Neutral Citation Number: [2013] EWCA civ 577

Case No: A3/2012/2128

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, CHANCERY DIVISION
Mr Justice Roth
HC10C04600

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 May 2013

Before :

LORD JUSTICE LONGMORE
LORD JUSTICE TOMLINSON
and
LORD JUSTICE LEWISON

- -

Between :

TELFORD HOMES (CREEKSIDE) LIMITED	**Appellant**
- and -	
AMPURIUS NU HOMES HOLDINGS LIMITED	**Respondent**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

MR JONATHAN GAUNT QC & MR ADAM ROSENTHAL(instructed by **Dentons UKMEA LLP, London**) for the **Appellant**
MR DAVID MAYALL (instructed by **WGS Solicitors**) for the **Respondent**

Hearing dates : 14 and 15 May 2013

- -

Approved Judgment

Judgment
As Approved by the Court

Lord Justice Lewison:

In a nutshell

1. In October 2008 a developer and an investor enter into an agreement for lease. The development in question consists of four mixed blocks (A, B, C and D) comprising commercial units on the lower floors and over 300 flats above. The ultimate objective of the agreement is the grant of four 999 year leases of the commercial units to the investor. Under the terms of the agreement the developer agrees to build the blocks to shell and core, using due diligence, and using reasonable endeavours to procure completion of the works by target dates. The target dates are 21 July 2010 in the case of blocks C & D; and 28 February 2011 in the case of blocks A and B.

2. Work begins on blocks C and D. Although it is behind schedule, these blocks are completed on 19 January 2011 and 4 April 2011 respectively. In the mean time as a result of funding difficulties work on blocks A and B has been suspended. The investor complained bitterly. The developer assures the investor that it is committed to the project; and that it will resume work. Work is resumed on 4 October 2010. But on 22 October the investor claims to be entitled to terminate the agreement on the ground that the delay in carrying out the works is a repudiatory breach of contract by the developer. Roth J agreed, but gave permission to appeal. The question for us is: was he wrong?

3. Mr Gaunt QC, appearing for the Appellant with Mr Rosenthal, takes two principal points:

    i) The judge did not adequately analyse what benefit the investor was intended to receive under the contract in order to decide whether the breaches of contract had deprived the investor of at least a substantial part of that benefit ; and

    ii) In assessing whether the breaches of contract were repudiatory breaches, the judge did not concentrate on the right date; which was the date when the investor purported to terminate the contract.

4. In my judgment, for the reasons that follow, both points are well-taken. I would allow the appeal.

The relevant facts in more detail

5. Telford Homes (Creekside) Ltd ("Telford") is a property development and construction company. In 2007 it acquired a significant residential and commercial development scheme ("the development") on land close to the south bank of the River Thames at the border of Greenwich and Deptford in London SE8. The proposed development was to consist of four blocks: Blocks B, C and D laid out in a straight line; and Block A more or less at a right angle to Block B, with the triangular space between Blocks A, B and C designed to provide a raised piazza. The blocks were designed to be of varying height and provide commercial accommodation on the ground, first and second floors, with residential accommodation on the floors above, comprising a total of 371 flats, and two floors of underground parking below. The

development was expected to involve an overall investment of some £102 million to bring to completion.

6. Ampurius Nu Homes Holdings Ltd ("Ampurius") is also engaged in property development.

7. On 7 October 2008 Telford and Ampurius entered into an agreement for lease, in which Telford was referred to as the Landlord and Ampurius was referred to as the Tenant. The agreement contained the following relevant provisions. It began with a number of definitions, as follows:

> ""Commercial Units" The Ground Floor and first Floor commercial units comprising 54,153.68 square foot Net Internal Area which includes open market space ("the Open Market Units") and affordable working space ("Affordable Workspace Units") all of which is shown coloured pink on the ground and first floor Plans annexed.
>
> "Estimated Purchase Price" £8,426,181.40 plus VAT (including the parking spaces at £600,000) as calculated in accordance with clauses 4.3.1 and 4.3.2 apportioned between the Blocks as provided in clause 4.4;
>
> "Landlord's Works" The construction of the Property to shell and core as set out in clause 2 and in accordance with the Plans and Specifications and to include the construction of the Parking Spaces;
>
> "Parking Spaces" The 40 spaces edged red shown on the car park plans;
>
> "Price" The sum of the Open Market Unit Price, the Affordable Workspace Unit Price and the Parking Space Price as set out in clauses 4.3.1 and 4.3.2 as apportioned between the Blocks in accordance with clause 4.4.
>
> "Property" The Commercial Units and the Parking Spaces;
>
> "Target Date" Blocks A and B 28th February 2011
>
> Blocks C and D 21st July 2010."

8. By clause 1.2, a deposit of £421,309.07, being 5% of the Estimated Purchase Price, was payable on signing to Telford's solicitors. By clause 1.3, further deposits of £143,958.17 for Blocks A and B and £267,350.90 for Blocks C and D were payable to Telford's solicitor within 20 working days of notice from Telford to Ampurius that the concrete frame of the relevant blocks had been completed, as evidenced by a certificate from Telford's architect. By clause 1.4, if any of the deposits payable under clause 1.3 were not paid within 30 working days of the clause 1.3 notice, Telford was entitled to rescind the contract and retain the deposits already paid.

9. Clause 2 was headed "Landlord's Works" and provided insofar as material:

> "2.1 The Landlord shall:-
>
> …
>
> (ii) regularly update the Tenant of any application development and progress made in connection with any matter concerning the development which may affect the Tenant's property …
>
> …
>
> 2.3 The Landlord will procure that the Landlord's Works are carried out:
>
> (i) in a good and workmanlike manner.
>
> (ii) using good quality materials of their several kinds.
>
> …
>
> (vi) with due diligence.
>
> 2.4 The Landlord will use its reasonable endeavours to procure completion of the Landlord's Works by the Target Date or as soon as reasonably possible thereafter."

10. Clause 4 contained machinery for working out the eventual purchase price based on multiplying the net internal area of the part of the development to be leased by a differential rate per square foot. Completion was to take place 25 working days after the date when Telford's Architect certified that Practical Completion of the Landlord's Works in the relevant block had taken place. Clauses 4.5.1, 6.1 and 7 provided that on the Completion Date for each block Telford would grant to Ampurius a 999 year lease of the relevant block in the form annexed and Ampurius would pay the Estimated Purchase Price less the deposit as apportioned to that block; subject to a proviso that Telford could not serve a Certificate of Practical Completion in respect of Block C or D without the other or in respect of Block A or B without the other. The structure of the contract was such that (by tracing through the various definitions) Ampurius could be compelled to complete a lease of the commercial units in a block even though the residential component on the upper floors was still under construction.

11. At the time the contract was signed, the bulk of the excavation of the double storey basement and the foundation piling for the blocks had already been completed. For the remainder of 2008 and early 2009, works proceeded successfully on Phase I of the development. However, the continuing effect of the credit crunch falsified expectations of demand for the flats. On 23 March 2009 Telford's board resolved to stop work on blocks A and B, and to allow work on block C to slip in order to assist cash flow. In accordance with this decision, work on Blocks A and B was halted in June 2009, although work continued to the shell on Block A to the extent necessary for the delivery of the energy unit and car park entrance that served also Blocks C and D.

12. A meeting between representatives of the parties took place on 2 July 2009. At that meeting Ampurius were told for the first time that blocks A and B were on hold and that it was a condition that 85 pre-sales were made for the release of Phase II funding. At about the same time Telford managed to secure a cash injection, which made it unnecessary to slow the construction of blocks C and D. In consequence, therefore, the work on blocks C and D was not put back.

13. On 14 July 2009 Mr Fitzgerald, Telford's managing director, wrote to Ampurius. In his letter he said:

> "…our development funding has temporarily been restricted to the amount required to deliver all basement works up to podium, all of block D, all of block C and a small amount of build works on A to facilitate the delivery of D & C. Therefore, we confirm that the concrete frames to blocks C and D should be complete on the dates previously advised (06/10/2009 block D and 27/10/2009 block C), that the commercial units within these blocks will be ready for completion on 21st July 2010 for both Blocks D and C and that at present blocks A and B are on hold until the secured development finance is released."

14. On 8 October 2009, the Telford's solicitor wrote to Ampurius' solicitor advising that the concrete frames for Blocks D and C were expected to be completed on 26 October and 27 November respectively, triggering the liability to pay the further deposits under clause 1.3 of the Contract. This provoked the following response:

> "I note from the letter dated the 14th July 2009 from John Fitzgerald to Jeff Shapiro that, as at that date, construction of Blocks A and B were on hold as a result of the financial problems of your client. So far as we are aware this is still the position.
>
> It is therefore clear that your client is in breach of, at least, its obligation to procure that the landlord's works are carried out with due diligence (Clause 2.3 (vi)) and to use its reasonable endeavours to procure completion of the Landlord's Works by the Target Date or as soon as reasonably possible thereafter (Clause 2.4).
>
> This is a deliberate and ongoing breach by your clients of the terms of the contract. By its conduct it has made it abundantly clear that it does not intend to be bound by the terms of the contract and is, therefore, in repudiatory breach of contract. My client is currently considering whether to exercise its option to accept the repudiatory breach. If my client decides to do so it will, of course, be entitled to the return of all deposits paid to date together with substantial damages.
>
> There is a material adverse effect on my client's ability to market and/or sell (pre-let) any of the commercial units without

> all four blocks being built and more particularly the main block in respect of which no works have begun.
>
> My client may be persuaded not to exercise its right to treat the contract as at an end (but not its right to recover damages for breach) if your client:
>
> (i) Can now give a clear timetable for completion of all four blocks: given the delays to date the agreement would have to be varied so as to expressly make time of the essence for completion;
>
> (ii) Agrees that the further deposits payable pursuant to clause 1.3 of the contract would be payable only upon completion of the concrete shell of the last block to be constructed."

15. In reply Telford's solicitor asserted that Telford had "every intention of being bound by the terms of the Contract." Negotiations between the parties then took place, but nothing was agreed. But in the course of the negotiations, at a meeting on 26 November 2009 Telford told Ampurius that it hoped to be able to resume work on blocks A and B in March 2010. In the light of those negotiations Telford did not demand payment of the further deposit under clause 1.3 upon completion of the concrete frames to Blocks C and D, for which the architect gave his certificates on, respectively, 2 December and 6 November 2009.

16. Work on blocks A and B did not start in March 2010 because the necessary funding was still not in place. Telford continued to seek funding through the summer. In June 2010 Telford's solicitor said that Telford was expecting the necessary finance to be confirmed within the coming week to enable further development of blocks A and B to begin in January 2011. Ampurius continued to be concerned about the delay. However, further negotiations came to nothing. On 29 June 2010 Ampurius' solicitor wrote to Telford's solicitor. His letter included the following:

> "Regrettably however following 8 months of negotiations with a view to settle the dispute between the parties they have come to a standstill and the dispute remains.
>
> As referred to in my letter to you of the 5th November and that of the 12th November 2009 in the circumstances additional deposit is not payable to your client at present.
>
> It is with regret and much concern that your clients have not commenced the works to Blocks A and B notwithstanding the obligation on your clients to use their "best endeavours" to implement the planning permission and to "use reasonable endeavours" to complete the works "by the Target date" and or reasonably soon thereafter.
>
> It is clear that your clients do not have the funds nor the ability to carry out the works to Blocks A and B.

> My clients have entered into the agreement on the basis of their acquisition of 4 blocks known as A, B, C and D, not merely 2 blocks C and D.
>
> The failure on your clients to commence works to Blocks A and B is not only in breach of the terms of the agreement but also causes damage to my clients in their attempts to sell/sublet the commercial units as tenants are mainly concerned that:
>
> Your clients will never carry out the works to Blocks A and B and/or that your clients will carry out the works over a period of time that would inflict damage and/or interfere with the businesses to be set out in the commercial units."

17. Telford's solicitor replied on 2 July. His letter contained the following:

> "It is certainly not my clients' position that negotiations have come to a standstill. My clients have every intention of performing and completing the contract.
>
> Your clients are house builders and are fully aware of the financial difficulties of the last two years. These difficulties have been demonstrated by the lack of development finance and the considerable slow down in the sales of new homes. These are matters totally outside my clients' control.
>
> You state:-
>
> "It is clear that your clients do not have the funds nor the ability to carry out the works to Blocks A and B".
>
> This is simply not true. Despite the "credit crunch" and low rate of sales my clients have now secured further development finance for Blocks A and B. Your clients will be fully aware that development finance will only partially cover the costs of works but our clients will have full funding available by the end of the year to enable them to continue with Blocks A and B in January. Your clients will be aware from inspection that the sub-structure of Blocks A and B is already in place.
>
> It was always clear that Blocks A and B would be delivered after C and D. The contract was specifically drafted to take account of this. The delays to the whole development arising from the international financial difficulties will not change this position."

18. This elicited a long response from Ampurius' solicitor, which included the following passages:

> "C. I am content to note that your clients do not regard the "negotiations to have come to a standstill" and note "their intention of performing and completing the contract". However,

> it is not only a matter of their "intention", it is a matter of "specific performance." Your clients have undertaken and are contractually obliged to undertake the works in accordance with the terms of the initial Agreement dated 7th October 2008 and to rectify the breaches committed by them as per my letter to you of the 5th November 2009. Your clients are obliged to undertake the works within the period of time, to use their "best endeavours" to implement the planning and to use their "reasonable endeavours" to complete the works before, or soon after the Target Date.
>
> ….
>
> E. The Agreement between our respective clients was not for your clients to build Blocks C and D whilst charging deposit on exchange of contracts in relation to Blocks A, B, C and D and for your clients to carry out the works to Blocks A and B as and when it suited your clients. Your clients are under contractual obligation. You state that "this is simply untrue. Despite the credit crunch and low rate of sales my clients have now secured further development finance for Blocks A and B". Accordingly your clients must commence carrying out the works now. Your clients are under contractual obligation to specifically perform the contract.
>
> F. The contract does provide the right for your clients to require the completion of Blocks C and D without completion of Blocks A and B. However, your clients are in a material breach of contract as per my communication dated the 5th November 2009."

19. Telford's solicitor replied on 14 July. He said:

> "The situation as it currently stands is exactly in accordance with the provisions of the draft supplemental agreement. The timing put forward by my clients for completing Blocks C and D and for continuing with and completing Blocks A and B accord with the terms of the draft supplemental agreement. Those were the terms agreed in principle at the meeting in November and you are well aware that I have been pressing for that agreement to be completed. There has been no change since November to my clients' position."

20. The letter continued:

> "Our clients have secured the necessary bank finance but it is a condition of this bank finance that this is not committed to further development on the site until January. We understand that the bank require to see sales of Units in Blocks C and D being completed in the autumn before releasing the funding in January."

21. On the same day, in a further letter, Telford's solicitor said:

> "My clients will continue works to Blocks A and B as soon as the bank permits. At present the funding which has been secured cannot be released until this coming January. My client is seeking to persuade the bank to bring this forward."

22. Further negotiations took place but they, too, came to nothing. In early September Telford claimed the further deposit which had become due on completion of the concrete frames to blocks C and D. In the letter claiming the deposit Telford's solicitor said:

> "My client expects to receive confirmation in the next few days from its bank that the development finance is available to enable work on Blocks A and B to recommence in early October."

23. Thus it appeared from that letter that Telford's attempt to persuade the bank to bring forward the release of funds from January 2011 had succeeded. A heated meeting took place on 15 September between principals, in the course of which Telford repeated to Ampurius that work on blocks A and B would recommence on 4 October, with a projected handover date of March 2012. The claim for the deposit was withdrawn later in the month, but it was subsequently renewed by a letter dated 24 September. As a consequence of that letter the deposit was due to be paid by 22 October 2010.

24. In response to that demand Ampurius' solicitor wrote on 29 September:

> "a. In relation to Affordable Works Space it has not been confirmed to date what the actual space required is and within which Block (whether A, B, C or D) the space is required and to what extent.
>
> b. Unless and until my clients are fully informed what space is available to them to acquire and in what Blocks are to be made available [sic] for affordable use, then it is impossible for my clients to agree the re-letting of any of the areas. This is common sense and no doubt your clients will agree that the failure to provide this information to date is causing my clients loss.
>
> …
>
> d. Please confirm what state of the negotiations, with whom and what endeavours have been undertaken by your clients in respect of the dealings with the Authority concerning the said affordable areas. Please provide a copy of any relevant documentation.
>
> …

> f. Please confirm whether or not the works to Blocks A and B have been commenced and if not then what is the commencement date and what guarantees are available that such works will indeed be commenced."

25. The judge found it understandable that Ampurius' solicitor wrote an open letter asking in terms whether the works had been commenced, and if not when they would be commenced and whether that was guaranteed. He reached this conclusion despite the fact that Ampurius had been told on 15 September that work was expected to start in the following month, because various dates for commencement had been mentioned in previous discussions but not adhered to. The judge's decision in this respect was, I think, a harsh one. It is true that Telford had said back in November 2009 that it hoped to be able to restart the works in March 2010 but had not done so. But since that date the only dates mentioned by Telford had been January 2011 (which was still months away) and October 2011 (which had also not yet arrived).

26. By letter dated 30 September (and sent by email on 1 October), Telford's solicitor sent Ampurius' solicitor the 'as built' measurements as requested at the meeting on 15 September; and also as regards the Affordable Workspace a copy of the submissions which Telford had made to Greenwich on 13 July 2010, with an email from a Ms Murat commenting on the submission. The letter also said:

> "My clients continue discussions with Greenwich regarding the affordable workspace. Nothing has been agreed and I will keep you informed of progress."

27. The request about the works to blocks A and B was not answered.

28. Works to Blocks A and B were restarted on 4 October 2010. The judge found that Telford's resumption of construction works to blocks A and B was not done simply with a view to performance of the contract, but because Telford was itself deeply committed to the development, of which the sale of the commercial units to Ampurius was only a small part. Irrespective of Ampurius' position Telford was going to carry out these works. However, no one on behalf of Ampurius visited the site in October; and Ampurius did not know that work had restarted. A letter dated 14 October from Ampurius' solicitor did not follow up the question whether work had started. A meeting took place on 21 October. Since the judge found that Ampurius did not know that works had been restarted it is a fair inference that it was not told at that meeting. It is an equally fair inference that it did not ask. On 22 October 2010 Ampurius purported to terminate the contract by letter from its solicitor. The letter read:

> "We refer to our letter of the 5th November 2009.
>
> Since that time your client has neither commenced work on blocks A and B in any meaningful way nor given the agreement requested in the said letter. As stated your client is in fundamental breach of its obligations pursuant to the agreement. Our client is entitled to and does now accept the repudiatory breach.

> In addition the agreement requires, at clause 4.3.2, your client to consult with our client and to make a joint application to the council to adjust the apportionment of the affordable cultural space from the equal apportionment between all blocks and between all three lower floors of each block envisaged by the agreement. Our client has to give consent to any re-apportionment. Notwithstanding this your client, according to its submission to the Council dated 13th July 2010 (copied to us on 30th September 2010) has agreed with the Council that all of the affordable cultural space will be included in block A. The submission also indicated that it is your client's intention to sell the freehold of the whole of block A to an investor at a price which will allow that investor to let the ground and first floors at a subsided [sic] rent. This is wholly incompatible with the obligation to let the ground and first floors to my client.
>
> The above amounts to further fundamental breaches of the contract, which my client now accepts."

29. At the date of this letter, there were still four months to go before the Target Date for blocks A and B. Telford's solicitor replied rebutting the suggestion that there had been any repudiation or fundamental breach, and by letter of 2 November 2010 stated:

> "With reference to your letter dated 22 October I can confirm that the further development in respect of Blocks A and B commenced at the beginning of October.
>
> The terms and allocation of the affordable cultural space is still subject to discussion. Your client will be consulted before any terms are concluded. The submission dated 13 July 2010 proposed that the cultural space be included in Block A. I was under the impression that your client favoured this arrangement. There was no reference to the freehold in the submission and clearly any arrangements in respect to the affordable cultural space will take account of your client's contractual position."

30. The letter also demanded payment of the deposit that had become due in respect of blocks C and D. Ampurius did not pay; and so by letter dated 9 November, Telford purported to terminate the contract. It is common ground that if the contract was still on foot that termination was effective. It is also common ground that if that termination was effective, Telford is entitled to keep the original deposit and to recover damages for any additional loss represented by the difference between the contractual price of the leases and their actual value at the date of termination (giving credit, of course, for the deposit). However, Ampurius says that it terminated the contract first, with the consequence that it is entitled to recover the original deposit; and it is not liable for damages.

31. Following these events Telford continued with the development of all four blocks. The commercial units in block C were certified as practically complete on 19 January 2011; and those in block D on 4 April 2011. This part of the development was thus

completed approximately nine months later than the Target Date. The judge found, on the basis of unchallenged evidence, that if Ampurius had not purported to terminate the contract practical completion would have been achieved on 1 May 2012 for Block A and 20 February 2012 for Block B. 20 February 2012 would have been just under one year later than the Target Dates for those blocks. The contract provided for a gap of seven months between handover of blocks C and D and handover of blocks A and B. In the outturn that gap would have increased to approximately thirteen months.

The Judgment below

32. The judge held that Telford's delay in carrying out the works to blocks A and B was a breach of clause 2.3 (vi) of the contract. He also held that the deliberate decision to put the works to blocks A and B on hold and the delay occasioned by the decision amounted to a breach of clause 2.4. That is no longer in dispute.

33. The judge applied the tests stated in Chitty on Contracts 30th edn (2008) at para 24-040 in order to determine whether the proven breaches amounted to a repudiation of the contract, although he said that he did not find the tests easy to apply. The test stated in Chitty was based principally on the well-known judgment of Diplock LJ in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, 66, to which I will return.

34. The judge expressed his conclusion thus at [106] and [107]:

> "[106] … where, as here, the agreement is not an entire contract but comprises different parts or stages, I think that if the breach goes 'to the root' or substantially deprives the innocent party of the benefit of a significant part or stage, it constitutes a repudiatory breach even though he has had the benefit of the other part or stage. Thus if, for example, after completing Blocks C and D the Defendant had said that it was going to wait for three years and concentrate on other projects before completing Blocks A and B (but that it would indeed complete them then), I do not think that it could fairly be said that this was not a repudiatory breach because the Claimant would receive Blocks C and D and thus, in effect, half the benefit of the Contract. Put another way, I find that the Contract envisaged a single project involving four blocks, with three of them framing a piazza. I accept the Claimant's evidence that this was regarded as an important feature for the purpose of marketing the commercial units. Mr Ellis also referred to the concern expressed by the Claimant at the time the Contract was being negotiated to avoid, so far as it could, having to take leases of some blocks while building work continued on the others since that might interfere with sub-letting. It would therefore "frustrate" the commercial purpose if, for a substantial period, the Claimant received only two blocks, while the rest of the development remained a building site."

> "[107] … I consider that at least by the end of 2009, if not before, the Defendant's ongoing breach of clause 2.3(vi) had become sufficiently substantial to be repudiatory. By then, work on Blocks A and B had been halted for over five months, and the Defendant was unable in response to the repeated requests made on behalf of the Claimant to state when it might be in a position to resume. By early December 2009, the concrete frames to Blocks C and D had been completed, and the fact that the Defendant asserted that it fully intended to re-commence work on the other two blocks as soon as funding became available is not, in my judgment, an answer to the question of whether the cessation of work on those blocks, which at that point was indeterminate and prolonged, was so substantial as to defeat the commercial purpose of the venture. I do not think that it is an effective answer to say, as Mr Gaunt submitted, that since the Claimant would in the end have received the four blocks, this was just a case of substantial delay to two of them that can be compensated in damages. That ignores the fact that this was seen from the outset as one, unified development, albeit divided for practical purposes into two closely related stages of construction. I am satisfied that this was the common intention of the parties at the time the Contract was entered into, albeit for different reasons. The Claimant made clear that it wanted delivery of all four blocks as close in time as possible if it could not receive them together, since it regarded them as interlinked for the purpose of commercial marketing; and the Defendant had planned to proceed without interruption in the construction of Blocks A and B well before Blocks C and D were complete."

35. He continued at [110]:

> "Insofar as it were necessary to reach a separate determination as regards the breach of clause 2.4, I consider that this constituted a repudiation by at least July 2010. By then the works to Blocks A and B had been halted for about a year and it would have been clear that the cessation of work left no possibility of completion of those blocks close to the Target Date. The response to the demand from the Claimant's solicitor that work should commence "now" was to say that the Defendant would act in accordance with the draft supplemental agreement "agreed in principle" at the meeting in November 2009. However, that was a 'without prejudice' negotiation and the Defendant accepts that no supplemental agreement was ever concluded. The Defendant was manifestly not in a position to carry out the work in accordance with the original Contract, which continued to be binding, and the breach had the substantial effect discussed above."

36. Ampurius had advanced a separate argument based on renunciation, which the judge did not accept. He said at [114]:

> "This is not a case where the Defendant stated that it had no intention of completing the work but, on the contrary, it repeatedly asserted that it was going to do so, and it indeed did so after the Contract came to an end. Accordingly, considering this case in terms of renunciation does not take the matter any further."

37. Ampurius revives that argument by way of Respondent's Notice.

Discussion

38. *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* is a seminal case which bears on a number of points raised in this appeal. I must therefore deal with it in some detail. The charterparty in that case was a time charter of 24 months. The vessel was delivered to the charterers on February 13, 1957, and on that day sailed from Liverpool to Virginia, to pick up a cargo of coal and carry it to Osaka. The vessel's machinery was in reasonably good condition at Liverpool but because of its age needed to be maintained by an experienced, competent, careful and adequate engine room staff. But the chief engineer was an inefficient alcoholic, and the engine room complement was insufficient. So there were many serious breakdowns in the machinery en route. On the voyage from Liverpool to Osaka she was at sea eight and a half weeks, off hire for about five weeks and had about £21,400 spent on her for repairs. She reached Osaka on May 25 when a further period of about 15 weeks and an expenditure of £37,500 were required to make her ready for sea. In June, 1957, the charterers purported to terminate the charter. The grounds on which they claimed to be entitled to do so were (1) a breach of the obligation under clause 1 of the charterparty to deliver a seaworthy vessel; (2) a breach of the obligation under clause 3 of the charterparty to maintain the vessel properly; and (3) a breach of the obligation to deliver a vessel capable of making about 12½ knots in good weather and smooth water. This last breach was not proved on the evidence. In addition the charterers argued that they were entitled to terminate the charter because of the failure of the owners to remedy the breaches (a) within a reasonable time, or (b) on the ground that the breaches were such that the delay involved in remedying them frustrated the commercial purpose of the charter. I have set this out at some length because it shows that what the case was about was the impact of actual (accrued) breaches and not merely threatened or anticipatory breaches. Salmon J held that the breaches were not sufficiently serious as to amount to a repudiation; and this court dismissed an appeal against his decision.

39. The first question that Diplock LJ posed in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* was how to decide whether the occurrence of an event discharged the parties to a contract from further performance of their obligations, where the contract itself was silent. The answer he gave at the outset of his judgment was:

> "The test whether an event has this effect or not has been stated in a number of metaphors all of which I think amount to the same thing: does the occurrence of the event deprive the party

> who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?
>
> This test is applicable whether or not the event occurs as a result of the default of one of the parties to the contract, but the consequences of the event are different in the two cases. Where the event occurs as a result of the default of one party, the party in default cannot rely upon it as relieving himself of the performance of any further undertakings on his part, and the innocent party, although entitled to, need not treat the event as relieving him of the further performance of his own undertakings."

40. Later he continued:

> "Once it is appreciated that it is the event and not the fact that the event is a result of a breach of contract which relieves the party not in default of further performance of his obligations, two consequences follow. (1) The test whether the event relied upon has this consequence is the same whether the event is the result of the other party's breach of contract or not, as Devlin J. pointed out in *Universal Cargo Carriers Corporation v Citati*. (2) The question whether an event which is the result of the other party's breach of contract has this consequence cannot be answered by treating all contractual undertakings as falling into one of two separate categories: "conditions" the breach of which gives rise to an event which relieves the party not in default of further performance of his obligations, and "warranties" the breach of which does not give rise to such an event."

41. In *Hongkong Fir* Upjohn LJ also took the view that the effect of the breach had to amount to frustration of the contract. He said:

> "In my judgment the remedies open to the innocent party for breach of a stipulation which is not a condition strictly so called, depend entirely upon the nature of the breach and its foreseeable consequences. Breaches of stipulation fall, naturally, into two classes. First there is the case where the owner by his conduct indicates that he considers himself no longer bound to perform his part of the contract; in that case, of course, the charterer may accept the repudiation and treat the contract as at an end. The second class of case is, of course, the more usual one and that is where, due to misfortune such as the perils of the sea, engine failures, incompetence of the crew and so on, the owner is unable to perform a particular stipulation precisely in accordance with the terms of the contract try he never so hard to remedy it. In that case the question to be answered is, does the breach of the stipulation go so much to

> the root of the contract that it makes further commercial performance of the contract impossible, or in other words is the whole contract frustrated? If yea, the innocent party may treat the contract as at an end. If nay, his claim sounds in damages only."

42. In *Hongkong Fir* Diplock LJ addressed the question: at what time should the seriousness and character of the breach be evaluated? He said:

> "What the judge had to do in the present case, as in any other case where one party to a contract relies upon a breach by the other party as giving him a right to elect to rescind the contract, and the contract itself makes no express provision as to this, was to look at the events which had occurred as a result of the breach *at the time at which the charterers purported to rescind the charterparty* and to decide whether the occurrence of those events deprived the charterers of substantially the whole benefit which it was the intention of the parties as expressed in the charterparty that the charterers should obtain from the further performance of their own contractual undertakings." (Emphasis added)

43. Thus, turning to the facts, Diplock LJ said:

> "The question which the judge had to ask himself was, as he rightly decided, whether or not at the date when the charterers purported to rescind the contract, namely, June 6, 1957, or when the shipowners purported to accept such rescission, namely, August 8, 1957, the delay which had already occurred as a result of the incompetence of the engine-room staff, and the delay which was likely to occur in repairing the engines of the vessel and the conduct of the shipowners by that date in taking steps to remedy these two matters, were, when taken together, such as to deprive the charterers of substantially the whole benefit which it was the intention of the parties they should obtain from further use of the vessel under the charterparty."

44. There are three points which emerge from this. First, the task of the court is to look at the position as at the date of purported termination of the contract even in a case of actual rather than anticipatory breach. Second, in looking at the position at that date, the court must take into account any steps taken by the guilty party to remedy accrued breaches of contract. Third, the court must also take account of likely future events, judged by reference to objective facts as at the date of purported termination.

45. As the judge pointed out in our case Diplock LJ also referred to *Jackson v Union Marine Insurance Co Ltd* (1874-1875) LR 10 CP 125, upon which the judge himself placed some reliance. Diplock LJ treated that case as authority for the proposition that delay will justify termination of a contract "if the breach is so prolonged that the contemplated voyage is frustrated." This was also the conclusion of Devlin J in

Universal Cargo Carriers Corporation v Citati [1957] 2 QB 401 which was clearly approved in *Hongkong Fir*.

46. In *Universal Cargo Carriers Corporation v Citati* Devlin J said:

> "But a party to a contract may not purchase indefinite delay by paying damages and a charterer may not keep a ship indefinitely on demurrage. When the delay becomes so prolonged that the breach assumes a character so grave as to go to the root of the contract, the aggrieved party is entitled to rescind. What is the yardstick by which this length of delay is to be measured? Those considered in the arbitration can now be reduced to two: first, the conception of a reasonable time, and secondly, such delay as would frustrate the charterparty. The arbitrator, it is clear, preferred the first. But in my opinion the second has been settled as the correct one by a long line of authorities."

47. The test favoured by Diplock LJ was applied by this court in *Shawton Engineering Ltd v DGP International Ltd* [2005] EWCA Civ 1359; [2006] BLR 1. That was a case of a contract for the design and manufacture of a number of packages for a handling plant for nuclear waste. The contractor was behind schedule in completing the work. May LJ said at [32]:

> "Shawton could only in law legitimately determine the contracts for delay if either
>
> (a) they gave reasonable notice making time of the essence; or
>
> (b) DGP's failure to complete within a reasonable time was a fundamental breach such that the gravity of the breach had the effect of depriving Shawton of substantially the whole benefit which it was the intention of the parties that they should obtain from the contracts.
>
> Where time is not of the essence and where the party said to be in breach by delay is nevertheless making an effort to perform the contract, it is intrinsically difficult for the other party to establish a fundamental breach in this sense."

48. These authorities adopt as the relevant test whether the breach has deprived the injured party of "substantially the whole benefit" of the contract; which is the same test as that applicable to frustration. This sets the bar high. Other cases adopt a view that is more favourable to the injured party. Thus in *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 WLR 361 the defendant distributors of the plaintiff's goods were slow in meeting bills of exchange. But their ability to meet the bills eventually, albeit late, was not in doubt. This court held that they had not repudiated the contract. Salmon LJ said that if the contract did not spell out the consequences of breach "the courts must look at the practical results of the breach in order to decide whether or not it does go to the root of the contract." Sachs LJ said

that "to constitute repudiation a breach of contract must go to the root of that contract." Buckley LJ said:

> "To constitute repudiation, the threatened breach must be such as to deprive the injured party of a substantial part of the benefit to which he is entitled under the contract. The measure of the necessary degree of substantiality has been expressed in a variety of ways in the cases. It has been said that the breach must be of an essential term, or of a fundamental term of the contract, or that it must go to the root of the contract."

49. On the face of it therefore there is a tension between the test of deprivation of "substantially the whole benefit" (Diplock LJ) and "a substantial part of the benefit" (Buckley LJ). In *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc (The Nanfri)* [1979] AC 757 Lord Wilberforce quoted a number of different formulations of the test (including those of Diplock LJ and Buckley LJ) and said:

> "The difference in expression between these two last formulations does not, in my opinion, reflect a divergence of principle, but arises from and is related to the particular contract under consideration: they represent, in other words, applications to different contracts, of the common principle that, to amount to repudiation a breach must go to the root of the contract."

50. The trouble with expressing important propositions of English law in metaphorical terms is that it is difficult to be sure what they mean. As the High Court of Australia majority judgment pointed out in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* [2007] HCA 61 (2007) 82 AJLR 345 at [54] to describe a breach as "going to the root of the contract" is:

> "… a conclusory description that takes account of the nature of the contract and the relationship it creates, the nature of the term, the kind and degree of the breach, and the consequences of the breach for the other party."

51. Whatever test one adopts, it seems to me that the starting point must be to consider what benefit the injured party was intended to obtain from performance of the contract. In our case, the benefit that Ampurius was intended to obtain from performance of the contract was, first and foremost, a leasehold interest of 999 years duration in four blocks. In other words, what Ampurius bargained for was the right to possession of those units for 999 years, and the right for a like period to exploitation of the rents and profits to be derived from them. It was to take the blocks in pairs, with a gap of seven months between each handover (although acknowledging that the seven month gap was dependent on meeting dates described as "Target Dates"). The first pair of blocks was to be handed over just over twenty one months after the contract was signed. I do not think that the judge gave adequate weight to the ultimate objective of the contract, viz. the grant to Ampurius of 999 year leases. He concentrated on the expected effects on the marketing period. This, in my judgment, permeates his consideration of what practical effect the breaches of contract had.

52. The next thing to consider is the effect of the breach on the injured party. What financial loss has it caused? How much of the intended benefit under the contract has the injured party already received? Can the injured party be adequately compensated by an award of damages? Is the breach likely to be repeated? Will the guilty party resume compliance with his obligations? Has the breach fundamentally changed the value of future performance of the guilty party's outstanding obligations?

53. I agree with the judge that if Ampurius were only ever to be able to acquire interests in two out of the four blocks, then it would have been deprived of the benefit of a substantial part of the contract. That is because it would not have acquired two out of the four promised 999 year leases. But that is not this case.

54. Take next the (hypothetical) case in which, as things turned out, all four blocks were delivered one year late. In such a case, Ampurius would have acquired interests in all the blocks that it contracted for. So the inquiry would centre on whether the delay of one year deprived Ampurius of a substantial part of the benefit of ownership of a 999 year lease in each of the four blocks. On the face of it to deprive someone of one year out of 999 years does not deprive him of a substantial part of the benefit he was intended to receive, let alone substantially the whole of that benefit. The judge made no contrary finding. Indeed, he recorded at [139] that there was no suggestion that the market had declined such that values would have been higher if Telford had completed the construction earlier. Delay of itself would not, on the judge's findings, appear to have caused Ampurius any loss at all.

55. What impressed the judge was that the four blocks were envisaged by the parties as a single project involving four blocks, with three of them framing a piazza. This was important for marketing. For Ampurius to be compelled to take two blocks, while building works continued on the remaining blocks, "might interfere with subletting". However, it must be remembered that the contract itself envisaged a staged handover, with a gap of seven months between handover of blocks C and D and handover of blocks A and B. To the extent that continuation of building works on two blocks would or might interfere with marketing of the two completed blocks, seven months' worth of interference was already part of the contract. So it overstates the case to say that the consequences of *any* gap between the two handover dates must be so serious as to amount to a repudiatory breach. In addition the contract was such that Ampurius could have been compelled to complete a lease on units in a particular block even though construction of the residential component of that block was still unfinished (I record that Mr Gaunt told us that Telford would not in practice have compelled Ampurius to do that; but we are considering legal entitlement). Moreover, in my judgment it is not enough to say that a possible interference with marketing is of itself sufficient to satisfy the test. After all, the judge did not find that marketing would be impossible: merely that it would be interfered with. But by how much; and with what financial consequences to Ampurius? The judge did not say. The effect of the breach was to increase the gap between handover from seven months to thirteen months: an increase of six months. What difference did that make, given that the contract itself contemplated a gap of seven months? Again the judge did not say.

56. Mr Mayall, appearing for Ampurius, accepted that the delay that had been occasioned up to and including 22 October 2010 had not caused any actual loss to Ampurius. It is to say the least unusual that a breach of contract that has caused no actual loss is characterised as a repudiatory breach. If no actual loss has been caused by the breach

one must then ask: what future loss is the injured party seeking to avoid as a consequence of the breach? The judge made no findings about future loss. But Mr Gaunt provided a calculation which illustrated the kind of loss that Ampurius might be expected to suffer on the assumption that it delayed all marketing of units in blocks C and D until the construction of blocks A and B had caught up with the contractual gap between the two; in other words on the assumption that marketing was impossible or so seriously interfered with that it was not practical. Both these scenarios are more favourable to Ampurius than the judge's actual finding. On that assumption:

i) Ampurius would have had to bear the cost of funding its original deposit of £421,309 for an additional six months;

ii) Ampurius would have had to fund the balance of the purchase price for blocks C and D, which was approximately £5 million".

57. Mr Gaunt submitted (and Mr Mayall did not disagree) that the cost that Ampurius would have incurred in these additional funding costs would have been of the order of £100,000. These costs were readily calculable; and Ampurius could have been readily compensated in damages or by way of set-off against the purchase price. Set against a purchase price exceeding £8 million, and in the context of an overall development cost exceeding £100 million, this was not a loss of a scale of magnitude sufficient to warrant characterising it as repudiatory. I agree. I am very doubtful whether, at any stage of the project, a repudiatory breach had been established. In my judgment Mr Gaunt's first point is well taken.

58. The judge was also impressed by the fact that at the end of 2009 Telford was unable to say when work on blocks A and B would recommence. In his view what gave the breach its repudiatory character was the uncertainty that works to blocks A and B would ever be restarted. That gives rise to the question whether the judge was right to freeze the situation at that date; or whether he should have taken into account the fact that on 15 September 2010 Telford told Ampurius that work would recommence on 4 October; and the fact that work did recommence at that time.

59. Mr Mayall submitted that whether a breach of contract does or does not amount to a repudiation of the contract must be judged as at the date of the breach. The right to accept the repudiation arises at that time and continues unless it is lost (for example by affirmation). Observations to the contrary were made in the context of anticipatory breaches; and the judge was right to distinguish such cases as he did at [126].

60. Mr Gaunt also relied on the decision of this court in *The Hermosa* [1982] 1 Lloyd's Rep 570. Although concerned with a ship, there is some resemblance between the facts of that case and our case. The case concerned a time charter for a period of two years from October 1979. The vessel came on hire in December 1974; but in January 1980 it went into dry dock for repairs. These repairs caused the charterers to lose a fixture. The vessel put to sea again at the end of March 1980, but on 18 April it was damaged in a collision. She was sent to Curacao for repairs. The estimated date for completion of the repairs was progressively postponed, and the vessel was still under repair at the end of July 1980. Charterers took the view that owners were doing little or nothing to carry out proper repairs; and on 15 August they called for owners to agree to begin repairs at once and to permit a survey on completion. Owners did not reply; and on 29 August charterers cancelled the charter. Meanwhile, however,

arrangements for repairs had been made with a different shipyard. The vessel sailed on 27 August and repairs began on 30 August. They were completed within seven weeks, and the vessel was then seaworthy. On these facts charterers were held to have wrongfully cancelled the charter. The important point for present purposes is the statement of Donaldson LJ (giving the judgment of the court) that:

> "… the conduct relied upon is to be considered as at the time when it is treated as terminating the contract, in the light of the then existing circumstances. These circumstances will include the history of the transaction or relationship. Later events are irrelevant, save to the extent that they may point to matters which the parties should have considered as hypothetical possibilities at the relevant time."

61. This is entirely consistent with what Diplock LJ had said in *Hongkong Fir*. On the facts of that case, the court held that charterers should have continued to press for information and should have waited to see whether the repairs would be commenced. As Donaldson LJ put it:

> "They struck too soon."

62. In *Stocznia Gdanska SA v Latvian Shipping Company* [2002] EWCA Civ 889 [2002] 2 Lloyd's Rep 436 Rix LJ said at [87]:

> "In my judgment, there is of course a middle ground between acceptance of repudiation and affirmation of the contract, and that is the period when the innocent party is making up his mind what to do. If he does nothing for too long, there may come a time when the law will treat him as having affirmed. If he maintains the contract in being for the moment, while reserving his right to treat it as repudiated if his contract partner persists in his repudiation, then he has not yet elected. As long as the contract remains alive, the innocent party runs the risk that a merely anticipatory repudiatory breach, a thing "writ in water" until acceptance, can be overtaken by another event which prejudices the innocent party's rights under the contract – such as frustration or even his own breach. *He also runs the risk, if that is the right word, that the party in repudiation will resume performance of the contract and thus end any continuing right in the innocent party to elect to accept the former repudiation as terminating the contract*." (Emphasis added)

63. The judge distinguished this case on the basis that Rix LJ was dealing with anticipatory repudiatory breaches. But as *Hongkong Fir* shows the same test applies to actual breaches. I do not consider that the judge was right to differentiate between the two in the way that he did. A breach of contract, although serious, may be capable of remedy. If it is remedied before the injured party purports to exercise a right of termination, then the fact that the breach has been remedied is an important factor to be taken into account. Likewise if there is delay in performance of an ongoing obligation it may well be possible for the delay to be made up by faster performance.

64. In my judgment, therefore, Mr Gaunt's second point is also well taken. What falls to be considered is the position as at the date when the injured party purports to terminate the contract. The judge in my judgment applied the test to the wrong moment in time.

65. In our case Ampurius did not purport to terminate the contract until 22 October 2009. But by that time work on blocks A and B had been restarted, and had been in progress for two and a half weeks. Thus it could no longer be said, as the judge said at [107], that "the *cessation* of work … was *indeterminate* and prolonged". The date for completion of the works might well have been indeterminate, even at that stage, but that is a feature of every building programme; and is reflected in the fact that the contractual completion dates were only Target Dates. But since work had already been restarted, the cessation of work had itself ceased.

66. Mr Mayall advanced an argument on the basis that Ampurius were justified in terminating the contract because Telford had not informed them in writing that work had been restarted in response to their solicitor's request of 30 September. That sat uncomfortably with his other argument that Telford had behaved in such a cavalier fashion that it was impossible to believe anything they said. In fact there is no hint in the correspondence that Ampurius thought that Telford were untrustworthy. But to my mind the real point is that work had actually restarted. It was not merely a question of Telford's say-so: there were, so to speak, boots and shovels on the ground. Mr Mayall argued that the judge had found that it was reasonable for Ampurius not to have inspected the site before purporting to terminate. But the judge made no such finding. He found that Ampurius did not know that work had restarted: he made no finding about whether that state of ignorance was reasonable. Nor did he need to.

67. What, then, was the effect on Ampurius of the delay in restarting the works to blocks A and B? As noted Mr Mayall accepted that no loss to Ampurius had actually occurred. I have already set out Mr Gaunt's calculation of the additional funding costs that Ampurius might expect to incur in the future. To revert to Diplock LJ's checklist in *Hongkong Fir*:

    i) The delay that had already occurred had caused Ampurius no loss;

    ii) Future delay was likely to require Ampurius to fund the deposits and the balance of the purchase price for blocks C and D for longer than it would otherwise have to have done;

    iii) But Telford had offered to defer the completion of the purchase of Blocks C and D, thus neutralising much of that expected loss;

    iv) Telford's conduct had been to make strenuous (and successful) efforts to find the necessary funding and to persuade its bank (also successfully) to bring forward the release date of the funds;

    v) Telford was committed to building out the whole project.

68. Mr Mayall added to that:

i) The effective length of the 999 year term would be shorter (perhaps by six months) and

ii) There would have been difficulties in funding.

69. The first of these is, with all respect, trivial in the context of a 999 year lease. The second of these is not supported by any finding that the judge made. In my judgment it is simply not possible to say, as at 22 October 2010, that the actual and reasonably foreseeable effects of Telford's breaches of contract were such as to deprive Ampurius of a substantial part (let alone substantially the whole) benefit of the contract. Nor is it possible to say that the delay had had the effect of frustrating the contract, whose overall objective was the grant of 999 year leases of the commercial units in each of the four blocks. I accept that uncertainty caused by delay is a commercial problem. But it seems to me that (absent any attempt to make time of the essence) delay, even with its attendant uncertainties, will only become a repudiatory breach if and when the delay is so prolonged as to frustrate the contract. In the context of an agreement to grant a series of 999 year leases, we are a long way from that in this case.

70. By way of Respondent's Notice Mr Mayall argued that the judge should have found that Telford had renounced the contract. There was no dispute about the applicable legal test. It is stated in para 24-018 of *Chitty*:

> "A renunciation of a contract occurs when one party by words or conduct evinces an intention not to perform, or expressly declares that he is or will be unable to perform, his obligations under the contract in some essential respect. The renunciation may occur before or at the time fixed for performance. An absolute refusal by one party to perform his side of the contract will entitle the other party to treat himself as discharged, as will also a clear and unambiguous assertion by one party that he will be unable to perform when the time for performance should arrive. Short of such an express refusal or declaration, however, the test is to ascertain whether the action or actions of the party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions. The renunciation is then evidenced by conduct. Also the party in default:
>
> "…may intend in fact to fulfil (the contract) but may be determined to do so only in a manner substantially inconsistent with his obligations"….
>
> If one party evinces an intention not to perform or declares his inability to perform some, but not all, of his obligations under the contract, then the right of the other party to treat himself as discharged depends on whether the non-performance of those obligations will amount to a breach of a condition of the contract or deprive him of substantially the whole benefit which it was the intention of the parties that he should obtain

> from the obligations of the parties under the contract then remaining unperformed."

71. The judge said at [114]:

> "This is not a case where the Defendant stated that it had no intention of completing the work but, on the contrary, it repeatedly asserted that it was going to do so, and it indeed did so after the Contract came to an end. Accordingly, considering this case in terms of renunciation does not take the matter any further."

72. I agree. Mr Mayall based a separate argument on communications between Telford and Greenwich LBC (the local planning authority) about requirements of a section 106 agreement. In breach of clause 4.3.2 of the agreement for lease Telford had approached Greenwich with proposals for locating Affordable Space within block A without having first consulted Ampurius. Communications between Telford and Greenwich were sent to Ampurius under cover of a letter of 1 October 2010. However, the judge found that if Ampurius had been consulted it would not have disagreed with that proposal. This, then, carries the matter no further. As part of its proposal to Greenwich Telford said that it proposed to market the space as a whole to an investor at rates per square foot given in the proposal. Mr Mayall said that this showed that Telford did not intend to be bound by its obligation to grant the leases to Ampurius, because an intention to market the units to an investor would be inconsistent with its pre-existing obligation to Ampurius to grant the leases. If Telford had implemented its stated intention there might have been some force in this submission. But it did not. Nor did Ampurius ask Telford for clarification or justification of what it had told Greenwich. As Lord Wilberforce said in *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277, 283 "Repudiation is a drastic conclusion which should only be held to arise in clear cases of a refusal, in a matter going to the root of the contract, to perform contractual obligations". In my judgment the mere fact of a communication between Telford and a third party but not acted upon (even though disclosed to Ampurius) is too slender a foundation for a conclusion that Telford renounced the contract.

Result

73. I would allow the appeal.

Lord Justice Tomlinson:

74. In order to resolve this appeal we do not need to decide whether the actual breaches of contract which Lewison LJ has identified at paragraph 32 above ever became repudiatory in character. If they did, that can only be because the stoppage in the work to blocks A and B combined with Telford's utterances as to when it might restart and its ability to raise the required finance was such as to lead a reasonable contractor in the shoes of Ampurius to conclude that blocks A and B would not be completed within such time as would not frustrate the contract. The judge did not ask himself whether this was so, which left Mr Mayall attempting to defend the judge's conclusion that the breaches had become repudiatory by reference to their indeterminate nature. However, the judge did not analyse the matter in terms of

whether the uncertainty caused by Telford's refusal or inability to perform had the effect of frustrating the contract. The judge seems to have concluded that the widening in the gap between completion of blocks C and D and completion of blocks A and B which had by July 2010 become likely was of itself sufficient to frustrate the contract. I agree with Lewison LJ that for the reasons he gives this conclusion is untenable.

75. It follows that the argument which Mr Mayall pursued on the appeal was never properly put to the test at trial. The judge may well have lacked the evidence or the material with which to test it. However if a repudiation is to be spelled out of the uncertainty to which Telford's ability to resume work and/or its expressed intentions with regard to a resumption of work gave rise, it must be obvious that once that uncertainty was removed so any accrued breach which acquired its repudiatory character solely from the uncertainty which it engendered would cease to be repudiatory in nature.

76. The judge addressed only the question whether the right to accept a different repudiatory breach had been lost, the breach which had, the judge concluded, become repudiatory because the likely delay between completion of blocks C and D and completion of blocks A and B was already such as to frustrate the contract, a situation which could not be remedied. Mr Mayall cannot salvage from the judge's conclusions in relation to the question whether the right to terminate by acceptance of this very different irremediable repudiatory breach had been lost anything of relevance to the question whether a breach, the repudiatory character of which was founded not upon the situation which it had already brought about but founded rather on the uncertainty which it engendered, survived for acceptance on 22 October 2010. Mr Mayall was forced into the heretical submission that whether a breach of contract is repudiatory must be judged as at the date of the breach. There is however no purpose in forming such a judgment. The fact that a breach is repudiatory is of no relevance unless it is relied upon as giving to the innocent party a right to terminate the contract. The appropriate question is whether such a right exists at the time at which it is sought to be exercised. By 22 October 2010 the element of uncertainty had been removed. There was no repudiatory breach then available for acceptance.

77. On the alternative argument of renunciation I have nothing to add.

78. I agree that the appeal should be allowed.

Lord Justice Longmore:

79. I agree with both judgments.