CROUDACE Ltd v THE LONDON BOROUGH OF LAMBETH

21 March 1986 *Court of Appeal*

May, Balcombe LJJ and Sir George Waller

By a contract dated 12 October 1979, which incorporated the standard form of building contract, local authorities edition 1963, July 1977 Revision, the plaintiffs agreed to construct houses and other works for the defendants.

Clause 4 of the agreement provided that the terms "Architect/Supervising Officer" and "Quantity Surveyor" in the conditions should mean the persons so named in the contract documents; the bills of quantities provided that the term "Architect" should mean the Chief Architect of the Borough and the term "Quantity Surveyor" should mean the Chief Quantity Surveyor of the Borough. In practice the functions of each were delegated to private firms, namely Andrews & Sherlock as architects and Stern and Woodford as quantity surveyors.

Item 12/A of Bill 1 provided amongst other things that the contractor was to inform himself about the nature of the site including any underground services and that any monetary or other claim made by the contractor on the ground of want or knowledge of all or any such matters would not be entertained by the employer.

The works were to have been completed by 19 October 1981 but practical completion did not take place until 22 July 1982. The plaintiffs claimed that they were delayed not only by the lack of instructions relating to the erection of a screen on part of the site but also by the discovery of an Electricity Board cable in respect of which instructions for its diversion were not issued until 3 January 1980. In May 1980 the plaintiffs wrote about the delay and formally claimed an extension of time by a letter to Andrews & Sherlock dated 11 December 1980. On 2 February 1983 the Chief Architect certified that the works ought reasonably to have been completed by 27 May 1982 and at the same time awarded an extension of time of 31 weeks and 3 days.

On 12 February 1983 the plaintiffs wrote to Stern & Woodford making a claim for loss and expense under clause 11(6). On 21 February 1983 Stern & Woodford replied that they had been instructed by the defendants that all payments relating to "loss and expense" claims had first to be approved by the defendants. The plaintiffs pursued their claims by correspondence and at meetings; at a meeting on 26 May 1983 a representative of Stern & Woodford agreed that £100,000 would be fair and reasonable as an interim payment on account of the plaintiffs' claim. On 31 May 1983 the defendants' Chief Architect retired but no one was appointed to take his place.

No payments having been made on 23 February 1984 the plaintiffs commenced proceedings claiming £646,995 as damages for breach of contract on the grounds of the defendants' failure and/or refusal to ascertain or to instruct the ascertainment of the plaintiffs' claim. On 10 May 1984 the plaintiffs issued a summons for summary judgment for £100,000 alternatively for an order for interim payment under Order 29 rules 10 and 11. On 27 June 1984 the defendants issued a summons for a stay of the proceedings pursuant to section 4 of the Arbitration Act 1950.

On 13 July 1984 His Honour Judge Newey QC heard the applications and in October 1984 gave judgment and made orders for the plaintiffs to be at liberty to enter judgment for damages to be assessed; dismissing the defendants' application for a stay; and ordering that the defendants should make an interim payment on £100,000 under Order 29 rule 11. The defendants appealed.

During the argument there was common ground as to two matters: first, the plaintiffs' claim under the agreement for their loss and expense could not be maintained by action in the absence of a certificate from the architect; secondly, the plaintiffs' claim for damages for the defendants' breach of contract in failing to instruct the ascertainment of the loss and expense was a dispute falling within the ambit of the arbitration clause.

***HELD**, dismissing the appeal:*

(1) The defendants' acts and omissions after 2 February 1983 amounted to a failure by them to take such steps as were necessary to enable the plaintiffs' claim for loss and expense to be ascertained and as such amounted to a breach of contract on their part: *Smith* v *Howden Union & Anor* (1890) 2 Hudson's BC (4th Edition) 156 *considered.*

(2) The plaintiffs could establish that they had suffered some damage as a result of the defendants' breach of contract and accordingly were entitled to judgment for damages to be assessed.

(3) It was not implicit in section 4 of the Arbitration Act 1950 that there had to be a dispute in existence when proceedings were commenced.

(4) However, a stay of the action would be refused in the exercise of the court's discretion taking into account the following factors:

(a) that there was no defence on liability to the plaintiffs' claim;

(b) that the case was one where a payment on account of damages would be appropriate;

(c) that the defendants' conduct from February 1983 to February 1984 in failing to take the steps necessary for the claim to be ascertained merited the strongest condemnation and the court was entitled to infer from it that the object of the defendants' conduct was to postpone the time when the defendnats would have to pay the plaintiffs the sum which had been acknowledged to be due and that it was a reasonable inference that a motive, if not the sole motive, of the application to stay the proceedings was to create further delay.

(5) The judge had not exercised his discretion incorrectly in awarding an interim payment of £100,000.

Desmond Wright QC and Nicholas Dennys appeared on behalf of the appellants, the London Borough of Lambeth, instructed by A J George
Christopher Thomas appeared on behalf of the respondents, the plaintiffs, instructed by Masons

Commentary

This case is a most interesting one since it illustrates that in certain circumstances a contractor with a claim for loss and expense, tantamount to damages for breach of contract, and in respect of which a dispute may exist referable to arbitration, can nevertheless obtain a payment on account by commencing proceedings in the courts. We deal elsewhere in our commentary to *Lubenham Fidelities & Investment Co Ltd* v *South Pembrokeshire District Council & Anor* (1986) 33 BLR 43 at 44 *below* with the question of whether or not a claim may be maintained in the absence of a certificate from the architect. The decision in that case apparently precluded the plaintiffs from pursuing their argument that the court could nevertheless award the amount claimed under the agreement.

The plaintiffs' claim could therefore only be justified on the basis of a direct claim for damages for breach of contract. Here the Court of Appeal was satisfied that the defendants had failed to discharge the duty which lay upon them to secure the proper consideration of the

plaintiffs' claim. (It was of course also pointed out by the Court of Appeal that the assessment of the plaintiffs' claim might in the event be affected by the term found in the bills of quantities and by any failure on the part of the plaintiffs to make their application within a reasonable time pursuant to the requirements of clauses 11(6) and 24 (1) of the contract conditions.) In this case the defendants had failed to appoint a person to take over the functions of the Chief Architect named in the contract as the architect empowered to ascertain the claims or to instruct the quantity surveyor to ascertain the claims; in addition it appears that the defendants had, for reasons which were not clear, themselves decided to investigate the claims and in some way to fetter the powers given under the contract to the architect or quantity surveyor. The net result was that the plaintiffs' claim was not dealt with in the time that it ought to have been so that the court could reach the conclusion that there had been a breach of contract on the part of the defendants. In addition, as appeared later in the judgment, the defendants' conduct was not merely of a "technical" character but itself cast considerable doubt over the defendants' good faith when they subsequently came to apply to have the proceedings stayed in favour of arbitration. The court here came to the conclusion that the defendants' conduct merited the strongest condemnation and that they were entitled to draw the inference that it was done deliberately in order to hinder the proper determination of the plaintiffs' claim.

Accordingly the plaintiffs were entitled to damages for the defendants' breach of contract; the question then arose as to whether the judge had been right to order £100,000 as a payment on account when there had been no ascertainment of the plaintiffs' claim. Could the plaintiffs show that they had suffered some damage flowing from the defendants' breach of contract? Looking at the evidence overall the Court of Appeal was satisfied that the plaintiffs were likely to be able to establish that they had suffered some damage and, having regard to the apparent admission by the private quantity surveyors that £100,000 was a reasonable payment on account, that such a sum was an appropriate amount to be paid on account notwithstanding the fact that that admission was made at a time when it had not apparently been appreciated that there might be a complete defence to the claim under the agreement by virtue of the provision on Item 12/A of Bill No 1 of the bill of quantities. In this respect the plaintiffs may perhaps have been fortunate since without that tacit admission it would probably be very difficult to convince a court that a particular sum of money was due, especially in the light of the terms of the contract.

That, however, did not dispose of the appeal since the defendants maintained that there was a dispute and that the appropriate forum

was arbitration — presumably because the arbitrator might be invited to exercise a power to make an interim award on account of the plaintiffs' claim — a matter in respect of which there is no authority and about which there must be of course some doubt since an arbitrator may well not have the power available to a court under Order 29. Plainly there was a dispute but was there a sufficient reason why the matter should not be referred to arbitration as section 4 of the Arbitration Act provides?

The Court of Appeal was satisfied that there were sufficient reasons why the matter should not be referred to arbitration since they took into account a number of factors which they considered to be relevant. First, there were two matters of law: the fact that if a sum was indisputably due judgment might be signed and therefore there was no true dispute; secondly, that in the earlier decision in *Associated Bulk Carriers Ltd v Koch Shipping Inc ("The Fuohsan Maru")* [1978] Lloyd's Rep 24; 7 BLR 18 was not now applicable since it had been overtaken by Order 29 rule 11 — as to this case see our commentary at 7 BLR 18. The way was therefore clear for the court not to order a stay if in its general discretion it was satisfied that it should do so.

The Court accepted the propositions stated in *Mustill & Boyd on Commercial Arbitration* at p433 that a defendant's conduct might be such that the court ought not to exercise its discretion in favour of granting a stay. The court also accepted the defendants' submission that such conduct must be of a kind as related to the right to arbitration but it held that the defendants' conduct was of such a kind for reasons to which we have already referred.

The facts of the case are not untypical: the contractor did not make his application for loss and expense until apparently some time after the relevant event; that claim was one which was affected by the terms of the contract; but the employers' conduct in failing to grapple with the claim, whatever its merits, for reasons which appear to be wholly extraneous to the proper administration of the contract materially affected their prospects of success in seeking to defer the hearing of the claim still further. The contractor was therefore able to overcome some of the difficulties which currently affect the successful presentation of claims in High Court proceedings for money which ought to have been certified.

CROUDACE Ltd v THE LONDON BOROUGH OF LAMBETH

21 March 1986 *Court of Appeal*

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BALCOMBE LJ: On 12 October 1979 a formal agreement was entered into between Croudace Ltd ("the Contractor") and the Mayor and Burgesses of the London Borough of Lambeth ("the Employer") for the erection by Croudace on a site belonging to Lambeth at Gaskell Street, Stockwell, London, SW4, of 148 dwellings (some houses, some flats), 4 shop units and a communal hall at a price of £2,832,527.55 or such further sum as might become payable under the JCT standard form of contract for use with quantities (Local Authorities Edition 1963, July 1977 revision), which was made part of the agreement.

The date for possession was defined as to the first part of the site 2 July 1979, and as to the second part 31 July 1979, and the date for completion was defined as 120 weeks from the date of possession.

The bills of quantities, which were part of the contract documents referred to in the agreement, provided (in Bill No 1, p5) that in the conditions of contract the term "Architect" should mean the Chief Architect of the London Borough of Lambeth and the term "Quantity Surveyor" should mean the Chief Quantity Surveyor of the London Borough of Lambeth. Clause 4 of the agreement provided that the terms "Architect/Supervising Officer" and "Quantity Surveyor" in the conditions should mean the persons so named in the contract documents "or in the event of either of them dying or ceasing so to act for the purposes of this contract such other person or persons as the employer shall nominate provided always that no person subsequently appointed as Architect/Supervising Officer shall be entitled to disregard or overrule any certificate or opinion or decision or approval or instruction given or expressed by the Architect/Supervising Officer for the time being".

Bill 1 also contained the following provision (at p12, paragraph A):

"*Contractor's visit to site.*

The Contractor is advised to visit the site by prior arrangement with the Architect and make himself fully acquainted by his own independent observations and enquiries as to the nature, extent and practicability of the Works, means of access, storage for materials, the positions relative thereto of exposed works, buildings, structures and any underground services, the levels of sub-soil or other water, the character of the soil or strata in or on which the works are to be constructed, material to be excavated and ground water conditions, and all other points which can in any way affect the prices inserted in the Bills of Quantities. Any monetary or other claim made by the Contractor on the ground of want of knowledge of any or all of the aforesaid matters will not be entertained by the Employer."

The conditions of contract included (*inter alia*) the following conditions:

Condition 2 which provides that the Contractor shall comply with all instructions issued to him by the Architect.

Condition 11(1) which provides that the Architect may issue instructions requiring a variation.

Condition 11(6) is in the following terms:

"(6) If upon written application being made to him by the Contractor, the Architect/Supervising Officer is of the opinion that a variation or the execution by the Contractor of work for which a provision sum is included in the Contract Bills (other than work for which a tender made under clause 27(g) of these Conditions has been accepted) has involved the Contractor in direct loss and/or expense for which he would not be reimbursed by payment in respect of a valuation made in accordance with the rules contained in sub-clause (4) of this Condition and if the said application is made within a reasonable time of the loss or expense having been incurred, then the Architect/Supervising Officer shall either himself ascertain or shall instruct the Quantity Surveyor to ascertain the amount of such loss or expense. Any amount from time to time so ascertained shall be added to the Contract Sum, and if an Interim Certificate is issued after the date of ascertainment any such amount shall be added to the amount which would otherwise be stated as due in such Certificate."

Condition 22 is in the following terms:

"22. If the Contractor fails to complete the Works by the Date for Completion stated in the Appendix to these Conditions or within any extended time fixed under clause 23 or clause 33(1)(c) of these Conditions and the Architect/Supervising Officer certifies in writing that in his opinion the same ought reasonably so to have been completed, then the Contractor shall pay or allow to the Employer a

sum calculated at the rate stated in the said Appendix as Liquidated and Ascertained Damages for the period during which the Works shall so remain or have remained incomplete, and the Employer may deduct such sum from any monies due or to become due to the Contractor under this Contract."

The liquidated and ascertained damages were fixed at the rate of £7,904 per week or part of a week.

Condition 23 provides that

"upon it becoming reasonably apparent that the progress of the Works is delayed, the Contractor shall forthwith give written notice of the cause of the delay to the Architect/Supervising Officer, and if in the opinion of the Architect/Supervising Officer the completion of the Works is likely to be or has been delayed beyond the Date of Completion ...

(e) by reason of Architect's/Supervising Officer's instructions issued under clauses 1(2), 11(1) or 21(2) of the Conditions ... then the Architect/Supervising Officer shall as soon as he is able to estimate the length of the delay beyond the date or time aforesaid make in writing a fair and reasonable extension of time for completion of the Works ..."

Condition 24(1) is in the following terms:

"24(1) If upon written application being made to him by the Contractor the Architect/Supervising Officer is of the opinion that the Contractor has been involved in direct loss and/or expense for which he would not be reimbursed by a payment made under any other provision in this Contract by reason of the regular progress of the Works or of any part thereof having been materially affected by:

(a) The Contractor not having received in due time necessary instructions, drawings, details or levels from the Architect/Supervising Officer for which he specifically applied in writing on a date which having regard to the Date for Completion in the Appendix to these Conditions or to any extension of time then fixed under clause 23 or clause 33(1)(c) of these Conditions was neither unreasonably distant from nor unreasonably close to the date on which it was necessary for him to receive the same; or ...

(e) Architect's/Supervising Officer's instructions issued in regard to the postponement of any work to be executed under the provisions of this Contract;

and if the written application is made within a reasonable time of it becoming apparent that the progress of the Works or any part thereof has been affected as aforesaid, then the Architect/Supervising Officer shall either himself ascertain or shall instruct the Quantity Surveyor to ascertain the amount of such loss and/or

expense. Any amount from time to time so ascertained shall be added to the Contract Sum, and if an Interim Certificate is issued after the date of ascertainment any such amount shall be added to the amount which would otherwise be stated as due in such Certificate."

Condition 30(1) provides for the issue of interim certificates by the Architect/Supervising Officer and concludes:

"Before the issue of the certificate of Practical Completion, Interim Certificates shall be issued at the Period of Interim Certificates specified in the Appendix to these Conditions. After the issue of the Certificate of Practical Completion, Interim Certificates shall be issued as and when further amounts are due to the Contractor from the Employer provided always that the Architect/Supervising Officer shall not be required to issue an Interim Certificate within one calendar month of having issued a previous Interim Certificate."

Condition 35 is the arbitration clause. Since much in this case depends upon the existence and provisions of this clause I set out the first four sub-clauses in full:

"35(1) Provided always that in case any dispute or difference shall arise between the Employer or the Architect/Supervising Officer on his behalf and the Contractor, either during the progress or after the completion or abandonment of the Works, as to the construction of this Contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith (including any matter or thing left by this Contract to the discretion of the Architect/Supervising Officer or the withholding by the Architect/Supervising Officer of any certificate to which the Contractor may claim to be entitled or the measurement and valuation mentioned in clause 30(5) of these Conditions or the rights and liabilities of the parties under clauses 25, 26, 32 or 33 of these Conditions), then such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed between the parties, or, failing agreement within 14 days after either party has given to the other a written request to concur in the appointment of an Arbitrator, a person to be appointed on the request of either party by the President or a Vice-President for the time being of the Royal Institute of British Architects.

(2) Such reference, except on article 3 or article 4 of the Articles of Agreement, or on the questions whether or not the issue of an instruction is empowered by these Conditions, whether or not a certificate has been improperly withheld or is not in accordance with these Conditions, or on any dispute or difference under clauses 32 and 33 of these Conditions, shall not be opened until after Practical Completion or alleged Practical Completion of the Works or termination or alleged termination of the Contractor's employment under this Contract or abandonment of the Works, unless with the

written consent of the Employer or the Architect/Supervising Officer on his behalf and the Contractor.

(3) Subject to the provisions of clauses 2(2), 30(7) and 31D(3) of these Conditions the Arbitrator shall, without prejudice to the generality of his powers, have power to direct such measurements and/or valuations as may in his opinion be desirable in order to determine the rights of the parties and to ascertain and award any sum which ought to have been the subject of or included in any certificate and to open up, review and revise any certificate, opinion, decision, requirement or notice and to determine all matters in dispute which shall be submitted to him in the same manner as if no such certificate, opinion, decision, requirement or notice had been given.

(4) The award of such Arbitrator shall be final and binding on the parties."

Croudace started work on the site in July 1979. Lambeth's Chief Architect was then a Mr Jacoby, but he delegated his day-to-day duties under the agreement to architects in private practive, Messrs Andrews Sherlock and Partners. Similarly Lambeth's Chief Quantity Surveyor delegated his day-to-day duties under the agreement to Messrs Stern and Woodford.

Croudace have asserted that they were delayed in carrying out the works on the site by two particular matters:

(1) Delay in completing a screen between that part of a warehouse shed which was comprised in the site and that part which was to remain in the possession of UBM Scaffolding Ltd. Croudace maintain that this delay was caused by Lambeth's failure to conclude their negotiations with UBM over the screen, and the architect's instruction to commence erection of the screen was not given to Croudace until 25 January 1980.

(2) More particularly delay attributable to the discovery of a hitherto unknown London Electricity Board cable passing under a part of the site. The existence of this cable was first known to Croudace on 17 December 1979, and on 3 January 1980 Andrews Sherlock gave to Croudace an architect's instruction (No 24) to revise their order with the London Electricity Board to provide for the diversion of this cable. For reasons which it is not necessary for me to go into the new cable diverting the supply was not completed until 11 June 1980. In the meantime Croudace were unable to work effectively on that part of the site through which the cable ran. Croudace maintain that this delay was attributable to Lambeth; Lambeth now deny this.

Croudace set out the history of delay in detail in letters to Andrews Sherlock dated 1 and 29 May 1980, and by a letter to Andrews

Sherlock dated 11 September 1980, after referring to the facts as set out in their letter of 29 May, said:

> "We would therefore make application to you for an extension of time for a period of 34½ weeks under clause 23(e) of the contract. We would also inform you that the delay, referred to above, is causing us direct loss and expense for which we are entitled to seek reimbursement under clause 11(6) and in accordance with that clause we hereby ask you to ascertain the amounts of such loss and expense."

The contract date for completion of the work was 19 October 1981. In fact, practical completion was effected on 22 July 1982. Croudace continued to press their application for an extension of time and to assert their claim for compensation, and on 2 February 1983 Mr Jacoby issued his certificate that the works ought reasonably to have been completed by 27 May 1982. He sent a copy of this certificate to Croudace under cover of a letter of the same date in the following terms:

> "GASKELL STREET HOUSING DEVELOPMENT
> EXTENSION OF CONTRACT
> Following consultation with Messrs Andrews Sherlock and Partners, I now advise you of my award covering the total construction period up to Practical Completion on 22 July 1982. A total period of extension amounting to 31 weeks and 3 days is now awarded under Clause 23(e) in respect of Architects Instructions issued during the course of the Contract.
> The Contract date for completion is 19 October 1981 and the revised date for completion will now be 27 May 1982, by which date it is considered that all works ought reasonably to have been completed.
> In pursuance of the requirements laid down under Clause 3(8) of the Contract I enclose herewith a copy of certificate issued to the Employer under Clause 22 of the Contract and have to advise you that the Employer may deduct from any monies due or to become due to you under the Contract, the sum of liquidated ascertained damages as stated in the appendix to the Contract, for the period from the Contract completion date as extended to the date of Practical Completion of the Works. A copy of this letter has been sent to Messrs Andrews Sherlock and Partners and Messrs Stern and Woodford but it will be necessary for you to submit a formal claim for any loss and expense that you may consider is due to you, to be ascertained by the Quantity Surveyor."

Mr Jacoby has since sworn an affidavit stating that when he issued his certificate, and wrote the covering letter, he did not have in mind the provisons of Bill No 1, p12, item A, set out above.

Responding to the invitation in Mr Jacoby's letter, on 12 February 1983 Croudace wrote to Stern and Woodford making their claim for loss attributable to the certified delay under condition 11(6). The draft submission attached to the letter was for the sum of £737,659.57. The letter concluded:

> "It would be appreciated if a realistic valuation could be made based on the attached, with a view to a substantial payment subsequently flowing to us to ease our cash burden on this contract."

On 21 February Stern and Woodford replied that they had been instructed by Lambeth that all payments relating to "loss and expense" claims must be approved by Lambeth and they had therefore forwarded a copy of Croudace's submission to Lambeth "for their guidance in this matter". Stern and Woodford were, of course, acting as agents for the Chief Quantity Surveyor of Lambeth, who had certain independent duties to perform under the agreement, particularly under condition 11(6). Unless this letter is intended to mean that on this matter Lambeth's Chief Quantity Surveyor was not prepared to delegate his functions under the agreement to Stern and Woodford, it is not clear to me what right Lambeth had to issue this instruction.

On 11 March 1983 Croudace wrote to Lambeth's Architectural Department asking for payment on account of their claim made to Stern and Woodford on 12 February. They repeated this request to Andrews Sherlock on 15 April, in the course of which they stated:

> "It is however understood from Stern & Woodford that this section of the account is to be dealt with directly by the London Borough of Lambeth and that they forwarded our submission to same on 21 February 1983 together with a recommendation that an interim payment be made. In further pursuing our request for payment direct with Lambeth we are advised that they are unable to make payment until amounts have been agreed and cleared by the audit section."

On 25 May 1983 Croudace submitted their revised assessment for loss and expenses in the reduced sum of £624,655.54 and this claim was sent to Lambeth's Architect, Andrews Sherlock and Stern and Woodford. On 26 May Mr Wooding of Croudace had a meeting with Mr Gaskell of Stern and Woodford — one of a series of regular meetings — in the course of which Mr Gaskell agreed that a sum of £100,000 would be fair and reasonable as "an interim payment on account" of Croudace's claim. Mr Gaskell confirmed his acceptance of the reasonableness of this sum as a payment on account at a further meeting with Mr Wooding on 14 July 1983.

On 31 May 1983 Mr Jacoby retired as Lambeth's Chief Architect. No one was appointed Chief Architect in his place.

Croudace continued to press Lambeth for their claim to be verified and to be paid something on account. On 8 September 1983 Mr Fromings, Lambeth's Senior Private Architect Liaison Officer, wrote to Croudace a letter which contained in two places (the third and sixth paragraphs) the statement that Croudace's claim was being ascertained by Messrs Stern and Woodford, who had been instructed for that purpose. This statement was untrue, and was soon denied by Stern and Woodford.

Croudace continued to press Lambeth both orally and in writing, but to no effect. On 29 November they wrote threatening to put the matter in the hands of their lawyers, to which Mr Fromings replied on 8 December saying that he was consulting Lambeth's legal division and adding:

> "I also mention that contrary to the third paragraph in my letter of 8 September, no instructions to ascertain have yet been sent to Messrs Stern and Woodford, pending receipt of the necessary legal advice."

Apparently at some time early in 1984 Lambeth realised that paragraph A on p 12 of Bill No 1 might provide an answer to all or part of Croudace's claim for loss and expense, and a letter to that effect was drafted but never sent. At no time before the start of this action did Lambeth make the point (which they do now) that the whole of the delay was attributable to the diversion of the electricity cable, that under Bill 1/12A this is Croudace's responsibility and accordingly that they are not liable to meet any part of Croudace's claim. Indeed, they now assert that they are entitled to have Mr Jacoby's certificate of 2 February 1983 re-opened, so that they may claim a large sum of liquidated damages from Croudace's for their delay in completing the works.

On 23 February 1984 Croudace, their patience finally exhausted, issued a specially indorsed writ in the High Court claiming the sum of £646,994.63 (being a revision of their claim for £624,655.54) or alternatively damages for breach of contract. The breach of contract alleged in paragraph 14 of the statement of claim is Lambeth's failure and/or refusal to ascertain or instruct the ascertainment of Croudace's claim.

On 10 May 1984 Croudace issued a summons returnable on 13 July asking for summary judgment under Order 14 for £100,000 and interest thereon to be assessed, alternatively damages and interst to be assessed, alternatively an order for an interim payment under Order 29, rules 10 and 11. In this court Croudace was given leave to amend its summons by deleting the final "alternatively", thus

making it clear that its claim for an interim payment was additional to, and not in substitution for, its claim for final judgment for damages to be assessed.

On 27 June Lambeth issued a summons, also returnable on 13 July, asking for a stay of proceedings pursuant to section 4 of the Arbitration Act 1950. On 11 July 1984 Mr Jacoby swore his affidavit to which I have already referred and this in turn was answered by an affidavit by Mr Williams, a partner in Croudace's solicitors, on 13 July 1984. It is, of course, impossible for the court to resolve the issues of fact which are raised by these two affidavits.

Both applications came before His Honour Judge John Newey QC sitting as an official referee on 13 July 1984. The learned judge reserved his judgment, which he delivered on 18 October 1984. His relevant findings may be summarised as follows:

(1) Croudace's application for payment for loss and expense under Conditions 11(6) and 24 was made within a reasonable time.

(2) If "the Chief Architect" could be regarded as if he were a sort of corporation sole, then in the absence of any individual bearing the title any qualified member of Lambeth's Architect's Department might act as such. If that were the correct view, then the Chief Architect by the Department failed to comply with the obligation to ascertain Croudace's loss and expense and, since he or they were acting as Lambeth's agent, Lambeth were liable for the breach of contract.

(3) If, on the other hand, the Chief Architect must be an individual, Lambeth's failure since 1 June 1983 to nominate one had prevented performance of Lambeth's contract with Croudace, since there had been no one legally entitled to ascertain or direct ascertainment. The agreement gave Lambeth the power to nominate a successor to the "Chief Architect" if he should cease to act and there must be implied a reciprocal obligation requiring them to do so. On that alternative view Lambeth were again in breach of contract.

The judge then made three orders:

(1) On 18 October 1984, that Croudace be at liberty to enter judgment for damages to be assessed.

(2) Also on 18 October 1984, dismissing Lambeth's application for a stay of proceedings pursuant to section 4 of the Arbitration Act 1950.

(3) Dated 22 October 1984, that Lambeth should make an interim payment to Croudace within 14 days of £100,000 pursuant to Order 29, Rule 11.

A stay of this payment was refused and we were told that it was duly made.

The judge gave Lambeth leave to appeal against his orders. This they have done and by notice of appeal dated 21 November 1984 ask (1) that they be given unconditional leave to defend, (2) that the order for the interim payment be rescinded and that the £100,000 be repaid, and (3) that the proceedings be stayed under section 4 of the Arbitration Act 1950. A stay of proceedings pending arbitration and the repayment of the £100,000 is what Lambeth really want.

By the end of the argument before us it had become apparent that there wre certain matters of common ground:

(1) Croudace's claim under the agreement for the sum of £646,994.63 for its loss and expense cannot be maintained by action in the absence of a certificate from the architect. In the light of the decision of this court in *Lubenham Fidelities & Investment Co Ltd* v *South Pembrokeshire District Council & Anr* (1986) 32 BLR 39 (the judgment being delivered on the morning when this case started), the decision of the House of Lords in *Panamena Europea Navigacion* v *Frederick Leyland & Co Ltd* [1947] AC 428 is distinguishable in a case, such as the present, where the contract requiring certification contains an arbitration clause.

(2) Croudace's claim for damages for Lambeth's breach of contract in failing to instruct the ascertainment of Croudace's loss and expense, whether by failing to nominate an architect or otherwise, is a dispute which falls within the ambit of the arbitration clause (Condition 35).

Further, although he did not formally concede the point, Mr Desmond Wright QC, for Lambeth, did not seriously contest the judge's finding that there was implied in the agreement an obligation on the part of Lambeth to nominate a successor to Mr Jacoby when he retired as Chief Architect, and that their failure to do so constituted a breach of contract on their part. In my judgment Lambeth's acts and omissions after 2 February 1983, including but not limited to their failure to appoint a successor to Mr Jacoby, amounted to a failure by them to take such steps as were necessary to enable Croudace's claim for loss and expense to be ascertained, and as such amounted to a breach of contract on their part: cf *Smith* v *Howden Union & Anr* (1890) 2 Hudson's BC (4th Ed) 156.

The real issues in this case are whether Croudace can establish that it has suffered any damage resulting from that breach of contract and, if so, whether the amount of that damage should be determined by the court or by arbitration.

Unless it can be successfully maintained by Lambeth that there are *no* matters in respect of which Croudace are entitled to claim for

loss and expense under Conditions 11(6) and 24(1)(e), it necessarily follows that Croudace must have suffered *some* damage as a result of there being no one to ascertain the amount of their claim. Without going into the details of the many matters raised by Croudace, I am satisfied that they can establish that they have suffered some damage in this connection even though, if Lambeth are right on the Bill 1/12A point, those damages may be less than the sum of £664,994.63 which they claim for loss and expense. Further, when damages come to be assessed it will be open to Lambeth to take the point that Croudace's applications under Conditions 11(6) and 24(1) were not made within a reasonable time, since the judge's statement of his view that "the application made under both conditions was made within a reasonable time" was not a finding necessary for the orders which he made. In my judgment, therefore, the judge was entitled to make the order of 18 October 1984 for damages to be assessed, unless it was a case for a stay of proceedings pending arbitration, and it is to that issue that I now turn.

Section 4 of the Arbitration Act 1950 provides that

> "if any party to an arbitration agreement commences any legal proceedings in any court against any party to the agreement, in respect of any matter agreed to be referred, any party to those legal proceedings may . . . apply to that court to stay the proceedings, and that . . . if satisfied that there is no sufficient reason why the matter should be referred in accordance with the agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings".

Mr Thomas, for Croudace, submitted that as Lambeth never raised the Bill 1/12A point until long after the proceedings had commenced they could not then have been ready and willing to do all things necessary to the proper conduct of the arbitration, since there was at that time no dispute to go to arbitration. He submitted that it is implicit in section 4 that there must be a dispute in existence at the time when the proceedings were commenced. I do not accept those submissions. Not merely is there nothing to justify the implication for which Mr Thomas contends; to make such an implication would encourage every party to an agreement which contained an arbitration clause and who wanted to go to court rather than to arbitration to rush to court at an early stage before a dispute had fully developed and then maintain that section 4 had no application. That cannot be right. In any event, in the present case there was a dispute in existence at the time when proceedings were commenced,

viz, Lambeth's failure to take steps to instruct the ascertainment of Croudace's claim.

However, that is not the end of the matter. The court has a discretion to stay proceedings under section 4, although it is a discretion to be exercised judicially and is to be exercised in favour of a stay unless the court is satisfied that there is a sufficient reason why the matter should not be referred to arbitration.

One reason why a matter should not be referred to arbitration is if the defendant's liability is so clear that it is possible to sign summary judgment for a sum indisputably due — see *Ellis Mechanical Services Ltd* v *Wates Construction Ltd* [1978] 1 Lloyd's Rep 33 (Note); 2 BLR 60. Admittedly in that case the defendant's liability was already quantified whereas here the quantum remains to be determined, but in my judgment the fact that there is no defence on liability is *a* factor which the court is entitled to take into account in exercising its discretion under section 4.

Another reason why a matter should not be referred to arbitration is if the case is one where a payment on account of damages would be appropriate. In *The "Fuohsan Maru"* [1978] Lloyd's Rep 24; 7 BLR 18 this court held that there was then no power for the court to make an interim payment on account of damages, and that in the absence of such a power there was no ground to refuse a stay under section 1 of the Arbitration Act 1975 (applicable to international arbitration agreements, unlike the 1950 Act, which applies to domestic arbitration agreements) which in any event was mandatory in its terms. If there had then been a power in the court to make an interim payment on account of damages — as there is now under Order 29, rule 11 — and there had been a discretion to grant or withhold a stay, it appears that the court would have been anxious to assist the plaintiffs. The court is now in a position to do so.

Finally there is the general question of Lambeth's conduct. In *Mustill & Boyd on Commercial Arbitration* at p433 it is stated that the plaintiff "may assert that the defendant's conduct... is such that the court ought not to exercise its discretion in favour of granting a stay". I accept that the defendant's conduct may be a ground for refusing a stay, but I also accept Mr Wright's submission that the conduct must be of such a kind as relates to the right to arbitration. In the present case Lambeth's conduct from February 1983 to February 1984 in failing to take the steps necessary for Croudace's claim to be ascertained merits the strongest condemnation. Moreover, the court is entitled to infer, and I do so infer, that the object of this conduct was to postpone the evil day when Lambeth would have to pay to Croudace the sum which the architect had acknowledged was due, even if its precise amount had not then been

quantified. Further, it is a reasonable inference that *a* motive, if not the sole motive of the application to stay proceedings, was to create further delay. In my judgment, therefore, Lambeth's conduct is a factor which the court is entitled to take into account in exercising its discretion under section 4.

On the other side of the scales it is relevant to note that, if the matter goes to arbitration, an arbitrator would be entitled to open up the architect's condition 22 and 23(e) certificates.

It is not easy to determine from the judgment of the official referee on what precise grounds he refused a stay under section 4. Towards the end of his judgment he said:

> "It may be that Lambeth's breaches of contract have in themselves given rise to a dispute or difference between them and Croudace, although neither before the commencement of the proceedings nor since have either Lambeth or their architects stated that they would not ascertain Croudace's loss and expense pursuant to their application — they have simply failed to do so. Since no certificate reflecting loss and expense has ever been issued, there is nothing which an arbitrator could open up or review."

If that last sentence was the judge's reason for refusing a stay, then in my judgment it was not a valid reason. However, the same day the judge had indicated his intention to make his order for payment of an interim sum on account of damages, and it is not unreasonable to assume that this possibility was in his mind when he refused the stay under section 4.

Nevertheless, I am not wholly satisfied that, in refusing a stay, the judge took all the relevant factors into account and it would be open to this court to review his decision. For my part I am satisfied that in the event it was right to refuse a stay. The factors which I have referred to above, and particularly Lambeth's conduct, in my judgment are valid grounds here for refusing the discretionary remedy of a stay. Once it is accepted that there should be no stay, then on the basis that there is no defence to the claim for breach of contract, the order for damages to be assessed necessarily follows.

There remains the question of the order for the payment of £100,000 on account of damages. Order 29, rule 11, empowers the court to order an interim payment on account of damages of such amount as it thinks just. The pre-conditions for making such an order include, under paragraph 1(b), "that the plaintiff has obtained judgment against the respondent for damages to be assessed". That condition is satisfied in the present case. Further, the amount of the interim payment must not exceed a reasonable proportion of the damages which in the opinion of the court are

likely to be recovered by the plaintiff. In the present case the judge knew that Croudace had a claim which, subject only to the Bill 1/12A point, might well amount to some £650,000, and that Stern and Woodford, Lambeth's own appointees, had recommended the payment of £100,000 on account. In those circumstances it was, in my judgment, a proper exercise of the judge's discretion, with which this court should not interfere, to order an interim payment of £100,000. It is to be remembered that, in the unlikely event of this payment proving too much, the court has power to order its repayment under Order 29, rule 17.

I would dismiss this appeal.

SIR GEORGE WALLER: I entirely agree with the judgment of Balcombe LJ.

I would only add a few words about the strength of defence which Lambeth seeks to put forward. Balcombe LJ has already dealt with the conduct of Lambeth. It is worth considering Lambeth's suggestion of the cause of the delay against the background of Lambeth's conduct.

On 2 February 1983 Mr Jacoby, the Chief Architect, awarded an extension of 31 weeks and 3 days "following consultation with Messrs Andrews Sherlock and Partners" the architects to whom he deputed the work. During the following months they suggested that an advance of £100,000 would be in order, but this had to be referred to Lambeth. Although Croudace were seeing the architects monthly and were pressing Lambeth for payment, at no time was any suggestion made that the delay was due to the electricity cable and was covered by Bill 1/12A. Eighteen months after the award was made, namely on 11 July 1984, Mr Jacoby swore an affidavit that in making the award he did not have in mind the provisions of Bill 1/12A. Mr Williams, on behalf of Croudace, made a very full reply in his affidavit showing that the causes of the delay were other than ignorance of the existence of the cable. No affidavit was filed from Andrew Sherlock and Partners. In my opinion, having regard to the terms of the original award, Lambeth's behaviour in the intervening period, and Mr Williams' affidavit, the nature of Lambeth's defence is shadowy. I would regard this as further supporting the view that a stay should be refused.

MAY LJ: I agree with both judgments which have just been delivered.