the first and the third of these questions can now be dealt with summarily. They were –

> had it been proved that Mr. Mell was mistaken as to the contents of the 27th April 2001 Document in that it went further than the oral agreement(s) which had been reached concerning the values of the CMIs ? and
>
> had it been proved that the mistake was one calculated to benefit MLEP ?

It is clear from the findings which I have made, in particular at paragraphs 31 to 41 above, that my answer to each of these questions is "Yes".

Mr. Taverner and Mr. Darling differed as to the correct formulation of the second question but, as Mr. Darling recognised at paragraph 74 of his written closing, whichever I might prefer there was likely to be little practical difference in the result. I agree with that observation but I also accept Mr. Darling's submission that it is

better to avoid the term "suspicion" when formulating the question. Accordingly, I pose it in the way he suggested –

> had it been proved that Mr Rumsey had actual knowledge that Mr. Mell was mistaken as to the contents of the 27th April 2001 Document or that, in this regard, Mr. Rumsey wilfully shut his eyes to the obvious or that he wilfully and recklessly failed to make such enquiries as an honest and reasonable man would make ?

48. So far as this second question is concerned, has Hurst proved its case to the civil standard ? I am conscious that I am considering Mr Rumsey's knowledge in the absence of evidence from Mr Rumsey himself. I need to consider carefully what facts are agreed/admitted on the pleadings (or later during the case) together with the evidence which is before the Court. When it comes to evaluating the evidence adduced by Hurst, in the absence of evidence from MLEP, I have in mind the observations of Lord Lowry in **R v Inland Revenue Commissioners** *ex parte* **T.C. Coombs & Co.** [1991] 2 AC 283 at page 300, to which my attention was invited by Mr. Taverner –

> **"…..in our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party, may be either reduced or nullified….."**

Having heard Mr. Mell's evidence concerning of the accounting exercise which he and Mr. Rumsey carried out between 12th January 2001 and 9th April 2001 (insofar as

he could recollect it), having taken into account Mr Grant's evidence that he was not informed about the accounting exercise, having considered the facts that were agreed/admitted and having carefully considered the contemporary documents, my answer to this second question is "Yes".

In the absence of positive direct evidence as to the way in which the 27th April 2001 Document was provided to Mr Mell, there are two possible factual situations to consider. The first possibility is that Mr Mell signed the 27th April 2001 Document in Mr Rumsey's presence. If so, in my judgment, Mr Rumsey probably had actual knowledge that Mr Mell was mistaken i.e. he fell into Mr Justice Peter Gibson's first category. The alternative possibility is that Mr Rumsey was not present when Mr Mell signed the 27th April 2001 Document. If so, in my judgment, the probability is that Mr Rumsey was a person falling into either the second or third of Mr Justice Peter Gibson's categories, and it matters not which of them he fell into. I explain these alternatives more fully below.

49. The possible factual situations which might have happened are these -

(1) Mr. Rumsey, as he had said in the witness statement upon which Mr. Mell commented in his evidence, personally handed the 27th April 2001 Document to Mr. Mell and invited him to sign it (without explaining to him that Mace had included in the document a previously unheralded invitation to Hurst to forego all as yet unrecognised contractual claims up to the date of signature). If he did so and saw that Mr Mell signed it without first taking time to read carefully through it, the probability is that he had actual knowledge of Mr. Mell's mistake as to the effects of the document; alternatively,

(2) Mr Rumsey, as he had said, personally handed the 27th April 2001 Document to Mr Mell (without explaining to him that Mace had included in the document a previously unheralded invitation to Hurst to forego all as yet unrecognised contractual claims up to the date of signature) but Mr Rumsey did not invite Mr Mell to sign it then and there. In the alternative, in line with the established site practice, Mr. Rumsey forwarded the document to Mr. Mell for him to collect from the Hurst site correspondence tray, (without including a covering note or in any other way drawing Mr Mell's attention to the fact that Mace had included in the document a previously unheralded invitation to Hurst to forego all as yet unrecognised contractual claims up to the date of signature). On either of these possible bases, the probability is that Mr Rumsey was wilfully shutting his eyes to the risk that Mr. Mell would not notice the newly introduced, potentially prejudicial, words which he had no reason to suspect might be there. Alternatively, at the very least, on either of these possible bases, Mr Rumsey would have been a person wilfully and/or recklessly failing to take such steps as an honest and reasonable man would take if he knew (as on my findings Mr Rumsey did know) that the document he had prepared did not simply reflect the agreement(s) on CMI values which had been reached earlier that month after protracted negotiations.

50. For those reasons, in my judgment, the 27th April Document 2001 should be rectified by deleting the paragraphs which I have identified at paragraph 46 above. If that is done no difficulty would arise concerning Mr. Mell's authority to sign on behalf of Hurst. The document would then record agreed values for CMIs 1 to 399 (inclusive) which were to be carried forward to the FSA. However, if I am wrong about rectification and the 27th April 2001 Document stands in the form that Mace put it forward, it is necessary to consider whether Mr. Mell had authority to bind

Hurst to those terms. I turn to that issue.

Mr. Mell's Authority

51. Hurst contends that Mr. Mell did not have authority (actual, implied or ostensible) to make a binding (compromise) agreement in the terms of the 27th April 2001 Document because that agreement was something outside the terms of the Trade Contract. As I have already said at paragraph 9 above, Hurst concedes that Mr. Mell had full authority to agree matters in accordance with the contractual mechanisms but, it is contended that he had no authority to bind the company outside the terms of the Trade Contract. In my judgment, if Hurst's unilateral mistake case fails then Hurst is entitled to the declaratory relief claimed on this basis.

I have dealt with the extent of Mr. Mell's authority at paragraph 22 above. As I have said, he was Hurst's senior site-based representative; he was there (and known by Mace/MLEP to be there) to deal with all aspects of Hurst's contract works, but his authority did not extend beyond dealing with matters pursuant to and in accordance with the terms of the Trade Contract. The Trade Contract contemplated interim accounting and interim payments continuing until the project was completed; the Trade Contract contemplated the FSA being produced after completion of the Trade Contract works – see particularly clause 23.6.4 (taken together with paragraph 7 of the Trade Contract Annex) and clause 23.6.5 of the Trade Contract, all cited at paragraph 16 above. The Contract did not provide for the production of a "Final Statement of Account, Stage 1" whether in the terms of the 27th April 2001 Document (or in other terms) and, in my judgment if a document of this type was to have contractual effect, its production must have been authorised in advance by the

contracting parties themselves or it needed to be ratified after the event by the contracting parties themselves. Given the fact that both contracting parties were corporate entities, authorisation or ratification must have been by an appropriate individual. In this case, so far as Hurst was concerned, Mr. Grant was the director of the company with responsibility for the project. He was the obvious person for Mace/MLEP to notify if MLEP desired to vary the contractually agreed accounting procedure. He was not informed of such a proposal by Mace/MLEP prior to 27th April 2001 nor was he asked to ratify what had been done on 27th April 2001 after the event. Mr Mell was not authorised (either expressly or impliedly) to agree to vary the terms of the Trade Contract nor did Hurst ever hold him out as having any such authority.

52. The introduction into the established contractual relationship between MLEP and Hurst of a previous uncontemplated species of final accounting documentation could only be done if the Trade Contract terms were varied. If Clause 32.3 of the Trade Contract was to be respected the variation would need to be made by an agreement in writing, signed by appropriate representatives of the contracting parties. That requirement for writing could perhaps have been waived or ignored if directors of Hurst and MLEP had reached agreement on some particular proposed variation but, it was essential that the agreement be made by persons with full authority to vary the terms of the Contract and, as I have said, so far as Hurst was concerned its Project Manager, Mr Mell, was not such a person.

53. On behalf of MLEP, Mr. Darling submitted that there was no real difference between the monthly ISA accounting exercise and the exercise that had resulted in the Final Statement of Account, Stage 1 - see, e.g. paragraph 58 of the written closing submissions. On the basis that Mr. Mell's understanding of the exercise being

undertaken between January 2001 and April 2001 was correct, I would accept that submission but, on the basis of the case which MLEP was advancing, I reject it. Mr. Darling stressed that under the Trade Contract the interim agreements shown on the ISA Forms "were given final effect". In my judgment that is not correct as a matter of interpretation of the contract (inter alia, because the ISA Forms dealt only with CMIs and not with other aspects of the contract) and, in any event, it was certainly not the approach which Mace took with regard to previously agreed CMI valuations during the review which Mr Rumsey undertook (see paragraph 34 above).

54. Accordingly, if the 27th April 2001 Document is not rectified, the conclusion which I have reached is that no appropriately authorised representative of Hurst agreed to it and, the agreements shown therein are not binding. Insofar as values for individual CMIs were agreed between Mr Rumsey and Mr Mell and shown on the ISA Forms from May 2001 onwards, it may be (but that does not fall for decision in this case) that agreements had been made by Mr Mell and Mr Rumsey which were within the ambit of each of their respective authorities under the Trade Contract and, for that reason, those agreements would remain binding on Hurst.

The Absence of an MLEP or Mace Signature

55. In my judgment the declaration sought should not be given. Mace was the organisation intended to provide a signature to the 27th April 2001 Document. The basis of Mace's authority to sign on behalf of MLEP has not been explored in this case but, I proceed on the basis that Mace was appropriately authorised by MLEP (or that any necessary ratification would have been forthcoming). Mace's failure to sign the document is nothing more than an irregularity of no legal significance. Mace had

drafted the document and put it forward to Hurst for signature; Mr Mell signed it on Hurst's behalf; if, contrary to the views which I have expressed, Mr Mell had authority to sign it on Hurst's behalf and was not acting mistakenly (to Mr Rumsey's knowledge), Hurst would be bound by its project manager's agreement to those terms whether or not Mace also signed.

The Consideration Issue

56. Here again, in my judgment the declaration sought should not be given. A sufficient statement of the legal principles can be found in section 3 of chapter 23 of **Chitty on Contracts** (28th Edition). I am of the view that Hurst's contentions on this matter are simply misconceived and MLEP's response at paragraph 36 of the Defence is over elaborate/unnecessarily complicated.

Where parties to a contract for work and materials negotiate and agree upon the sum which will be paid by one party and be accepted by the other there is an accord (or compromise) for which there is ample and obvious consideration. That accord is binding on them both. In the normal case, and in this regard I see nothing at all abnormal in the facts of this case, the accord provides a new certainty of obligation which is substituted for the pre-existing contractual rights (and obligations), the nature and extent of which were to some extent at least uncertain/ debatable.

57. Hurst relies on three matters in support of the plea that there was no consideration for the agreement contained in the 27th April 2001 Document – the first and third of these matters are in reality the same; Hurst avers that the agreement concerned the CMI values for CMIs 1 to 399 (inclusive) made between Mr. Mell and

Mr. Rumsey prior to 27th April 2001, was made "without such agreement being made in full and final settlement of all claims which had accrued by 27th April 2001" so that the inclusion of the settlement of all such claims in the 27th April 2001 Document was "gratuitous". Factually what is contended is entirely in line with the findings I have made but, in my judgment, a no consideration plea simply cannot be sustained. Once again, proceeding on the basis that Mr. Mell had authority to act for Hurst and that he did not act mistakenly (to Mr. Rumsey's knowledge), acceptance of a proposal to include all existing (accrued) but as yet unacknowledged claims within the ambit of a proposed accord would not adversely affect the accord, if an agreement were reached in terms which included these claims. The second of the matters upon which Hurst relies is an averment that MLEP was contractually obliged to pay the labour, plant and material costs of CMIs 1 to 399 (inclusive). I agree but ask, rhetorically, what were the actual sums that MLEP was obliged to pay ? Was there room for debate as to the sums properly claimable ? Assuming there was, there was ample scope for resolution of the matter by means of enforceable accord.

Estoppel

58. Hurst's contention is that the correspondence/discussions between July and September 2001 concerning its claims for additional preliminaries "amounted to a representation by [MLEP] that [Hurst] was entitled to pursue its claims for loss and expense which were not compromised, alternatively the parties conducted themselves on the conventional basis that this was the position." Hurst then contends that in reliance on this representation it incurred substantial costs in pursuing its loss and expense claims to adjudication. In the alternative Hurst contends that it would be "unjust to allow MLEP to resile from this position."

59. As I have said at paragraph 9 above, Mr. Taverner did not press this part of the case but it was not withdrawn. In my judgment this claim fails on every point – the evidence of Mr Grant taken together with the documentary materials before the Court does not demonstrate any representation of any sort made by MLEP (or by Mace on its behalf) in respect of the possible pursuit (by Hurst) of a loss and expense claim; the parties did not conduct themselves on any basis that could possibly be described as a "conventional basis" with regard to the pursuit (by Hurst) of a loss and expense claim; Hurst did not rely on any material representation of any sort made by or on behalf of MLEP when it originally decided to put forward a loss and expense claim and/or when it decided to pursue that claim in an adjudication. In the circumstances if, contrary to the conclusions I have reached, Hurst was bound by the terms of the 27th April 2001 Document from the date that Mr. Mell signed it, I find myself unable to see any possible basis upon which the pleaded estoppel claim might succeed.

60. I come finally to MLEP's pleaded "estoppel". Corrected for the obvious typographical error, the plea at paragraph 49 of the Defence was –

> "49. ……it is [MLEP's] case that in signing the [27th April 2001 Document] [Hurst] is estopped from denying that the sums stated were in full and final settlement of all claims as at 27th April 2001 and from attempting to bring additional claims for loss and expense for events prior to 27th April 2001. [Hurst] has made a clear and unequivocal statement that all claims up to 27th April 2001 are compromised by payment "of the sum agreed". [MLEP] has acted to its detriment on that representation by paying the agreed sum and now being unable or in a worse position to assess any alleged claims the Claimant now says it has. Had Mace been made aware "timeously" of any alleged disrupting events they might have been able to reprogramme or manage other trade Contracts in such a way as to avoid any disruption for [Hurst]."

Although this part of MLEP's case was maintained with apparent enthusiasm by Mr Darling, in my judgment it cannot possibly succeed. No evidence was called to support the factual matters raised in the final two sentences (which, at first blush, fall to be viewed with considerable scepticism) but, even if they had been established in

view of the findings I have made in relation to Hurst's claim for a declaration based on unilateral mistake and in the alternative, its claim for a declaration based on Mr Mell's lacking the necessary authority to bind Hurst to the terms of the 27th April 2001 Document, I see no possible basis upon which Hurst can be prevented from vindicating its true legal rights.

Costs

61. Mr Taverner submitted that Hurst should be awarded its full (standard basis) costs of the action. Basing himself on CPR 44.3 Mr Darling submitted that although Hurst had succeeded in obtaining two of the declarations which it had claimed, its failure on a number of the factual and legal issues raised should be taken into account. Hurst, he said, should be awarded somewhere between 50% and 70% of its costs. I accept Mr Darling's submission that Hurst's cost recovery should be limited but, in my view a lesser reduction is justified. The extent to which Hurst has failed on a number of the factual and legal issues which were raised is apparent from this Judgment and I also take into account, as a counter-balancing factor, MLEP's own failure on its estoppel case. In my judgment, considering the case as a whole, substantial justice will be done if Hurst is allowed to recover 80% of its costs from MLEP, and I so order.

Dated 25th June 2003

COLIN REESE QC
[Recorder, sitting as a Deputy Judge of the TCC]

CLAIM No: HT-02-322

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

TECHNOLOGY AND CONSTRUCTION COURT

MR RECORDER COLIN REESE Q.C.

B E T W E E N :

HURST STORES AND INTERIORS LIMITED

Claimant

and

M.L. EUROPE PROPERTY LIMITED

Defendant

J U D G M E N T

This is the official Judgment of the Court and I direct that no further note or transcript be made.

25th June 2003 COLIN REESE QC
(Recorder – Sitting as a Deputy Judge of TCC)