IN THE HIGH COURT OF JUSTICE **Claim No. 2BS41204**
QUEEN'S BENCH DIVISION
BRISTOL DISTRICT REGISTRY
TECHNOLOGY AND CONSTRUCTION COURT
[2014] EWHC 589 (TCC)

Bristol Civil Justice Centre
2 Redcliff Street
Bristol
BS1 6GR

Monday, 13th January 2014

Before:

HIS HONOUR JUDGE HAVELOCK-ALLAN QC
Sitting as a Judge of the High Court

Between:

STOPJOIN PROJECTS LIMITED
Claimant/Respondent

-v-

BALFOUR BEATTY ENGINEERING SERVICES (HY) LIMITED
First Defendant/Applicant

-and-

BRUNEL CONTROL SYSTEMS LIMITED
Second Defendant

Counsel for the Claimant/Respondent: ANDREW KEARNEY

Counsel for the First Defendant: DUNCAN McCALL Q.C.

The Second Defendant did not appear and was not represented

JUDGMENT APPROVED BY THE COURT

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JUDGMENT

1. THE JUDGE: This is an application by the first defendant Balfour Beatty Engineering Services (HY) Limited, which I shall refer to as "Balfour Beatty", to strike out the claim against it or obtain summary judgment on the claim in its favour on the ground that the claim stands no real prospect of success.

Background

2. The claim is to recover sums alleged to be due and owing from Balfour Beatty to the second defendant Brunel Control Systems Limited, who I shall refer to as "Brunel", under two construction subcontracts, under which Balfour Beatty, under its former name of Haden Young Limited, was the employer and Brunel was the subcontractor. Haden Young was taken over by the Balfour Beatty Group and renamed with the name of the first defendant in this action after Brunel's performance of both subcontracts had come to an end. Nothing turns on this.

3. The first subcontract was for the manufacture, supply, delivery, installation, testing and commissioning of automatic control systems in works which were being carried out to six schools or educational establishments in or around Exeter. It has been referred to in this application as the "Exeter schools contract". The second subcontract was for broadly similar work in connection with works being carried out to premises in Portwall Lane in Bristol and I shall refer to that as the "Portwall Lane contract".

4. The Exeter schools contract was concluded in February 2005. The contract sum was £540,000. The contract sum of the Portwall Lane contract was £252,150. There is a dispute as to precisely when and how this contract came into being. It is common ground that Brunel was invited to provide a quotation in July 2006. It was sent with the invitation to tender a copy of Haden Young's Articles of Agreement which contained Haden Young's Standard Conditions of Subcontract, Edition 1, September 2003 Revision. Following the tender, Brunel attended a post-tender interview with Haden Young on 21st November 2006. The Minutes of the post-tender interview, which were not in fact produced until sometime in January 2007, record that it was agreed that the subcontract documentation for the Portwall Lane contract would include Haden Young's Standard Conditions of Subcontract and, amongst other documents, a copy of the Minutes of the interview on 21st November 2006. The Minutes also stated:

> "Only on receipt of Haden Young's official order number and countersigned Articles of Agreement does any contract exist between our companies."

5. Brunel started work on the Portwall Lane contract in December 2006. The Minutes of the post-tender interview were signed by the parties in or around January 2007 as being an accurate record of what was agreed at that meeting. Therefore, it is clear that Brunel started work at Portwall Lane before having sight of the Minutes of the post-tender interview. Brunel also started work long before countersigning the Articles of Agreement.

6. Balfour Beatty says that the Portwall Lane contract was concluded at the post-tender interview meeting or, at the latest, shortly thereafter when work commenced. Balfour Beatty's case is that the contract incorporated its Standard Conditions of Subcontract

from the outset. The claimant says that the Portwall Lane contract was formed at the earliest in August or September 2007 when Haden Young continued to engage Brunel to complete the subcontract after Brunel had purported to make some amendments to the contract terms, including, in particular, amendments to Haden Young's Standard Conditions of Subcontract. Alternatively the claimant says that if the Portwall Lane contract was concluded when Balfour Beatty says it was concluded, then, by virtue of exchanges between the parties which took place in August 2007, that contract was varied so as only to include an amended version of Haden Young's Standard Conditions of Subcontract. In the further alternative the claimant says that, by virtue of the correspondence between the parties and Haden Young's subsequent conduct in allowing Brunel to complete the subcontract in the light of those exchanges, Haden Young waived its right to rely on one particular condition in its Standard Conditions of Subcontract.

7. The claimant's claim in the action is to recover sums said to be due and owing to Brunel under the two subcontracts, as I have already stated. The claimant says that Brunel is owed a sum of £386,315 under the Exeter schools contract and a sum of £275,340 under the Portwall Lane contract, both sums inclusive of interest and VAT. The claimant claims the sum due under the Portwall Lane contract as an assignee and the sums due under both contracts by way of an implied trust.

8. Balfour Beatty strongly disputes that any sums are due under either contract. Its case is that Brunel failed properly to complete either subcontract and that some of its work was defective. Balfour Beatty alleges that the true position is that there is a balance owing from Brunel to Balfour Beatty of £10,767 in respect of the Exeter schools contract and £53,576 under the Portwall Lane contract, plus a further sum of £40,000 relating to an additional alleged defect in the work under the Portwall Lane contract which was not discovered until May 2012.

9. Balfour Beatty makes no counterclaim for these sums because Brunel went into voluntary liquidation in August 2008 and has no money. Brunel has been joined by the claimant as second defendant in order to support the trust claim. The trust claim is advanced because the liquidator of Brunel has declined to pursue a claim for the money outstanding under the contracts on the claimant's behalf and has stated that Brunel will play no active part in this litigation.

10. For the purposes of the present application only, I shall assume that there are, indeed, sums due from Balfour Beatty to Brunel in respect of both contracts rather than vice-versa.

11. The first defendant's application notice seeks striking out under rule 3.4 of the Civil Procedure Rules on various bases, including abuse of process (see CPR 3.4(2)(b)) and on the ground that the claim is "totally without merit" (CPR 3.4(6)). Balfour Beatty also invoke the inherent jurisdiction of the court. I agree with Mr Kearney, who appeared as counsel on behalf of the claimant, that the only real basis for the application is that contained in CPR rule 3.4(2)(a): viz that there is "no reasonable grounds for bringing the claim". Balfour Beatty relies on abuse of process as a ground only in order to emphasise that it considers both bases upon which the claimant asserts title to sue (as an assignee or as beneficiary of an implied trust) are hopeless.

Further background

12. The claimant Stopjoin Projects Limited is a factoring company which, in particular, provides finance to contractors in the construction industry. The evidence it has filed in opposition to Balfour Beatty's application consists of two witness statements of Mr Keith Britton who was at all material times a director of both Brunel and of the claimant. No evidence has been filed by Balfour Beatty in response to what is said in those witness statements. It may well be controversial: but for present purposes I must assume that what Mr Britton says is arguably correct. He says there is a history of business between Brunel and Haden Young going back to at least September 2003. The Exeter schools and Portwall Lane contracts were chronologically the fourth and fifth subcontracts for works which Brunel had entered into with Haden Young. Crucially, he says that Haden Young's senior management was informed on various occasions from September 2003 that Brunel was receiving financial support from the claimant. This was an issue which cropped up whenever Haden Young ran credit checks on Brunel, whose balance sheet was not strong.

13. Mr Britton says that, on 1st September 2006, Brunel entered into a loan facility agreement with the claimant under which it obtained a loan from the claimant of £400,000 in return for assigning to the claimant its fixed assets and receivables i.e. book debts, under a deed of general assignment of the same date. That agreement was superseded by a second loan facility agreement of £500,000 which was concluded on 4th October 2006. On the same date, two fresh deeds of general assignment were entered into, one covering book debts and the other covering fixed assets. Mr Britton has exhibited to his first witness statement copies of the 4th October 2006 loan facility agreement and the two assignments of 4th October 2006. His case is that Haden Young was given notice in writing by Brunel that its book debts had been assigned to the claimant. The notices of assignment exhibited to his second witness statement are dated 30th September 2006 and appear to refer to the September assignment which accompanied the first loan facility agreement. Mr McCall QC, counsel for Balfour Beatty, says that it is disputed that notice of any of the 2006 assignments was ever received by Haden Young.

14. During the period in which the Exeter schools contract was being performed, Brunel continued to experience financial difficulties and these continued into 2007 when the Portwall Lane contract was being undertaken. There is more than a hint in the contemporaneous correspondence between Brunel and Haden Young that Brunel's cash flow problems were being caused or contributed to by late payment or withholding of payments under the subcontracts by Haden Young. That, also, is very much in dispute and I express no view about it.

15. What is a matter of record is that in or around early June 2007, Dun & Bradstreet, the well-known credit rating agency, downgraded Brunel's credit rating. This caused Haden Young to be concerned that Brunel might be unable to complete the Portwall Lane contract. There was a meeting on 6th June 2007 between representatives of Haden Young and Brunel at which various assurances were given by Brunel about completion of the works and at which Haden Young urged Brunel to sign and return the Portwall Lane contract documents or, as the letter puts it, "Advise any items unacceptable to you."

16. Brunel signed and returned the Articles of Agreement in respect of the Portwall Lane contract under cover of a letter from Mr Britton dated 8th August 2007. The letter of 8th August said as follows:

> "We enclose your copy of the signed documents which you require to allow payments to be made in accordance with our agreement. We understand that monies are being withheld on our claims for payment until such time as these documents are received. Please ensure all withheld monies are now released.
>
> We have noticed certain items within the contract that we do not accept and have noted these within the signed contract. We must advise that all debts owed to Brunel Control Systems Limited have already been assigned to Stopjoin Projects Limited, which will, should any unusual events occur, complete the contract and will collect full payment which would have been due to Brunel Control Systems Limited. The assignment contract is available should you require. The assignment does, however, provide you with a much higher level of protection, considering your concerns with regard to Brunel's financial position as reported at Dunn & Bradstreet."

17. Haden Young's Standard Conditions of Subcontract, which the parties agree were incorporated without modification into to the Exeter schools contract, contained the following material provisions. Clause 2.3 stated:

> "No variation of or substitution for these conditions shall be binding on the contractor unless agreed in writing by the contractor."

Clause 7.1 provided:

> "Assignment or subletting
>
> (1) The subcontractor shall not without the prior written consent of the contractor wholly or partly assign this subcontract or any benefit or interest hereunder and shall not without the written consent of the contractor sublet any portion of the subcontract works. Such consent shall not relieve the subcontractor from his obligations under the subcontract and he shall remain fully liable for the proper execution of the subcontract works.
>
> (2) The subcontractor shall not assign either absolutely or by way of charge any sum which is or may become due and payable to him under this subcontract without the prior written consent of an officer of the contractor."

Finally, it was provided in clause 15, under the heading "Discount terms", that:

> "(1) The subcontractor shall allow the contractor a discount on all payments made in accordance with condition 14 of this subcontract, including payments in respect of retention monies, fluctuations or loss and expense.
>
> (2) The amount of discount referred to in clause 1 of this condition shall be 2.5 percent unless otherwise stated in the appendix to the Articles of Agreement."

18. On the copy of the Articles of Agreement which accompanied Mr Britton's letter to Haden Young of 8th August 2007, two annotations were made in manuscript. They concerned clause 15(2) and clause 7. In clause 15(2) Mr Britton had deleted the figure of 2.5 percent and substituted in manuscript the figure of 0 percent. He did so because

Brunel maintained that the price quoted in its tender had already allowed for a main contractor's discount of 2.5 percent.

19. The second annotation, at the top of clause 7, was the insertion of the words "See cover letter". The claimant invites the court to interpret that second annotation as saying, in effect, that Brunel could not enter into a contract with Haden Young for the Portwall Lane works which incorporated Haden Young's Standard Conditions of Subcontract if clause 7 was retained because, as the covering letter said, the sums due to Brunel under that contract had already been assigned to the claimant and thus prior consent to such assignment was not possible. In the alternative, the claimant invites the court to interpret the annotation as meaning that Brunel could only contract with Haden Young on the basis of Haden Young's Standard Conditions of Subcontract if Haden Young agreed either to waive reliance on clause 7 or to disapply it in respect of the assignment which Brunel had already agreed with the claimant. It seems clear to me that, on any view, Brunel's letter to Haden Young of 8th August was a counter-offer.

20. The response from Haden Young was a letter dated 21st August 2007. It will help if I quote most of the contents of that letter:

> "Thank you for your letter dated 8th August 2007 enclosing an engrossed copy of the subcontract document to which you have added a number of unilateral amendments regarding your price and a handwritten annotation against clause 7 of the conditions. As a consequence to (sic) those amendments, payment terms will be 60 days rather than 35 days as previously discussed.
>
> Your letter also refers to '… signed documents to allow payments to be made in accordance with our agreement'. For the avoidance of doubt, this subcontract and its related documents are the sole extent of the agreement between us.
>
> We note with some concern that you have already assigned certain benefits of this undertaking to Stopjoin Projects Limited without reference to us or seeking our approval, which is a fundamental breach of contract. You are therefore asked by return to clarify the situation by responding to the following questions:
>
> Who is Stopjoin Projects Limited?
>
> What is Stopjoin Projects' company registration number?
>
> If Stopjoin Projects are a new trading entity that have not made any returns to Companies House, we shall require to know who the Board of Directors and Company Secretary are, the company's capital value and to see its most recent balance sheet and trading summary.
>
> What has exactly been assigned and on what terms? Please provide a copy of the assignment instrument.

> Please provide details of the following Stopjoin Projects company information: health and safety policy; PL, EL and PI insurances (please provide copies of policies or brokers' letters of comfort).
>
> When and if we obtain satisfactory answers to these questions, a new trading account can be set up for Stopjoin Projects Limited but in the interim we must continue to contract with Brunel Control Systems Limited and look to them for the delivery of all requirements of the contract."

21. Reading the letter as a whole, it is plain that the deletion of the 2.5 percent main contractor's discount from clause 15(2) of Haden Young's Standard Conditions of Subcontract was acceptable to Haden Young if the payment terms in the contract were changed from 35 days to 60 days. However, the assignment to Stopjoin Projects Limited was not acceptable unless and until Brunel provided a good deal more information about the claimant.

22. In its Defence in the action, which was drafted by Mr McCall and filed in August 2013, Balfour Beatty has identified 14 queries by Haden Young about Stopjoin in the letter of 21st August. Mr Britton wrote back to Haden Young on 28th August. The material parts of his letter read as follows:

> "We have noted your concern that all debts have been assigned to 'Stopjoin Projects'. These were assigned following the Exeter schools project in 2006 and was in place prior to quoting this contract or Haden Young ordering the project. It would not be common practice to advise companies who require credit to be informed of how that credit is provided. At no point has any work been assigned to Stopjoin. They are Brunel Control Systems' bankers and, therefore, are only interested in your performance over your payment cycle. They will, however, ensure that the contract is completed to enable Haden Young to fulfil its duties over the money borrowed from Brunel.
>
> If you consider this to be a breach of contract, then please advise if you wish to pursue this matter as we equally feel that you have already breached this contract in a number of areas.
>
> To answer your question, 'Who is Stopjoin Projects Limited?' answer: they are our bankers in association with NatWest Bank. They will not play an active role in this contract save for recovery of their money and completion of the contract to enable full payment by Haden Young. The assignment agreement can be viewed in our offices during normal working hours should you require. We do not require you to open any trading account for Stopjoin as they will not become a supplier to Haden Young now or in the future.
>
> We understand Stopjoin have been trading in the financial investment market for over 15 years. We confirm your contract is with Brunel Control Systems Limited and you should address all correspondence as normal.
>
> The issue with regard to Stopjoin came up because your company was concerned that we could not offer you the level of credit you required. It was suggested because of your red warning that we might not be long for this world. To enable you to understand that we had already assigned your

> debts meant that financially we were not about to implode. We would, however, point out that this situation can only be created by customers not paying their debts correctly and on time. As with all contracts, the flow of money is equally as important as the supply of materials and labour to site and, at present, we seem to have a failing on the money flow."

23. There the correspondence between the parties ended. Brunel continued with the Portwall Lane contract and did not leave site until May 2008.

24. In the meantime, the claimant and Brunel entered into a new loan facility agreement under which the claimant agreed to provide Brunel with what I understand to be an unlimited sterling overdraft facility with which to support its business. That new facility agreement was entered into on 8th February 2008. A further deed of general assignment was entered into between the claimant and Brunel on the same date. The operative assignment in clause 2.1 was in materially identical terms to the assignment of 4th October 2006. The clause stated:

> "The borrower with full title guarantee assigns absolutely as a first priority assignment to the lender all its right, title and interest in and to the book debts as a continuing security for the payment or discharge to the lender on demand of the secured liabilities."

25. Unlike the assignment of 4th October 2006, the assignment of 8th February 2008 also contained the following warranties by Brunel to the claimant in clauses 4.1.5 and 4.1.7:

> "4.1.5 The borrower is the sole, lawful and beneficial owner and/or person entitled to the benefit of each of the book debts and shall ensure that each of the book debts remains at all times free from any security interest."
>
> 4.1.7: Each of the book debts is or will be, when it comes into existence, assignable at any time by the borrower to the lender without the consent of any third party;"

26. There is attached to Mr Britton's first witness statement a notice of the assignment of 8th February 2008. The notice is dated 11th February 2008. It was not in the form of the specimen notice of assignment contained in the schedule to the deed of assignment of 8th February 2008 and it was incomplete in some of its details: but it purported to be notice by Brunel to Haden Young of the assignment to the claimant dated 8th February 2008. Again, there is a dispute as to whether this, or any, notice of the February 2008 assignment was sent to or received by Haden Young. I shall assume for the purposes of the present argument only that notice of the February assignment was, indeed, given. However, counsel agree that it makes no difference to the assignment argument whether notice of the 2006 assignments or of the 2008 assignment was or was not given to Haden Young.

27. In the particulars of claim in the action, the claimant relies only on the February 2008 assignment in support of its claim. A day or so before the hearing, the claimant served in draft an amended particulars of claim. I agreed to hear the argument today on the footing that the proposed amendments had been allowed, without actually deciding whether permission to amend ought to be given and, if so, on what terms. In the

amended particulars of claim, Mr Kearney has clarified on behalf of the claimant that the claimant does not rely on assignment as a basis of claim to recover the sums said to be due under the Exeter schools contract and that assignment is the primary basis of claim in respect of the Portwall Lane contract. The reason for distinguishing between the two subcontracts is that the claimant accepts that Haden Young's Standard Conditions of Subcontract were incorporated into the Exeter schools contract without modification. Thus the anti-assignment provision in clause 7 precludes the claimant from relying on the assignment in respect of that subcontract. That is the effect of the House of Lords decision in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85. However, the claimant says that the position is different in respect of the Portwall Lane contract.

The assignment argument

28. The claimant's case on assignment in respect of the debt allegedly arising under the Portwall Lane contract is as follows.

29. Mr Kearney submits that, after the post-tender interview on 21st November 2006, a number of matters concerning the scope of the works and the subcontract price remained to be decided. The parties had, however, expressly agreed at the 21st November meeting that no contract would exist until an official order number had been issued by Haden Young, and Brunel had countersigned the Articles of Agreement. In Mr Kearney's submission, this was a bespoke arrangement which the two parties were perfectly free to adopt even if, as actually happened, work started on site before the Articles of Agreement had been countersigned and before the remaining contract documents, including the Minutes of the meeting of 21st November, had been produced. Mr Kearney submits that operating in that way created no difficulty since, when the contract documents were finalised and the Articles of Agreement countersigned, their provisions would retrospectively govern the parties' rights and obligations since work began. That, he submitted, was commonplace in construction contracts. The contract terms would govern the earlier phases of the works by application of the doctrine of relation back. So, in the claimant's submission, there was no contract between the parties for the Portwall Lane works before the Articles of Agreement were countersigned by Brunel on or about 8th August 2007. At that point, or shortly thereafter when Haden Young permitted Brunel to continue with the subcontract works, a contract came into being.

30. When the Articles of Agreement were returned to Haden Young with Brunel's signature on them, they contained two amendments made by Brunel. Mr Kearney submits that the correct analysis of the correspondence which ensued and the conduct of the parties thereafter is that Haden Young accepted the explanation which was given by Brunel in its letter of 28th August of the involvement of the claimant as assignee of Brunel's book debts and that the contract which came into being at that point or shortly thereafter was a contract on Haden Young's Standard Conditions of Subcontract without the inclusion of clause 7.

31. Alternatively, Mr Kearney submits that Haden Young by its conduct represented that it would not enforce clause 7 in respect of the assignment that Brunel had made to the claimant and, by waiver or estoppel, is now precluded from relying on clause 7 as an answer to the claimant's claim as assignee of sums due under the Portwall Lane contract. As a second fall-back argument, Mr Kearney submits that if Haden Young

did not accept the fact of the assignment, there was, in truth, no consensus between the parties as to the inclusion of clause 7 in the Portwall Lane contract and, therefore, that the contract which came into being and was operated after August 2007 was a contract without that provision in it.

32. Balfour Beatty's response to those submissions can be summarised in the following propositions:

(1) The effect of clause 7 of Haden Young's Standard Conditions of Subcontract is to render the assignment that took place in 2006 between Brunel and the claimant ineffective as a basis of claim because no consent was given before that assignment was entered into.

(2) As to the note in the Minutes of the post-tender interview about no contract existing between the parties until Haden Young gave an official order number and the Articles of Agreement were countersigned by Brunel, these were clearly matters of form. Neither side expected such formalities not to be completed until some nine months after the subcontract had been up and running. The way in which the parties performed the works and the way in which payment for the works was made in the period between December 2006 and August 2007 demonstrates that both sides were treating each other as contractually bound. There must, therefore, have been a contract in existence between the parties during that period.

(3) All the available evidence shows that the subcontract for the Portwall Lane works, like all previous subcontracts between Haden Young and Brunel, was intended from the outset to incorporate Haden Young's Standard Conditions of Subcontract. It is, therefore, untenable to suggest that there was no contract in existence, incorporating those Standard Conditions, prior to August 2007.

(4) If that is right, any modification of that contract, so as to delete clause 7, would have had to have been a variation of the contract terms. Variations were required by clause 2(3) to be agreed by Haden Young in writing. There was no such agreement in writing. The correspondence between the parties did not amount to a written variation of the contract so as to delete clause 7 from it.

(5) The mere fact that Haden Young permitted Brunel to complete the subcontract works after the correspondence between the parties in August 2007 cannot possibly evidence a waiver or estoppel which precludes Balfour Beatty from relying on clause 7. Haden Young stated clearly on 21st August that the assignment to which Mr Britain had referred in his letter of 8th August was a "fundamental breach of contract", since it had been made without the consent of Haden Young. It is, in Haden Young's submission, stretching credulity to extract from that statement, and Haden Young's subsequent conduct, any representation that Haden Young was happy to abandon clause 7 in respect of the assignment to the claimant.

(6) The right analysis is that Haden Young insisted on clause 7 being included in the subcontract terms. Brunel did not provide answers to all of the questions which had been raised by Haden Young in its letter of 21st August. So Haden Young never lifted the requirement of consent to any assignment and never

gave such consent. By proceeding to complete the subcontract against that background, Brunel must be taken to have accepted that that was the position.

(7) There is, in any event, a chronological disconnect between the conduct relied upon by the claimant as a waiver of clause 7 and the assignment that is relied on in the particulars of claim. The assignment pleaded is the assignment made in February 2008; but the conduct relied upon as constituting waiver of clause 7 predates February 2008, or very largely predates it. The conduct could only ever represent acceptance of an assignment which Mr Britton had told Haden Young on 8 August 2007 that Brunel had already made. It could not represent acceptance of an assignment which had yet to be made.

Conclusions on assignment

33. I was puzzled why, in the light of the evidence in Mr Britton's witness statements, the particulars of claim, even in their draft amended form, relied solely on the assignment made in February 2008. Mr Kearney said this was because the claimant and Brunel had regarded the February 2008 assignment as superseding the previous ones. However, it seemed to me that, since Mr Britton's letter of 8th August 2007 plainly referred to the assignment which had been made in October 2006, it is expanding the claimant's argument to breaking point to plead only the assignment in February 2008 and to say that Haden Young's conduct in permitting Brunel to complete the subcontract works from late August 2007 onwards was a consent to that assignment. That would be a waiver in advance of any objection to an assignment in favour of the claimant at some unspecified future date.

34. Recognising this difficulty and that, in truth, the claimant's case rests on the continuing status of the claimant as assignee since prior to August 2007, Mr Kearney formulated a re-amendment of paragraph 26 of the particulars of claim so as to plead reliance on the two earlier assignments in September and October 2006.

35. The argument now is that by the exchanges that took place between Brunel and Haden Young in August 2007, and Haden Young's subsequent conduct in allowing Brunel to complete the Portwall Lane contract, the contract did not include clause 7. Alternatively, Haden Young represented that it would not object to the assignment to the claimant which had already been made in 2006. The February 2008 assignment is relevant to the claimant's title to sue in respect of the sums due under the Portwall Lane contract only because it did in fact supersede the October 2006 assignment.

36. Assuming for the purposes of argument that the proposed re-amendment of paragraph 26 of the particulars of claim would be allowed, Mr McCall's chronology point falls away.

37. My conclusions on the remaining arguments about the assignment are as follows. The first question is whether the claimant stands a real prospect of establishing at trial that no contract incorporating Haden Young's Standard Conditions of Subcontract came into existence between Haden Young and Brunel any time before 8th August 2007. If such a contract did come into existence before August 2007, nothing which passed between the parties in August 2007 amounted in my judgment to a variation of that contract so as to delete clause 7 or to modify it so as not to apply to the assignment which had already been made.

38. I regard the claimant's argument that there was no contractual nexus based on Haden Young's Standard Conditions at any time prior to 8th August 2007 as thin, but just crossing the threshold of a real prospect of success. On the face of it, there is a strong case for saying that the parties cannot have intended that countersignature of the Articles of Agreement, which had been incorporated into several previous subcontracts between them, should hold up the creation of any contract in respect of the Portwall Lane works for as long as nine months after those works had started. All the present indications are that the parties were treating each other as contractually bound prior to August 2007. However, Mr Kearney is right that disclosure might shed more light on that question. I do not, therefore, consider that the assignment basis of claim should be struck out because there is no evidence that the contract was varied. However that conclusion does not get the claimant home on the assignment point because the claimant accepts that, after August 2007, there was a contract between Haden Young and Brunel. The question then is: on what terms?

39. If there was no contract before Mr Britton wrote to Haden Young on 8th August 2007, I think that the letter of 8th August represented a counter-offer from Brunel and that this counter-offer was itself not accepted by Haden Young in its reply letter of 21st August. The letter of 21st August from Haden Young represented a second counter-offer, both in relation to the deletion of the 2.5 percent main contractor's discount and the permitting of the assignment. Whether there was agreement over deletion of the main contractor's discount depends on Brunel's conduct after August 2007. I have been referred to some evidence which suggests that the 2.5 percent main contractor's discount was deleted from all payments made to Brunel after August 2007 and that the sums withheld in respect of the discount in payments made to Brunel between December 2006 and August 2007 were reimbursed to Brunel. Nevertheless, I do not need to form a view as to whether Haden Young's Standard Conditions of Subcontract were varied so as to delete the 2.5 percent main contractor's discount. Whether the exchanges between the parties in August 2007 amounted to a representation by Haden Young that the anti-assignment provision in clause 7 would not be applied to the assignment in favour of the claimant in 2006 depends on how Haden Young reacted to the explanation of the claimant's role given in Mr Britton's letter of 28th August.

40. In my judgment, Haden Young's conduct in allowing Brunel to complete the subcontract without saying or doing anything more than was said in the letter of 21st August is not enough to establish an unequivocal representation that Haden Young would not seek to rely upon or enforce the anti-assignment provision in clause 7. Nothing apparently happened between August 2007 and May 2008 which would indicate that Haden Young had consented to the assignment. No payments under the subcontract were made by Haden Young to the claimant. There was no communication between Haden Young and the claimant. Nothing was said by Haden Young to show that it acknowledged that the claimant was legally or beneficially entitled to any payments due to Brunel under the Portwall Lane contract. In those circumstances, I consider that the claimant stands no real prospect of proving the waiver or estoppel on which it relies.

41. That leaves Mr Kearney's fall-back argument that if no contract had come into being by 8th August 2007, the correspondence between 8th and 28th August reflects a consensus about the subcontract terms, except clause 7 and the main contractor's

discount in clause 15(2). Thus a contract was concluded at that point: but without either of those provisions being incorporated. This argument relies upon the absence of consent by Brunel to clause 7, even if there was no representation by Haden Young that it would not enforce that clause. It asserts a contract based on the lowest common denominator. However, it is an argument which in my view gives insufficient weight to the content of the parties' written exchanges. Brunel had acknowledged that the subcontract should include Haden Young's Standard Conditions of Subcontract because it had countersigned and returned them. It had proposed two amendments. In reply, Haden Young had insisted on clause 7 by pointing out that the assignment was a fundamental breach of contract without prior consent. However, it indicated that it might not rely upon clause 7 if it had satisfactory answers to a number of questions. Brunel provided answers to some only of the questions. Haden Young never reverted to Brunel to say whether the answers were considered satisfactory or whether Haden Young was prepared to accept the assignment which had already been made. By completing the subcontract without obtaining that clarification, it is in my judgment Brunel who must be taken to have accepted Haden Young's position, rather than vice-versa. I therefore reject the assignment argument as a basis of claim in respect of the Portwall Lane contract. I turn now to consider the trust argument.

The implied trust argument

42. The claimant's case is that clause 7 is no defence to a claim based upon an implied trust. In the claimant's submission, a clause against the assignment of property does not necessarily operate to preclude the property in question being alienated by a trust. The assignment in this case may have been effective as between Brunel and the claimant, but it did not transfer the right to sue to the claimant because of the decision in the *Linden Gardens Trust* case. The claimant's argument is that, in the circumstances of the present case, the just solution to this impasse is the imposition of an implied trust over the debt owed to Brunel, and permitting the claimant, as beneficiary of that trust, to sue the debtor by the application of what has been referred to as "the *Vandepitte* procedure", see *Vandepitte v Preferred Accident Insurance Corporation of New York* [1933] AC 70. Where a trustee, in this case the liquidator of Brunel, refuses or is unable to sue in his own name on behalf of the beneficiary, the beneficiary, here the claimant, may be allowed to sue the debtor himself by the device of simply adding the trustee as an additional defendant to the proceedings. That is the procedure which Mr Kearney submits should be applied here.

43. Mr Kearney relied upon the following authorities in support of his argument. The first was the decision of the Court of Appeal in *In Re Turcan* [1889] 40 Ch D 5. That case concerned a marriage settlement by Mr Turcan under which he covenanted to settle his entire estate and any interest in after-acquired property on certain trusts. After making the covenant, he took out certain insurance policies which, by their express terms, were not assignable. Mr Turcan was drowned in an accident and the proceeds of the insurance policies were paid to his executor. The first question the Court had to decide was whether the policy proceeds were covered by the covenant in the marriage settlement. The Court of Appeal held that they were. The second question was whether the clause against assignment in the policies was an impediment to enforcing the covenant in respect of the policy proceeds. The Court of Appeal held that it was not. The reason for this part of the decision appears in the judgment of Cotton LJ at pages 10 to 11 of the report. He held that since Mr Turcan could in his lifetime have

executed a declaration of trust over the policies or their proceeds, although he had not in fact done so, the Court of Appeal would imply such a trust. The Court of Appeal therefore agreed with the judgment of the Vice-Chancellor at first instance that the policy proceeds were caught by the marriage settlement.

44. That an implied declaration of trust is the rationale of the decision in *In Re Turcan* is clear from the explanation of that case given by Morritt LJ in paragraph 26 of his judgment in *Don King Productions Inc. v Warren & Others* [2000] Ch 291. This was the second of the cases on which Mr Kearney relied. It concerned an agreement between Don King Productions on the one hand, and Mr Warren and his business called Sports Network Limited on the other, to create a partnership for the promotion and management of professional boxers in Europe to which both sides would transfer the benefit of all their boxing promotion contracts and associated rights. The parties endeavoured to achieve that transfer by an agreement in September 1994 ("the first agreement", clause 6.1 of which provided as follows:

> "Mr Warren and Sports Network limited as beneficial owners hereby assign to the partnership with effect from the date hereof the full benefit and burden of all existing promotional and management agreements with boxers together with all and any associated sponsorship, closed circuit television and radio contracts absolutely. Such contracts shall be assigned to the partnership free and clear of any and all liens or encumbrances and, save as expressly provided herein, free of charge and without any recourse whatsoever."

45. It was held by Lightman J that the first agreement was ineffective to procure the transfer which the parties had desired for two reasons. The first was that it was legally impossible to assign the burden of the contracts. The second was that the contracts were contracts for personal services based on the personal mutual confidence between the boxer and the promoter and manager, so it was not possible to assign them. Having been advised that there might be a difficulty, the parties entered into a second agreement in April 1995 with the aim of solving the problem. Clause 7 of the second agreement was in these terms:

> "7.1 SNE shall procure that Mr Warren and Sports Network Limited, as appropriate, shall apply for and hold all licences for the benefit of the partnership absolutely without separate compensation therefor.
>
> 7.2 DKP or SNE as appropriate shall procure that Don King, Mr Warren or Sports Network Limited as appropriate shall hold all promotional and management agreements relating to the business of the partnership as defined in clause 3 to the benefit of the partnership absolutely without separate compensation therefor."

46. Lightman J held, and the Court of Appeal agreed, that the two agreements reflected an intention on the part of the parties to confer a beneficial interest in the relevant contracts on the new partnership. Morritt LJ, delivering the leading judgment in the Court of Appeal as to the effect of the two agreements, said at paragraph 30:

> "In my view, the conclusion is ... largely dictated by the chronology. There can be no doubt that it was the intention of the parties, as demonstrated by

> clause 6.1 of the first agreement that the full benefit of the management and promotional agreements between Mr Warren (or his corporate vehicle) and a European registered boxer existing on 16th September 1994 should be partnership property. Such an intention is reflected in the provisions of clause 7.1, which assume that the full benefit of such agreements is an asset of the partnership to be distributed *in specie* to Mr Warren. ... Given the terms of clause 6.1 of the first agreement and the legal inability of Mr Warren to assign the benefit of the agreement to the partners jointly, a trust within clause 1 was the only way the evident intention of the partners could be achieved. For the reasons I have given earlier, the fact that the benefit of the agreements could not be sold and were otherwise unassignable is no reason to refuse to recognise the trust which was necessary to give effect to the manifest intention of the partners."

I interpret the "manifest intention" to which Morritt LJ there refers not as being an intention to create a trust but an intention to confer the benefit of Mr Warren's management and promotional agreements on the partnership.

47. The next case to which Mr Kearney referred was *Explora Group plc v Hesco Bastion Ltd & Anor* [2005] EWCA Civ 646. Hesco Bastion was a company that manufactured gabions, which had some use in military engineering. It had a marketing agent called TTF. TTF had succeeded in promoting the Hesco business by obtaining advertising for Hesco in a United States Armed Forces procurement catalogue. This had generated sales. Shortly before it went into liquidation, TTF entered into an agreement ("the CSA agreement") with a phoenix company called Explora Group Plc. Under the CSA agreement, TTF purported to sell to Explora the benefit, subject always to the burdens, of all its agency contracts with Hesco. Explora, as assignee of TTF, then sued Hesco for TTF's entitlement to commission under the agency contracts. However, there was a prohibition on assignment in at least one of the agency agreements ("the 1995 agency agreement") covered by the assignment in the CSA agreement.

48. Before Simon J, at first instance, it was argued that the anti-assignment provision in the 1995 agency agreement did not preclude the CSA agreement from taking effect as an implied trust in favour of Explora of TTF's entitlement under the 1995 agency agreement. Simon J dismissed that argument in paragraph 98 of his judgment in these terms:

> "The claimant also argued that if the CSA agreement did not have the effect of transferring the right to commission, it had the effect of constituting TTF as the trustee of the right to receive all commission on sales since 30th April 2002 (see *Don King Productions Incorporated v Warren & Others* [2000] Ch 291). Such a trust may arise where the parties intend to create a trust in order to do justice between assignor and assignee but, in my view, no such intention can be found in the present case and the court would be hesitant to allow use of what Lightman J in the *Don King* case at page 321D referred to as a 'procedural shortcut' in a commercial case where the reasons advanced are based on expediency rather than justice. I also note that there is no evidence that the liquidator has refused to act."

49. In the Court of Appeal, the leading judgment was delivered by Rix LJ. He first referred to the argument about the effect of the prohibition on assignment in the 1995

agency agreement in paragraph 44 of his judgment. He observed that Simon J's decision on that point was strictly obiter because he had found that the CSA agreement had been ineffective to transfer any rights to Explora. He said:

> "Finally, the judge dealt obiter with Explora's submission that even where there had been a prohibition on assignment, the CSA agreement could take effect by constituting TTF as the trustee of the right to receive commission coming due after 30 April 2002. The judge held that there was no evidence of the intention to create a trust between TTF and Explora in the present case (para 98)."

50. Rix LJ then dealt with the issue as issue 8(b) in the section of his judgment which begins at paragraph 98. Rix LJ defined issue 8(b) in the following terms: "what if the right was assigned but was not assignable?" He gave the following answer at paragraph 104:

> "In these circumstances, I feel entitled to deal with issue 8(b) relatively briefly. The judge thought that if the commission in respect of the DSCC contract had not been assignable even in the absence of an express prohibition, then it would have been irrelevant that it had been expressly assigned by TTF to Explora. He rejected Mr Purle's submission that the ineffective assignment would have taken effect as a trust in favour of Explora (para 98). I would merely say that I do not see why such a trust would not take effect: see *Linden Gardens* at 108D, *Don King* at 320A/B, Chitty at 19-045. Therefore, if there is any commission still due under the 1995 agency agreement which falls within the assignment under the CSA agreement, TTF holds that in trust for Explora."

51. A problem then arose because, when Mr Strauss QC, counsel for Hesco, saw the draft judgment, he complained that he had not had an adequate opportunity to deal with the point addressed in paragraph 104 and indicated the further points he would have wanted to make. In consequence Rix LJ added paragraphs 105 to 109 to his draft judgment, in which he dismissed Mr Strauss' further submissions as to why the prohibited assignment could not take effect as a trust in favour of Explora. At paragraphs 105 to 109, Rix LJ said this:

> "105. At the time appointed for the hand-down of these judgments, Mr Strauss asked the court to reconsider this issue 8(b) on the ground that during his oral reply the court had indicated that it did not need to hear him further in relation to it. He says – and I accept - that he would have wished to make further submissions not found in his written submissions, to the effect that, even if the right to commission was assigned, nevertheless there was no intention to create a trust in favour of Explora. His essential additional argument was to rely on a paragraph within the definition of Transferred Assets within clause 1 of the CSA, not otherwise cited to the court, as follows:
>
> > 'it excludes the Retained Assets and the Additional Assets, which shall remain with the Company, and any asset the transfer, surrender, disposal of or with which, or any part of or interest in which, would or might cause or occasion a breach of third party rights whether or not in

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> the nature of intellectual property rights, or be otherwise contrary to any relevant law.'

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106. Mr Strauss relied on the words beginning 'and any asset the transfer *[etc]* of… which… would or might cause or occasion a breach of third party rights'. He submitted that any assets whose assignment was even arguably contrary to a covenant against assignment were within these words as involving at least a possible breach of 'third party rights'. He also submitted that consistently with this view, paragraph 9 of Schedule 1 to the CSA, another term not otherwise cited to the court, provided TTF with an indemnity from Explora 'against any claim by reason of the infringement of any third party's rights...'

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107. It seems to me that this is a bad point. First, it is a point which is relevant, if at all, to issue 8(a) rather than issue 8(b). If the debts in question were assigned, it seems impossible to suppose that there was no intent to render TTF a trustee of the debts in question. However, there was no application for the court to reconsider its judgment under issue 8(a), even if it became obvious in the course of Mr Strauss's further submissions that that was where the logic of his point was taking him and that he was really attempting to say that there simply had been no transfer in the first place. That illustrates the danger of allowing a party to seek the exceptional jurisdiction to reopen argument after a draft judgment has been distributed to the parties. Secondly, the clause is in my judgment dealing with assets in which third parties have an interest, not with a covenant against assignment. Thirdly, given that the 1995 agency agreement is a specifically scheduled transferred asset, it seems to me to be impossible to say that post 30 April 2002 debts under it fall outside the transfer just because of even an argument against assignability. This conclusion seems to me to be fortified by the indemnity provisions under clause 9 of Schedule 1.

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108. Mr Strauss further wished to submit that the conclusion stated in para 104 above, that TTF holds any post 30 April 2002 book debts under the 1995 agency agreement in trust for Explora, was not supported by any reason, and was wrong in the light of what Lightman J had said in *Don King* at 321D. I respectfully do not agree. I have referred above to what the judge, Simon J, had said in para 98 of his judgment, where he cites the same passage from *Don King* and says cautiously that a court 'will be hesitant to allow a "procedural short-cut"', ie to allow a litigant to get round the prohibition against assignment merely by joining the assignor/trustee. The court will be hesitant (see also *Hayim v. Citibank NA* [1987] AC 730 at 748F). However, in this case TTF has been a party to this action from the start, but was joined on terms that it wished to play no part in it: TTF plainly did not wish to make any claim in its own name. The points on non-assignability and intention to create a trust points were equally plainly on the pleadings, but that did not tempt TTF to show any interest in the relevant claims.

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109. That has been confirmed in the period since the distribution of our draft judgments. They have been copied by our direction to both the administrative receivers and to the liquidators of TTF, who have been

> expressly requested by Explora to enforce the post 30 April 2002 claim under the 1995 agency agreement (which we are informed is worth about £50,000). The liquidators have ignored the request, and the receivers, who have instructed Mr James Potts to appear on their behalf at the adjourned hearing at which Mr Strauss has asked us to reconsider our judgments, have through him made it expressly clear that they make no claim to commission under the 1995 agency agreement and accept that this claim belongs to Explora. In the circumstances, the suggestion that this court should leave this claim in some black hole is, as Mr Strauss himself accepts, wholly unmeritorious. Hesco owes it to TTF, a party to this action, and TTF is entitled to deal with it as it wishes. I would agree that mere procedure should not permit a failed assignee to ignore the prohibition on assignment. But equally, in circumstances such as these, the court must be prepared to deal with the issues and claims as presented to it, without creating unnecessary and disproportionate procedural complexities."

52. The last of the cases on which Mr Kearney relied is *Barbados Trust Company Ltd v Bank of Zambia & Anor* [2007] 1 Lloyd's Rep 495. The facts in that case are that the Bank of Zambia had the benefit of funding from various banks and financial institutions to enable it to issue letters of credit under the terms of an Oil Import Facility. The Oil Import Facility Agreement contained in Article 12 a non-assignment provision in the following terms:

> "Each Bank may at any time and from time to time assign all or any part of its rights and benefits in respect of the Facility to any one or more banks or other financial institutions (an 'Assignee'), provided that any such assignment may only be effected if (save in the case where the assignee is a member of the same group as the assignor, no such consent then being required) the prior written consent thereto of the Borrower shall have been obtained (such consent not to be unreasonably withheld and to be deemed to have been given if no reply is received from the Borrower within fifteen days after the giving of a request for consent by a Bank)."

This provision required the prior consent of the Bank of Zambia to the assignment by a bank of any asset arising under the Oil Import Facility.

53. At all material times between 1992 and 1999 there was a single creditor recorded as holding all of the assets arising under the Oil Import Facility. That creditor sold its debt to Bank of America towards the end of 1999. Bank of America sold the debt to another entity called GMO. GMO in turn sold the debt on and it was transferred by a series of further assignments to Barbados Trust. Neither GMO nor Barbados Trust was a bank or financial institution. They were, therefore, entities who required the prior written consent of Bank of Zambia to acquire the debt as an assignee. Although notice of the chain of assignments was given, Bank of Zambia declined to give its consent. Foreseeing that the lack of consent to the assignment might cause problems, Bank of America made an express declaration of trust in respect of the debt in favour of Barbados Trust. Barbados Trust, as assignee of the debt or as beneficiary of the trust, sued Bank of Zambia to recover the value of the debt which it had purchased.

54. The claim by Barbados Trust as an assignee failed before Langley J at first instance and failed on appeal (Rix and Hooper LJJ, Waller LJ dissenting), because the Court on

both occasions accepted that, without consent to the assignment, Bank of America had not acquired a title to the debt which it could transfer to third parties. However, it was held, obiter, by Waller and Rix LJJ (Hooper LJ dissenting) that if Bank of America had acquired title to the debt which it could pass on by way of assignment to Barbados Trust, the claim of Barbados Trust would have succeeded on the basis of an implied trust and that Barbados Trust, as beneficiary, would have been entitled to sue for the amount of the debt, using the ***Vandepitte*** procedure and joining Bank of America as an additional defendant.

55. The case is therefore one in which an express declaration of trust was made in order to avoid the consequences of an assignment that was possibly ineffective by virtue of the anti-assignment clause in the Oil Import Facility. However, the judgments of Waller LJ and Rix LJ are instructive as to the circumstances in which, in a commercial context, the court may be prepared to allow the ***Vandepitte*** procedure to be used so that the beneficiary of a failed assignment can sue to recover in circumstances where the assignor and putative trustee declines to prosecute the claim on the beneficiary's behalf. Waller LJ approached the matter in this way, in paragraphs 45 to 47 of his judgment:

> "It is said that BoZ has, by article 12, a right to decree by whom it should be sued and that to allow the bringing of an action using the *Vandepitte* procedure on an acknowledged debt would be to allow interference in BoZ's contract with its lenders under the facility. This argument seems to me to be a false one. The procedure is 'procedure' and it simply provides a short cut to prevent litigation under which BoA could be forced to sue followed by an action under which BoA sues. In other words, albeit BT is the claimant, it is as if BoA were claimant seeking to recover that which is due in law which they will then hold for BT. There is thus no interference by BT. In any event to construe suing on an acknowledged debt as interfering in BoZ's contract with its lenders seems to me far-fetched. Thus article 12, on its true construction, does not, in my view, prevent the use of the *Vandepitte* procedure.
>
> 46. What then should be the attitude of the court? In that regard one should first consider the terms of the declaration of trust. The declaration of trust certainly does not provide in terms for BoA not being prepared to sue in its own name, nor is any assistance to be gained from the letters which preceded the declaration in that regard. The declaration recognises that BT will sue, but it also seems to recognise that there does exist the very situation in which the ***Vandepitte*** procedure should be available in normal circumstances.
>
> 47. That brings me to the final question, which is whether, if as I am now assuming, article 12 contains some prohibition on alienability, what attitude should the court take to the use of the ***Vandepitte*** procedure? In my view procedure is then to enable BT to enforce its rights against BoA. It is not a measure of substantive law which might affect the asset, the subject of the declaration of trust. There is no reason why the court should hold that BoZ should be entitled to a defence which it would not have had if some longer and more tortuous form of procedure, compelling BoA to sue, were used. The court has to recognise that it is concerned in this instance both with the

enforcement of the trust declared as between BoA and BT as well as with the contract as between BoA and BoZ. I see no reason for the court not to assist BT or any reason why it should provide BoZ with a defence which BoZ does not have against BoA."

56. On the question whether the prohibited assignment could take effect as a declaration of trust, Rix LJ said this, at paragraphs 87-89 of his judgment:

> "87. My conclusions under this issue are as follows. The fact that a prohibition on assignment between A and B cannot allow a third party, C, as A's purported assignee, to bring a direct contractual claim against B is not in dispute. It was held in *Linden Gardens* to be the consequence of the contractual prohibition. As Lord Browne-Wilkinson said (at 108F):
>
> > 'Therefore the existing authorities establish that an attempted assignment of contractual rights in breach of a contractual prohibition is ineffective to transfer such contractual rights. I regard the law as being satisfactorily settled in that sense. If the law were otherwise, it would defeat the legitimate commercial reason for inserting the contractual prohibition, viz, to ensure that the original parties to the contract are not brought into direct contractual relations with third parties.'
>
> 88. The ineffectiveness of the assignment in breach of a prohibition on assignment is understandable. It is not merely a matter of contract but of property. Although the would-be assignor has legal title to property in the form of a chose in action, he lacks the power, because of the terms on which the property is held, to transfer that property so as to entitle the transferee to exercise those contractual rights himself against the other party to the contract. However, he does not lack the power to render himself a trustee in equity of the property concerned. He would only do that if the prohibition on assignment extended as far as prohibiting a declaration of trust.
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> 89. There is, however, nothing in article 12.01(A) to suggest that the limitations on assignment go as far as preventing the contract between would-be assignor and assignee taking effect as between those two as a declaration of trust, and *a fortiori* nothing to prevent a personal contract between them."

57. There being an express declaration of trust in that case, Rix LJ went on in paragraphs 98 and following of his judgment under "Issue 5" to consider whether it was appropriate that the *Vandepitte* procedure should be utilised by Barbados Trust. He referred to what was said by Lightman J in his judgment at first instance in the *Don King Productions* case:

> "The courts will .... be astute to disallow use of the procedural short-cut sanctioned in the *Vandepitte* case in a commercial context where it has no proper place."

That was a theme taken up in the Court of Appeal in the *Don King Productions* case (see Morritt LJ at paragraph 26) and is a passage relied upon by Mr McCall in the

present case. Referring to what was said by Lightman J and Morritt LJ about use of the *Vandepitte* procedure, Rix LJ (at paragraph 107) said:

> "It is possible to read these passages as saying that the *Vandepitte* procedure has no place in the commercial sphere. That, however, would not accord with my understanding of what Lightman J and Morritt LJ were saying. It would also be inconsistent with established lines of cases in the commercial field, such as the trust found in a charterparty in favour of the shipbroker. I understand these passages as saying that the law would not permit rules and procedures, such as the *Vandepitte* procedure, to be misused in the commercial context where inappropriate."

58. Rix LJ went on, at paragraphs 110 and following in his judgment, to ask whether use of the *Vandepitte* procedure would have been inappropriate in the circumstances of the *Barbados Trust Company* case. His answer to that question was "No" because (i) there was nothing in the underlying contract of a personal nature, (ii) there was no prohibition of any declaration of trust in the anti-assignment clause; and (iii) a trust had been implied in not dissimilar circumstances in other cases such as *Don King Productions v Warren* and *Explora Group v Hesco Bastion*.

59. Rix LJ considered hypothetical situations where, in his view, the implication of a trust and use of the *Vandepitte* procedure would be justified. One example he gave was that of factored invoices. At paragraph 118 of his judgment he said:

> "118. A closely related example is that of factored invoices. A non-assignment clause will create difficulties for the factoring company. However, it would be highly undesirable if customers could totally prevent their suppliers from factoring their book debts by the device of a non-assignment clause. If the supplier has no interest in suing and has to be joined as a defendant, is that case crucially different from the case where the supplier is prevailed upon to sue together with the factoring company?"

It is clear that Rix LJ's answer to that question was "No". He concluded in paragraph 119 of his judgment as follows:

> "119. For these reasons, if I had decided issue (1) in favour of finding that BoA had a good legal title to the debt, I would, on balance, have been in favour of saying that, on the facts of this case as far as they appear and on the submissions we have heard, the *Vandepitte* procedure could be used to recover into BoA's possession, for the benefit of BT, a debt which on that hypothesis would have been an acknowledged debt owned by BoA. As it is, I do not have to make a final decision on this ultimate issue. That is perhaps just as well, as the argument on appeal has both far outstripped the evidence with which the parties had come to court in the first place and at the same time failed to focus on the particular facts before the court. Thus we know little about the real considerations which have affected the relationships in this case. Moreover, there was no immediate relationship between BoA and BT to support the declaration of trust, which does not arise out of a failed assignment directly between BoA and BT. It might therefore have been said that that declaration was merely a device to bring before the court, at the instance of BT, a claim which BoA would otherwise have allowed to

become time-barred. On that hypothesis, I would be doubtful that equity would enforce the trust."

60. I have quoted at some length from the judgments in the *Barbados Trust Company* case because of the arguments advanced by Mr McCall in saying that the claimant's implied trust basis of claim stood no real prospect of success. Whereas Mr Kearney submitted that the implication of a trust to remedy the consequences of the failed assignment was the just solution, Mr McCall strongly contested that analysis. He went so far as to submit that reliance on the concept of trust in the present case was "an opportunistic and legally impermissible attempt to sidestep the implications of clause 7 of Haden Young's Standard Conditions of Subcontract."

61. Mr McCall emphasised that, unlike the Barbados Trust Company, the claimant here cannot rely on an express declaration of trust in its favour. The claimant's argument is that the deed of general assignment of October 2006 constituted or should be held to give rise to, an implied declaration of trust by Brunel in favour of the claimant as beneficiary. Mr McCall submitted that for there to be any such trust, there must be some evidence of an intention to create a trust. In other words, it must be shown that the transferor intended to part with the beneficial interest in the property whilst retaining the legal ownership. For that proposition Mr McCall relied on the judgment of Sir George Jessel MR in the well-known case of *Richards v Delbridge* [1874] LR 18 Eq 11. Mr McCall submitted that the deeds of general assignment executed by Brunel did not evidence any such intention. Whether one looked at the deed of February 2008 or the previous deed dated October 2006, the purported assignment by Brunel was an absolute assignment to the claimant (as lender) of all Brunel's rights, title and interest in and to the book debts. In Mr McCall's submission, that was wording which demonstrated an intention on the part of Brunel to dispose of its entire legal and beneficial interest in the book debts due under the subcontracts, leaving Brunel with no interest to which a trust could attach.

62. Mr McCall contrasted the wording of the agreements in the *Don King Productions* case. Both agreements had provided for the parties to transfer the *benefit* of the management and promotional contracts to the partnership. The second agreement had expressly directed the parties to "hold all licences and promotional and management agreements for the benefit of the partnership absolutely". In Mr McCall's submission, this wording was consistent with an intention to confer or to transfer a beneficial interest in the agreements in question. Mr McCall submitted that, in any event, the decision of the Court of Appeal in *Don King Productions* was distinguishable on its facts, since Morritt LJ appears to have concluded that Mr King and Mr Warren must have known, when they entered into the agreements, that the management and promotional contracts were not assignable. Mr McCall pointed out that there was no evidence that Brunel or the claimant appreciated that any of the book debts which were the subject matter of the assignments in September and October 2006 and February 2008 were not assignable. Indeed, the February 2008 assignment contained the warranty in clause 4.1.7 that the debts were assignable or would be assignable when they were created.

63. Mr McCall relied also on the reservation expressed by Lightman LJ in the *Don King Productions* case about using the *Vandepitte* procedure as a shortcut in a commercial context – a reservation which he says was shared by Morritt LJ in that case in the Court of Appeal. Mr McCall submitted that using the *Vandepitte* procedure as a

shortcut is precisely what the claimant is seeking to do by suing in its own name and joining Brunel as second defendant in the present case. He relied upon the concluding remarks in paragraph 119 of Rix LJ's judgment in *Explora Group plc v Hesco Bastion* to the effect that, if the express declaration of trust (or an implied trust) was being used merely as a device to bring before the court a claim which would otherwise have been allowed to lapse by expiration of time, equity would probably not enforce the trust. This is exactly, says Mr McCall, how the *Vandepitte* procedure is being used in the present case because, if this action had not been commenced by the claimant when it was commenced, Brunel's claim to be paid the sums allegedly due under the two subcontracts would have become statute barred. Thus, in Mr McCall's submission, even if the deed of assignment here, did purport to create a trust of the non-assignable book debts of Brunel (something which he strongly disputes), it is a trust which the court should not enforce against Balfour Beatty because the context here is a commercial one and the *Vandepitte* procedure is being used to enable a claim to be brought which would otherwise have been statute-barred.

Conclusions on the implied trust argument

64. My conclusion on these rival arguments about the implication of a trust is as follows. It is plain that whilst a non-assignment clause in sufficiently clear terms can itself invalidate the creation of a trust (see Waller LJ in the *Barbados Trust Company* case at paragraph 43), unless it is phrased in terms which plainly prohibit the creation of a trust interest, a non-assignment clause does not in general preclude the creation of such an interest. Mr McCall accepts that clause 7 of Haden Young's Standard Conditions of Subcontract was not expressed in terms which themselves would negative the creation of a trust. Whether, therefore, the failed assignment gives rise to a trust in the present case depends on whether, in all the circumstances, there was an intention on the part of Brunel to create a trust in the claimant's favour. Intention can be express or it can be implied. It can be deemed or inferred. The intention to create a trust cannot usually be derived from the sole fact that the transfer by purported assignment has been ineffective because of an anti-assignment clause in the contract. If that was the case, then most failed or incomplete transfers could be remedied in equity by the device of a trust. That would run flatly contrary to the judgment of Sir George Jessel MR in *Richards v Delbridge*. However, I accept Mr Kearney's submission that in the present context one must treat the decision in *Richards v Delbridge* with caution. That was a case of a gift. The decision is cited in the textbooks as authority for the principle that "equity will not assist a volunteer". Brunel was not a volunteer, any more than was Mr Warren. Brunel had received good consideration in return for the assignment of the book debts and is, therefore, in a different position to someone who has purported to make a transfer by way of gift which has failed.

65. The trust argument in this case rests on whether the claimant has a real prospect of persuading the court at trial to imply a trust on the ground that the deemed intention of Brunel when it entered into the assignments of October 2006 and February 2008 was to confer on the claimant a beneficial interest in the book debts if for any reason the assignment failed.

66. The claimant will encounter some difficulties in advancing that argument. First, the wording of the assignment is one of absolute transfer of all interest and benefit and is not redolent of trust wording in the same way as the wording of the two agreements in the *Don King Productions* case. On the other hand, the wording is not so very

different from that of the CSA Agreement between TTF and Explora in *Explora Group plc v Hesco Bastion*.

67. Second, the claimant cannot say that when the assignments were made, it and/or Brunel knew or appreciated that there might be a problem with assignment of the book debts in question because of the provision requiring Haden Young's prior consent in the contracts under which those book debts arose. In the assignment dated February 2008, there was an express warranty by Brunel that the debts were assignable. Moreover, at least so far as the February 2008 assignment is concerned, it is the claimant's primary case that clause 7 had been deleted or waived as a result of the exchanges between the parties in August of the previous year. The parties must be taken to have thought that the book debts were assignable and had been validly assigned.

68. Third, there is no evidence (and I would expect that evidence to be in Mr Britton's witness statements if it existed) to the effect that Brunel intended to give the claimant a beneficial interest in the debts when it assigned them. On the face of it the intention was simply to make an assignment. On the other hand, the cases do not suggest that whether or not a trust will be implied depends solely or even principally upon the wording used in the assignment in question.

69. Notwithstanding these difficulties, I do not think that the trust argument stands no real prospect of success. I am not persuaded that it is being relied upon as a device to bring before the court a claim which would otherwise be time barred. Rix LJ was led to make the observation that he did in paragraph 119 of his judgment in the *Barbados Trust Company* case because, as he pointed out, there was no immediate relationship between the Bank of America and the Barbados Trust Company to support the express declaration of trust. There had been a number of intervening assignments and there was no prior contractual relationship between those parties. The present case is very different. There has been a business relationship between the claimant and Brunel since long before the conclusion of the Portwall Lane contract and, if Mr Britton's evidence is accepted at face value, since long before even the conclusion of the Exeter schools contract. Brunel had been receiving financial support from the claimant long before the first of the assignments which is relied upon as giving rise to the declaration of trust in support of the claim in this case. Not only was Brunel not a volunteer when it made the assignments, but also the financial backing given by the claimant to Brunel in order to enable Brunel to perform its subcontracts provides a rationale for the implication of a trust so as to give effect to the intended transfer of the receivables earned by Brunel through that performance.

70. The position in this case is quite close to that in *Explora Group plc v Hesco Bastion*. In that case, as in this, the liquidator stands in the shoes of the assignor and is the putative trustee. He has shown no interest in asserting a claim to recover sums due under the subcontracts with Haden Young, notwithstanding that the company in liquidation received financial support from the assignee and putative beneficiary, which enabled it to earn those very sums. On this hypothesis, the claimant is left without a remedy unless the court is prepared to deem the implication of a trust to support the claim, and regards it as appropriate to allow the *Vandepitte* procedure to be utilised so that the claimant can sue to recover. The judgment of the Court of Appeal in the *Explora Group* case suggests that, in circumstances such as these, the court will approve the implication of a trust, and will allow the beneficiary to sue by using the

Vandepitte procedure. The *Barbados Trust Company* case, albeit that it involved an express declaration of trust, also tends to suggest that the *Vandepitte* procedure might be justified even where the relationship between assignor and assignee was far more remote than in the present case.

71. For these reasons, I am unable to conclude that the trust argument is one which stands no real prospect of success. Far from it being an opportunistic attempt at a shortcut, it seems to me that it is fairly arguable.

Overall conclusion

72. Accordingly, my conclusion is that the claim based upon the assignment in respect of the Portwall Lane contract should be struck out or that summary judgment should be given to Balfour Beatty in respect of it, but that Balfour Beatty's application in respect of the claims under both contracts based upon an implied declaration of trust must be dismissed.

THE JUDGE: Now, Mr Preece, the upshot is that some thought will have to be given to the particulars of claim because I have found against you on the assignment point but I have found in your favour on the implied trust argument. So both parties may have something they want to complain about in this judgment. What I propose is that there should be a short telephone hearing, involving counsel, at some time in the near future which is convenient to consider the implications of my judgment. It may well be that you will not want that hearing to take place until you have a shorthand transcript.

MR PREECE: Yes, my lord. I can confirm that the parties have agreed to share the cost of a transcript and that will be expedited to ensure that —

THE JUDGE: Well, what I will formally direct today is that there should be an Order in the terms that I have just indicated. Time for appealing will be extended until further order. There shall be a hearing to consider other matters arising out of this judgment on a convenient date to be fixed. It seems to me that an Order can be drawn up now which encapsulates my decision. When a transcript is available - obviously, it will come to me for correction first, so I suspect that the hearing will not take place until about three weeks from now... but as soon as the transcript is available, there should be a hearing fixed.

MR PREECE: My lord, would you like to deal with the suggested amendments to the particulars of claim in relation to the strike out *[inaudible]*?

THE JUDGE: No. It seems to me that that is a matter that is consequential upon the judgment. I will have to consider a revised amended particulars of claim which will incorporate some of the existing proposed amendments but will include some deletions, subject to any appeal. If anyone is going to appeal, it may be better if all the proposed amendments are left in. If nobody is going to appeal, then the case will proceed on the basis that the assignment arguments are deleted but there will still have to be some adjustment of the pleadings. I do not think I should deal with that unless and until I have heard from both counsel.

MR PREECE: Thank you, my lord. *[Inaudible]*.

THE JUDGE: Yes. There may also be some costs arguments relating to the proposed pleading amendments. So unless there is anything else that you want to draw to my attention, I should like to see a draft Order in the next couple of days which contains the matters I have just referred to and directs that time for appeal shall not run until there has been the further hearing. That, I think, is all we can do for today.

MR PREECE: Thank you, my lord.

THE JUDGE: Anything else? No? All right. Thank you both very much indeed.

[Hearing ends]