Neutral Citation Number: [2008] EWHC 1420 (TCC)

IN THE HIGH COURT OF JUSTICE
BIRMINGHAM DISTRICT REGISTRY
TECHNOLOGY & CONSTRUCTION COURT

BIRMINGHAM CIVIL JUSTICE CENTRE
33 BULL STREET
BIRMINGHAM B4 6DS

Date of hearing: 29 April 2008
Date of draft judgment: 7 May 2008
Date of judgment: 19 May 2008

Before
Her Honour Judge Frances Kirkham
sitting as a deputy High Court Judge

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OWEN PELL LIMITED

Claimant

and

BINDI (LONDON) LIMITED

Defendant

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Ms Charlotte Ellis of Counsel (instructed by Wragge & Co) for the Claimant
Mr Thomas Rochford of Counsel (instructed by Humfrys & Symonds) for the Defendant

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JUDGMENT

1. The claimant applies for summary judgment to enforce the decision of an expert.

Background

2. In August 2003 the claimant and defendant contracted whereby the claimant agreed to build an extension and undertake M&E work at the defendant's property at Holme Lacy. The claimant left site in October 2004 before work was complete. A dispute arose as to the claimant's entitlement to payment under its final account and the defendant complained of defects in the claimant's work.

3. At that stage, the claimant was represented by Wragge & Co, solicitors, and the defendant by Messrs Brook Barnes James (BBJ) a firm of chartered quantity surveyors.

4. On 15 November 2005, the parties agreed to have their dispute determined by an independent expert, to be appointed by the RICS. That agreement (the Agreement) was set out in a letter, the relevant terms of which are:

   "The parties entered into a building contract for construction works to … Garenin Cottage, Holme Lacy…. Owen Pell was the Contractor and Bindi the Employer on the project. Owen Pell has submitted its final account to Bindi for payment. The parties are in dispute concerning the value of the works and wish to have the dispute settled by an independent expert appointed by RICS.

   The proposed independent expert will be asked to determine the following:

   1 The value of Owen Pell's work and therefore the sum due to Owen Pell pursuant to submission of its final account; alternatively the amount to be deducted from sums paid to Owen Pell under the contract; and

   2 The entitlement (or otherwise) of Bindi to contra charge Owen Pell in respect of work carried out on the project.

   We would suggest that in carrying out his investigations and making his decision, the expert should have regard to Owen Pell's final account and all supporting documents including site diaries and Bindi's documentation concerning the project.

   The independent expert should conduct the proceedings in any way that he sees fit but the parties suggest that it would be beneficial for him to conduct a site visit and hold a meeting between the parties.

   The timescale for conducting the proceedings is in the hands of the independent expert. Nevertheless the parties agree that the process should take no longer than two months.

   The parties agree that they should be bound by the decision of the independent expert and, following the decision, that they are not able to refer the dispute to a subsequent tribunal, including adjudication under the [1996 Act]."

5. In January 2006, the RICS appointed Mr Cartwright. The parties made submissions. Mr Cartwright directed that the parties prepare a Scott Schedule. A site visit was arranged for 4 September 2006. The following people attended that day: Mr Cartwright; two representatives of the claimant; Mr Woods of Wragge & Co (the claimant's solicitor); Mr Hamed of the defendant, Mr Jerrison (an architectural technician engaged on the project) and Mr Barnes (a surveyor acting for the defendant). Separate meetings and inspections of the property were held as the defendant was not prepared to have a joint inspection. In the morning, Mr Cartwright met Mr Hamed and Mr Barnes and inspected the property in their company. Mr Cartwright acceded to Mr Woods' request that he be entitled to be present as a "silent" observer. In the afternoon, Mr Cartwright met the two representatives of the claimant and Mr Woods and inspected the property with them. No representative of the defendant was present during that afternoon meeting and inspection. It would appear that, at the end of that day, Mr Cartwright called the parties and representatives together and gave directions for further steps to be taken. He confirmed these in an e mail sent on 5 September 2006.

6. Mr Jerrison wrote a letter which was dated 22 November 2006, but which Mr Cartwright did not receive until 5 January 2007. Mr Cartwright refused to have regard to it, on the grounds that it had been submitted out of time.

7. Mr Cartwright issued his decision on 11 September 2007. He set out his reasons for that decision in a detailed document, which included the Scott Schedule which each party had completed and showing his comments against each item. By letter dated 22 October 2007, Mr Cartwright clarified his decision. He decided that the claimant was entitled to be paid £53,487.65 plus VAT and that such sum should be paid within seven days of his decision. He also decided that the defendant should pay 80% of his fees.

The issues

8. The defendant has refused to make payment. The claimant commenced proceedings in December 2007 to recover the sums due to it pursuant to the decision. The claimant now applies for summary judgment.

9. The claimant's case is that Mr Cartwright answered the question put to him. His decision is binding, even if it is wrong. The rules of natural justice do not apply to expert determination. Even if they do, Mr Cartwright did not breach these.

10. The defendant served a defence and counterclaim in February 2008. By that pleading, it contends that that there was an implied term of the Agreement, namely that the decision of the expert would be of no effect and/or would be liable to be set aside in the event that

    (a) the expert failed to conduct himself in accordance with the principles of natural justice; or

    (b) the expert conducted himself in such a way as either was biased or gave the appearance of bias; or

    (c) in conducting himself and/or reaching his conclusions, the expert was guilty of gross or obvious error and/or was perverse in his conclusions.

The defendant contends that such term is to be implied as a matter of obvious inference (the officious bystander test) and to give business efficacy to the Agreement.

11. The defendant also contends that Mr Cartwright was guilty of bias or partiality, both actual and perceived, and acted in breach of the principles of natural justice in a number of ways, namely:

    1) He heard from the claimant in private at the site meeting on 4 September 2006.

    2) He gave the impression of being dismissive of the defendant's complaints throughout the meeting on 4 September 2006.

    3) He declined to consider Mr Jerrison's letter of 22 November 2006.

    4) He concluded that the parties had "effectively agreed a walk away situation" as at [the date when the claimant left site]; the defendant had not so agreed.

    5) He reached that conclusion without having given the defendant the opportunity to comment on it.

    6) He reached conclusions which contained gross and obvious error and which were perverse.

12. The defendant's case is that the decision is void and unenforceable, alternatively that the court should conclude that it should be set aside.

13. In its defence, the defendant relied on the fact that Mr Cartwright and Mr Woods lunched together on 4 September 2006. In circumstances where the evidence suggests that Mr Hamed of the defendant had been asked, in advance, about such an arrangement and had made no objection, the defendant no longer relies on that complaint. In its pleading, the defendant also raised concerns about possible previous dealings between the claimant's solicitors and Mr Cartwright. The defendant does not rely on those matters.

Authorities

14. I have been taken to the following authorities.

15. Lord Denning, in **Dean v Prince [1954]** 2 WLR 538, said that the decision of an expert could be impeached not only for fraud but also for mistake or miscarriage. That must, however, be treated with great caution in the light of Lord Denning's judgment in **Campbell v Edwards:** see below**.**

16. In **Campbell v Edwards** [1976] 1 WLR 403, the Court of Appeal was concerned with a non-speaking valuation and the question whether a valuer might be liable in negligence. In his judgment, Lord Denning said:

    "In former times (when it was thought that the valuer was not liable for negligence) the court used to look for some way of upsetting a valuation which was shown to be erroneous. They used to say that it could be upset,

not only for fraud or collusion, but also on the ground of mistake: see for instance what I said in **Dean v Prince**. But those cases have to be reconsidered now. I did reconsider them in **Arenson v Arenson** [1973] 2 WLR 553. I stand by what I there said. It is simply the law of contract. If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives a valuation honestly and in good faith, they are bound by it. Even if he has made a mistake they are still bound by it. The reason is because they have agreed to be bound by it. If there were fraud or collusion, of course, it would be very different. Fraud or collusion unravels everything. It may be that if a valuer gives a speaking valuation - if he gives his reasons or his calculations - and you can show on the face of them that they are wrong it might be upset."

The comment in the last sentence was obiter. It simply raised the possibility that the legal position might be different with a speaking determination.

17. In **Baber v Kenwood** [1978] 1 Lloyd's Rep. 175 the Court of Appeal was concerned with a non-speaking share valuation. Megaw LJ referred to the obiter dicta of Lord Denning in **Campbell v Edwards** and said: "It was suggested that, somehow or other, the facts of the present case should be treated as being equivalent to a 'speaking certificate'. I am unable to see how that could be." Megaw LJ expressed no view on Lord Denning's obiter dicta. His stance was entirely neutral. The Court of Appeal did not decide whether a speaking decision could be vitiated for error nor did they lay down any principles as to how the court might approach that question.

18. **Nikko Hotels (UK) Ltd v MEPC plc** [1991] 2 EGLR 103: a mistake by an expert will not render the determination invalid, provided that he has answered the question which was put to him: "If he has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity" per Knox J.

19. The Court of Appeal in **Jones and others v Sherwood Computer Services** [1992] 1 WLR 277 quoted with approval the passage from **Campbell v Edwards**: "if two persons agree that the price of property should be fixed by a valuer on whom they agree and he gives a valuation honestly and in good faith, they are bound by it. Even if he has made a mistake they are still bound by it. If there were fraud or collusion, of course, it would be different. Fraud or collusion unravels everything."

20. **Re Medicaments and Related Classes of Goods** [2001] 1 WLR 700: "The cases draw a distinction between the cases draw a distinction between 'actual bias' and 'apparent bias'. The phrase actual bias has not been used with great precision but has been applied to the situation (1) where a judge has been influenced by partiality or prejudice in reaching his decision, and (2) where it has been demonstrated that a judge is actually prejudiced in favour of or against a party….."

21. In **Porter v Magill** [2002] 2 AC 357 the House of Lords laid down the test for apparent bias: "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

22. In **Macro v Thompson (No. 3)** [2002] BCLC 36, Robert Walker J said: "On the authorities as a whole I accept the submission… that when the court is

considering a decision reached by an expert valuer who is not an arbitrator performing a quasi-judicial function, it is actual partiality, rather than the appearance of partiality, that is the crucial test. Otherwise auditors (like architects and actuaries) who have a long-standing professional relationship with one party (or persons associated with one party) to a contract might be unduly inhibited, in continuing to discharge their professional duty to their client, by too high an insistence on avoiding even an impression of partiality."

23. In **Bernhard Schulte v Nile Holdings** [2004] Lloyd's Rep. 352, Cook J said: "There is no requirement for the rules of natural justice or due process to be followed in an expert determination in order for that determination to be valid and binding between the parties." While actual partiality on the part of an expert would invalidate his determination, apparent or unconscious bias does not have this effect.

24. In **Homepace Ltd v Sita South East Ltd** [2008] EWCA Civ 1, Lloyd LJ said at paragraph 18:

    "The binding effect, or otherwise, of an expert determination has been considered in a number of cases in recent years. Each case depends on the terms of the contract under which the determination is made, both as to what it is that the expert has to decide, and as to how far his decision is binding on the parties. In each case it is necessary to examine the determination, in order to see whether it lies within the scope of the expert's authority. If it does not, then it has no effect as between the parties. If on the other hand it does, then the contract also governs the question whether the determination is binding…."

    At paragraph 24, he said: "The first question, therefore, is what the agreement has entrusted to the expert. The second is whether that is what he has decided. If so, the third is whether it can be shown that he has made a mistake which vitiates his decision."

Should the court imply the terms contended for by the defendant?

25. The defendant's case is that, where the parties and expert all anticipate and intend a reasoned decision, and that is what is provided, it is an implied term of the agreement to be bound that the award is enforceable only if free from gross or obvious error or perversity in its conclusions. This, Mr Rochford submits, is implicit from the fact that the expert is to give his reasons to the parties.

26. The defendant pleads that such a term or condition precedent is to be implied as a matter of public policy pursuant to the Human Rights Act 1998 ("HRA"), and Article 6 and Article 1 of Protocol 1 of the European Convention on Human Rights. Mr Rochford accepts that the Convention does not apply as between private individuals. He submits, however, that the court should now be slower to conclude that the parties had given up the right to a fair trial; in agreeing to expert determination, the parties are less likely than before the HRA to have agreed a process which did not include the safeguards available in, for example, a trial before a court.

27. Mr Rochford submits that it was the expectation of both parties that Mr Cartwright give detailed reasons and incorporate the Scott Schedule in his decision; this was not a case where either party had ever expected or agreed

to a non-speaking decision, ie one without reasons. He submits that, where parties and the expert all anticipate and intend a reasoned decision (a speaking valuation) and that is what is provided, it is an implied term of the agreement to be bound that the award is enforceable only if free from gross or obvious error or perversity in its conclusions. This, he submits, is implicit from the fact that the expert is to give his reasons to the parties.

28. Here, the Agreement is silent as to whether the expert should give reasons or not, and thus apparently neutral on the point. However, Mr Cartwright did in fact give detailed reasons. I am not persuaded that there is any real distinction between a speaking and a non-speaking decision. Often no agreement is reached as to whether or not the decision should be supported by reasons - that is left to the expert. As Ms Ellis submitted, to make such a distinction would put parties in the odd position that the parties might have grounds to challenge the decision if the expert decided to give reasons but not if he decided not to show his reasoning. That would be arbitrary and an undesirable distinction. Further, Mr Cartwright's decision to deliver a speaking decision was arrived at after the Agreement was reached. It is not appropriate to attempt to construe the Agreement by reference to this post-contractual event.

29. I am not persuaded by this part of the defendant's case. There is nothing in the Agreement which suggests that this dispute and the approach to it was different from other expert determinations. It is not suggested that the parties gave any consideration to the rights enshrined by virtue of the HRA when they agreed to submit to expert determination. They were both represented by professionals who could, if uncertain as to the nature of expert determination, have researched this on, for example, the RICS web site. It is important to bear in mind the nature of expert determination. There are benefits to parties who choose this route: for example, it may provide a quick solution; the parties are able to limit their exposure to costs; the parties achieve certainty and finality. The wording of the Agreement indicates that the parties indeed intended to be bound by it. I accept Ms Ellis' submission that to imply the term which the defendant seeks would frustrate rather than promote the commercial purpose of the Agreement. It cannot be said that it is necessary to imply such a term to give business efficacy to the Agreement, a purpose of which was to arrive at a binding (and therefore final) decision. Similarly, the question whether such a term should be implied does not pass the officious bystander test.

30. I see no reason to depart here from the guidance given by Cook J in **Bernhard Schulte** namely that there is no requirement for the rules of natural justice or due process to be followed in an expert determination in order for that determination to be valid and binding between the parties. However, in case it assists, I deal below with the defendant's allegations as to breaches of the term on which the defendant relies.

Mr Mouzer's report

31. The defendant commissioned a report from Mr Mouzer purportedly in the capacity of an independent expert. There is as yet no permission for the parties to rely upon expert evidence. It is not clear what purpose, if any, such report serves. In the first part of his report, Mr Mouzer gives his opinion on some of the issues which are exclusively within the remit of this court, and on which no expert evidence has been invited by the court. In my judgment, Mr

Mouzer's comment on these matters is inappropriate. In the second part of his report, Mr Mouzer comments on a number of aspects of Mr Cartwright's decision. Although Mr Mouzer appears to have had access to many of the papers available to Mr Cartwright, it seems that he did not have access to all of these. Accordingly, if it was Mr Mouzer's intention to review in detail Mr Cartwright's decision, he has not been able to do so because he did not have access to precisely the same material as was available to Mr Cartwright. In any event, in my judgment, such an exercise is pointless and of no assistance.

32. The task for the court is to decide whether the decision which Mr Cartwright made was within his jurisdiction, that is, whether he decided the issues referred to him. If he did not, his decision is a nullity; if he did, his decision is binding even if he made errors: see **Campbell v Edwards**, approved in **Jones v Sherwood**. No expert evidence is needed to deal with that point. The question whether Mr Cartwright was actually biased, as that concept was defined by the Court of Appeal in **Re Medicaments** is a question of fact. The court does not need the opinion of an expert to decide that point. (In fact, there is no evidence at all of actual bias on the part of Mr Cartwright.) Expert evidence is not needed to decide whether apparent bias is made out. As set out in **Porter v Magill,** the test for apparent bias is whether a fair-minded and informed observer would conclude that there was a real possibility of bias. To apply that test, the court must put itself in the position of a fair-minded and informed observer. The court does not need the opinion of an expert to do this.

Actual bias?

33. There is no allegation that Mr Cartwright was guilty of fraud or collusion. The defendant does, however, allege actual bias on the part of Mr Cartwright: the defendant contends that Mr Cartwright "took against" him. So far as actual bias is concerned, in **Re Medicaments,** the Court of Appeal said (at paragraph 37) that, while actual bias had not been used with great precision in decided case, the phrase had been applied to the situation ()1) where a judge had been influenced by partiality or prejudice in reaching his decision, and (2) where it had been demonstrated that a judge was actually prejudiced in favour of or against a party.

34. I am not persuaded that there is any evidence that Mr Cartwright had taken against the defendant. I deal in paragraph 37 below with the complaint about Mr Cartwright's apparently dismissive approach. There is no evidence to suggest that Mr Cartwright was actually prejudiced against the defendant or that he had been influenced by partiality or prejudice in reaching his decision. There is no evidence of actual bias.

Apparent bias or appearance of bias?

Meetings and inspection on 4 September 2006:

35. As I have set out above, both parties and Mr Cartwright met at the property on 4 September 2006. Mr Hamed refused to agree that all inspect the property together. It was agreed that the defendant's party would accompany Mr Cartwright in the morning and the claimant's party during the afternoon. Mr Woods asked whether he could attend the inspection with the defendant's party in the morning, as a "silent observer". Mr Hamed agreed to that. Mr

Cartwright did not extend an invitation to the defendant for one of its representatives to be present. That complaint lacks merit. None of the defendant's representatives asked to be present at the afternoon meeting, although they could easily have done so.

36. The defendant relies on the fact that Mr Cartwright did not summarise to the defendant the points which the claimant had made to him during the afternoon session. Again, that complaint lacks merit. Had the defendant asked for a representative to be present during the afternoon, he would have heard what had been said. Mr Cartwright convened a full meeting at the end of the visit on 4 September. The defendant thus had the opportunity to ask what had been said during the afternoon, but did not take it.

Mr Cartwright was dismissive of the defendant's case

37. The defendant complains that Mr Cartwright was dismissive of some of its complaints. There is no substance to this complaint. Mr Cartwright made comments during his inspection on 4 September 2006. A common complaint is that a dispute resolver remains sphinx-like so that the parties do not know what he or she is thinking. Here, Mr Cartwright gave an indication of his thinking. His comments were plainly well within appropriate bounds. The parties had agreed that Mr Cartwright decide upon the procedure to be adopted in determining the dispute. He was entitled to decide upon the seriousness of the matters of which the defendant complained. It simply cannot be said that, because Mr Cartwright reached decisions on matters which were not favourable to the defendant, a fair-minded and informed observer would conclude that there was a real possibility that he was biased.

Mr Jerrison's letter dated 22 November 2006:

38. In his statement, Mr Jerrison said he thought he had posted his letter to Mr Cartwright that day. However, in a letter dated 19 January 2007, BBJ asked Mr Cartwright to consider that letter and said: "It's just unfortunate that it was not sent on the 22.11.06. However I will leave it up to you to decide whether or not you should consider it." That letter indicates that the defendant accepted, at the time, that Mr Jerrison's letter had not reached Mr Cartwright in time. It is also clear that BBJ acknowledged that the procedure to be adopted was a matter for Mr Cartwright, as indeed the parties had made clear in the Agreement. BBJ did not at that stage submit that Mr Cartwright should not refuse to take the letter into account. The defendant made that point only when the question of enforcement arose.

39. The parties had expressly agreed that Mr Cartwright adopt those procedures he considered appropriate. He had set a timetable for submissions. It appears that the defendant failed to comply with that timetable. It was in my judgment open to Mr Cartwright to decline to take into account a late submission. To do so did not amount to bias or to the giving of the appearance of bias.

40. Applying the test in **Porter v Magill** to all these complaints**,** in my judgment a fair-minded and informed observer would not conclude that there was a real possibility that Mr Cartwright had been biased.

What was the scope of the dispute referred to Mr Cartwright? Did he answer the questions referred to him?

41. The issue here is whether Mr Cartwright proceeded on a basis which was contrary to his instruction or has purported to determine an issue which was not before him.

42. In paragraph 32 of his decision, Mr Cartwright referred to the Scott Schedule which the parties had produced, which included sections on variations, assessment of provisional sums, assessment of provisional quantities and the contra charges claimed by the defendant. At paragraph 33, he noted that there were various matters which arose out of that schedule which needed separate consideration, including the basis of his evaluation. Mr Cartwright dealt with the latter in paragraph 34:

> "(a) the basis of my evaluation
>
> (i) The parties' agreement [*ie to refer to expert determination*] requires me to value Owen Pell's work in accordance with its final account which includes a reference to direct loss and expense in the form of preliminary and overheads recovery. As part of Owen Pell's submissions it says that it has made assessments without the need for contractual avenues. …… there are no references to determination provisions of the contract and no claims are made in that regard. However, Bindi has, subsequent to the agreement, included invoices for works executed after 20 October 2004 for the completion of the project. This completion work has not been included as part of the defect costs and is in addition to the omissions of works but again there is no reference to any contractual provisions.
>
> (ii) Therefore, from the way the agreement is drafted, it seems that the parties have effectively agreed a walk away situation whereby Owen Pell are paid for the works properly carried out up to the date they left site, namely 20 October 2004. It follows on this basis that Owen Pell is entitled to payment less any defective works carried out whilst on site. I therefore take the view that Bindi can only abate any monies due to Owen Pell by the rectification costs of any defects…."

43. The defendant contends that the Agreement required Mr Cartwright to take into account not only the value of work carried out by the claimant but also sums which the defendant claims to have incurred, over and above the cost of rectifying defective work, in completing the project. Further, some of the decisions which Mr Cartwright reached were inconsistent with his assumption that the parties had agreed a walk away position.

44. In my judgment, on a true construction of the Agreement, Mr Cartwright was required to consider matters relevant to the claimant's entitlement to payment based on its final account and to identify the basis of any entitlement on the part of the defendant to apply contra charges. The obvious reading of the Agreement is that Mr Cartwright was to consider contra charges in relation to the work which the claimant carried out on the project. His conclusion that the parties had effectively agreed a walk away situation whereby the claimant was entitled to payment less any defective works carried out on site was a conclusion which was, in my judgment, clearly within the scope of the Agreement.

Errors

45. Mr Rochford submits that Mr Cartwright made gross and obvious errors and reached decisions which were perverse. The defendant relies on three particular matters where, they say, Mr Cartwright's conclusions were in error or perverse. They are (1) that the extension was out of square; (2) that incorrect roof slates had been fitted; and (3) that there were defects in the windows. All three relate to disallowed contra charges and thus flow from the conclusion that Mr Cartwright reached that the parties had agreed a walk away position.

46. The authorities do not provide strong support for Mr Rochford's submission that, if the defendant is able to demonstrate that Mr Cartwright made gross and obvious errors and reached decisions which were perverse then the decision should be considered to be a nullity or set aside. The comments made by Lord Denning in **Campbell v Edwards** and Megaw LJ in **Baber v Kenwood** were obiter. More recent authorities indicate that provided the expert answered the right question, his decision is binding even if wrong. Mr Cartwright's decision was within the scope of the dispute referred to him. He answered the right question. It may be that he answered that incorrectly. I reach no conclusion on that. In my judgment, it is not open to the court to set aside or to refuse to enforce the decision by reason of errors in the determination, whether gross, obvious or perverse. Mr Cartwright's determination is binding and thus enforceable even if it is wrong.

47. It seems to me that it would be undesirable for the court to follow the route suggested by Mr Rochford. But if I am wrong on that, and if it were appropriate for the court to review an expert's decision to ascertain errors, I accept Ms Ellis' submission that the court should limit itself to errors on the face of the decision. The errors which Mr Mouzer suggests Mr Cartwright has made largely fall outside that category.

Conclusion

48. Pursuant to CPR Part 24, the Court may give summary judgment if the defendant has no real prospect of successfully defending the claim and there is no other compelling reason why the issue should proceed to a full trial. For the reasons given above, I conclude that the defendant has no real prospect of defending the claimant's claim to enforce the expert's decision. There is no other compelling reason why judgment should not be given now.

49. Accordingly, the claimant's application succeeds.

Frances Kirkham
19 May 2008