Case No: HC-2015-000800

Neutral Citation No: [2016] EWHC 2042 (CH)
IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

The Rolls Building
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Fetter Lane
London EC4A 1NL

Friday, 27 May 2016

B E F O R E:

MISS AMANDA TIPPLES QC
(Sitting as a Deputy High Court Judge)

B E T W E E N:

REBELLION INTERACTIVE LTD

Claimant

- and -

SQUARE ENIX (2009) LTD

Defendant

MR JONATHAN HILL (instructed by Simons MuIrhead & Burtons) appeared on behalf of the Claimant

MR TOM CLEAVER (instructed by Russells) appeared on behalf of the Defendant

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JUDGMENT
(Approved)

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1. **THE DEPUTY JUDGE**: I have before me an application for summary judgment under CPR Part 24.2. The application is made by the defendant, Square Enix (2009) Ltd, against the claimant, Rebellion Interactive Ltd in relation to part of the claimant's claim. The defendant says that this application raises a short question of law which turns on the meaning and effect of a letter dated 4 February 2010, which the defendant says is capable of being determined summarily. The defendant says that, if it is correct, the application will dispose of 75 per cent of the sums claimed and nearly all the disputed issues of fact. These disputes, the defendant says, will simply fall away.

2. The claimant's claim is for £1,630,000, plus interest and costs. The defendant says that if its application is successful (which it maintains it should be) the maximum sum at stake will be £460,000 plus interest and costs. It also says that that reduction of 75 per cent in the value of the claim would have a significant effect on the economics of the case and the prospects of settlement. The parties have filed costs budgets which show that total costs through to trial are £392,000 for the claimant and £578,000 for the defendant.

3. Before I turn to the facts of the case, I will just briefly say something about the law in relation to the procedure under CPR Part 24. So far as material in the present circumstances, CPR Part 24.2 provides that the court may give summary judgment against a claimant on a particular issue if it considers that the claimant has no real prospect of succeeding on that issue and there is no other compelling reason why the issue should be disposed of at a trial.

4. It is well established that the respondent has to have a case which is better than merely arguable, that the hearing of an application for summary judgment is not a summary trial and it is for the applicant, which in this case is the defendant, to establish that the claimant had no real prospect of success on the issue identified in the application notice. It is common ground between the parties that the principles in relation to exercise of the court's jurisdiction under CPR Part 24 are set out in a case called **Easy Air Ltd v Opal Telecom** [2009] EWHC 339 (Ch) at paragraph 15, a decision of Lewison J. In relation to those principles, I have in particular had my attention drawn to (vi) and (vii), which say this:

> “(vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: **Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd** [2007] FSR 63; ..."

5. The second of the principles identified by Lewison J I have also had my attention directed to is set out at (vii) of his judgment of the **Easy Air** case, which says this:

> "(vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for

> the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: **ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725**."

6. The claimant, as I shall explain, relies on principle (vi), whereas the defendant has emphasised and directed my attention to the need to "grasp the nettle" and decide the point of law it has identified in this case.

7. I turn now to the facts. The claimant is part of the Rebellion group of companies, a leading independent video game developer. The defendant is a member of the Square Enix group of companies, one of the largest video game publishers. On 16 June 2009, the claimant and the defendant entered into a detailed written agreement pursuant to which the claimant agreed to develop for the defendant an interactive entertainment software product provisionally known as "Rift". The agreement itself runs to some 27 pages and contain a number of schedules. I shall refer to it in this judgment as "the agreement".

8. The product was to be completed by early 2011 and the claimant was required to develop it in accordance with an agreed specification and what was described in the agreement as a "milestone schedule". The milestone schedule means the delivery and payment schedule for completion of the product attached at schedule 2 to the agreement. The milestone schedule was, by agreement, revised on 30 October 2009 and the relevant document for the purpose of this hearing is at tab 8, pages 132 to 135 of the bundle.

9. The milestone schedule is in fact a table with four columns. The heading of the first column is entitled "Milestone", and under that heading there are 21 rows identifying the particulars of milestones 1 to 21, the milestone being a stage of development of the product described or detailed in the milestone schedule. The heading of the second column is entitled "Date", and each milestone has a date by which it is to be achieved. The heading of the third column is "Milestone Description", which identifies the deliverables to be delivered by the claimant, as the developer, to the defendant in respect of each milestone. The last column is headed "Payment", and identified the payment to which the claimant is entitled subject to the terms of the agreement in respect of each milestone. In the event that all milestones were successfully completed by the claimant in accordance with the terms of the agreement, the total payment the claimant was entitled to was £6,206,900.

10. Returning to the agreement itself, clause 2.1 provided that the claimant shall develop the product as a professional quality interactive software program in compliance with the specification and milestone schedule, and the claimant was required to complete each milestone and deliver to the defendant at a specified UK address each of the deliverables by the date specified in the milestone schedule. In the agreement, the deliverables are defined as:

> "The deliverables to be delivered by the Developer to SEL pursuant to the Milestone Schedule and the Specification ..."

11. Clause 2.3 provided that the claimant was to give the defendant written notice of each delivery identifying the deliverables delivered, and a delivery was not to be considered complete unless and until the defendant had received such a notice. Clause 2.4 of the agreement set out, amongst other things, the time period for the defendant to test the deliverables received from the claimant and to inform the claimant the results of such tests and the last sentence of clause 2.4 provides:

> "... only approval given in writing by the Project Producer shall constitute the acceptance by SEL [that is the defendant] of any Deliverable."

12. Further, clause 2.4 provided that milestone 6, "GREENLIGHT 2", had to be approved by the defendant's headquarters in Japan prior to being accepted. Clause 2.5 provides that, if a deliverable is rejected, then the date for completion of milestones can be rescheduled with the defendant's written consent. Clause 2.6 provides, amongst other things, that upon or before the acceptance of any deliverable, the claimant shall provide the defendant with an invoice for the relevant milestone payment, and there is then provision relating to the time for payment of this invoice.

13. Clause 3 of the agreement relates to what are described as change procedures. These allow the defendant to require the claimant to modify the specification or performance under the agreement. But to take effect under clause 3, any such change request needed to be in writing.

14. The termination provisions are contained in clause 12 and, under clause 12.1, the defendant was entitled to terminate the agreement at any time on written notice to the claimant. If it did so, then clause 13.1 took effect. Clause 13.1 is set out at tab 8, page 84 of the bundle and provides (so far as material):

> "[13.1] Upon termination of this Agreement by SEL pursuant to Clause 12.1, the Developer shall be entitled to the following amounts as its sole and exclusive remedy for any damage that the Developer may suffer as a result of such termination: SEL shall pay the Developer within thirty (30) days of termination: (a) any and all Milestone Payments that have bene approved by SEL but for which SEL has not made payment to the Developer under the terms and conditions of this Agreement; and (b) an amount equating to the Milestone Payment for the Milestone being developed at the date of termination (if not already paid by SEL) and (c) an amount equating to the Milestone Payment for the next Milestone due for development after the current Milestone. Notwithstanding the foregoing it is acknowledged and agreed by the parties that

> Milestones 6 and 10 (respectively “Greenlight 2: First Playable” and “Greenlight 3: Vertical Slice” Milestones) shall be key Milestones to be evaluated by the SEL board to determine if SEL shall proceed with the Product. On evaluation of each of these Milestones SEL shall be entitled within thirty (30) days following receipt of the relevant Milestone to terminate this Agreement in its sole and absolute discretion without further liability to the Developer and Developer shall be entitled to the following amounts as its sole and exclusive remedy for any damages that Developer may suffer as a result of such termination: within thirty (30) days of termination SEL shall pay the Developer for any and all Milestones that have been approved by SEL but for which SEL has not made payment to the Developer per the terms and conditions of this agreement, such payment it include the sum due on approval of the relevant Greenlight Milestone Provided That it was acceptable by SEL acting reasonably in Accordance with the terms of this Agreement prior to the termination by SEL…"

15. There is no dispute in this case that on 5 March 2010, the agreement was validly terminated by the defendant under clause 12.1, and the game or product was never finished. The issue between the parties is what, in the light of the events which happened, the claimant is entitled to be paid or receive in terms of damages or monetary compensation as a result of that termination of the agreement.

16. Clause 13.2 of the agreement provides that any termination of the agreement, however occasioned, shall not affect any accrued rights or liabilities by the party. Clause 15.6 provides that:

> "No waiver or modification of any provision of this Agreement shall be effective unless in writing and signed by the party against whom such waiver or modification is sought to be enforced."

17. There is no dispute that the milestones 1 to 5 were delivered, approved and paid for in accordance with the agreement. The milestone schedule identifies that milestone 6 had to be achieved by 15 November 2009, the milestone description for milestone 6 is entitled "GREENLIGHT 2" and there are 16 different bullet points making up this particular milestone description, including such items as "Pre-production 5: First playable preliminary build", "First pass force gauntlet" and so on.

18. Underneath the bullet point, there was also this provision:

> "After GDD is finalised the parties agree that an updated and mutually agreed GDD, TDD and Milestone Schedule should be inserted into this Agreement as an addendum."

19. The acronym GDD means "game design document", and the acronym TDD means "technical design document". Under the milestone schedule, the achievement of milestone 6 is worth £460,000, whereas the achievement of milestones 7, 8 and 9, are worth over £390,000 each.

20. On 16 November 2009 -- so one day late, but no particular point is to be taken on this -- the claimant provided the defendant with what is described as the deliverables

under milestone 6. Mr Hill, counsel for the claimant, took me to the document evidencing this at tab 10, page 165 of the bundle. This document is entitled in a very small font "Rift_MS6_Deliverables". It says in the top left-hand corner "Rift: Milestone #06: Delivery 16th November 2009". It is a four-page document and lists out numerous items under the headings "Programming", "Art", "Design", "Audio", "Production" and then "Physical Deliverables". On the right-hand side of the document is a heading "Publisher comment", and then space is left on each page of the document for comments to be provided by the publisher.

21. It is the claimant's case that what was delivered on 16 November 2009 was the deliverables required for milestone 6, and this is set out at paragraph 9 of the Particulars of Claim. The claimant then says that the defendant thereafter failed to notify the claimant of any test results in respect of the deliverables under milestone 6 as it was required to do so under clause 2.4 of the agreement. Thereafter, the claimant continued to develop the game or product in accordance with milestone 7.

22. There are a number of emails in the papers before me which shed light on what happened after 16 November 2009. On 11 December 2009, Mr O'Driscoll of the defendant sent an email to Mr Hart of the claimant entitled "Green light demo, et cetera". The email refers a number of times to the acronym "GL", which means "Greenlight". The email said this:

> "A decision was taken at the last min to pull the game from the full European GL and have the game GL in Japan with the SQEX board. Our studio GM and both COO's have been reviewing the materials and are happy to send them to Japan.
>
> The build has already gone to Japan along with build notes and a play through video and a producer there will be familiarizing themselves with the way to play the game before the meeting. I will also be present (via video conference).
>
> Also I want to say thank you for to you and your team for all the hard work you've put in ahead of this, and it's by no means wasted work as the materials are all just as needed for a GL in Japan."

23. In the last sentence of that email, it appears that the claimant is referring to the materials which appear to be all the items sent by the claimant as deliverables to the defendant on 16 November 2009, which are "just as needed" for a greenlight in Japan. There is no suggestion in that email that anything is missing or that the deliverables provided by the claimant were in any way inadequate.

24. On 17 December 2009, Mr Hart of the claimant emailed Mr O'Driscoll of the defendant, copied to Mr Cheung, also of the defendant in relation to a subject entitled "Rift - Milestone 7 deliverable". The email from Mr Hart to Mr O'Driscoll informed Mr O'Driscoll that:

> "Milestone 7 is on our FTP. Contents include ..."

And it refers to MS project schedule monthly fee count, and so on. Then the email concludes by saying:

> "... look forward to hearing from you tomorrow regarding the Japanese presentation."

Which would appear to be a reference to a meeting and presentation in Japan on 18 December.

25. Also on 17 December, Mr Kingsley of the claimant sent an email to Mr Cheung of the defendant entitled "Rift resourcing", which in the last sentence attaches invoices for the November and December milestones. Looking at the milestone schedule, those must be invoices for milestones 6 and 7. In the same email, Mr Kingsley also says to Mr Cheung:

> "I will speak with our production team and see where things are regarding resourcing now and ongoing. AvP team members are working on the game [and] have been since the beginning."

26. Mr Cheung responds about an hour and a half later to Mr Kingsley and says this:

> "I know materials have been delivered for MS7, but this seems a bit premature given that we not had the meeting and feedback from Japan yet. In anticipation of this, Matt did ask Steve to hold fire on [that settlement] until after Japanese review of MS6 to ensure that everyone was happy with the direction before moving forward and to avoid wasted work (and Steve was told that the schedule post-MS6 would be re-worked to accommodate).
>
> MS6 is an important milestone, we need to get all the feedback from Japan, take stock of where we are and take on-board any feedback to clarify the next steps.
>
> And part of MS6 is signing off the schedule, resourcing plan and deliverables for the rest of the project, and until all this is approved, it does not seem terribly efficient to produce and create and deliver assets that may be going in the wrong direction and may be wasted."

27. On 18 December 20009 Mr O'Driscoll of the defendant emailed Mr Hart of the claimant stating that :

> "With regard to the MS deliverables I's hard for us to accept them as a MS as we will need to approve the full project plan before we can move on. It is of course still much valid for us as an update."

28. The next document is dated 8 January 2010 and is entitled "RIFT Project Refocus - & Questions". It appears to have been prepared by Mr O'Driscoll of the defendant and has various comment boxes in the right-hand margin. The summary of this document on page 1 says this:

> "Following on from the GL meeting and the review of the code and documents we feel that we would like to push the design and scope further to realise the full potential of the design pillars and maximise our sale potential."

29. While I cannot be sure about this from the documents I have referred to so far, the GL meeting appears to be a reference to the meeting which took place on 18 December in Japan, which was the greenlight meeting. I say that because under clause 2.4 of the agreement, the requirement relating to milestone 6 was that it had to go to the board in Japan for approval.

30. The summary continues:

> "We understand that any change in design emphasis may have an impact on how the remaining budget is allocated, and may also impact on the final release date, so we need to spend this month planning what can be done, and have various budget, schedule and design options that can be proposed, in respect had been proposed.
>
> The areas of the design we would like you to look at are listed below with some bullet points so your team can start looking at these and thinking of ideas and planning."

31. There is then a heading which is called "Project refocus". The next heading is "Areas we would like to push the current design on and explore further". On page 3 after that, there is a subheading "Design Refocus Issues", which refers to “the extra focus on creature summoning and the greater number of creatures”, and so on and so forth, and makes other points it appears the defendant wanted to focus on.

32. Then on the last page is the heading "Other points". The third bullet point says this:

> "Ask them outright what is required of us to get the greenlight signed off and paid."

Then in the comments box on the right-hand side, they have commented:

> "MOD23. As per our discussions after the meeting and e-mail called 'Rift Greenlight Deliverables - MS6.1'."

33. I mention this because, as far as I can tell, that appear to be the first reference to MS6.1 in the papers, and therefore to milestone 6.1.

34. The narrative is then picked up in the Particulars of Claim at paragraph 19, under the heading "The Game to be delivered is amended at the defendant's request", and the Particulars of Claim says this at paragraphs 19 and 20:

> "[19.] The parties met at the Claimant's offices on 14 January 2010 to discuss feedback on the Deliverables for Milestone 6. At the meeting, the Defendant sought to amend the Game, with development to be “refocused” in a different creative direction. This request did not comply with clause 3 of the Agreement on “Change Procedures”. The parties discussed what additional work the Defendant wished the Claimant to carry out as part of this “refocus”. The amended Game differed from the Game originally specified in the Agreement and so required the parties to amend the Agreement by means of clause 3.
>
> [20.] Although clause 3 of the Agreement was not complied with, and the Agreement therefore remained unamended for the purpose of defining the parties' legal rights and obligations, the Claimant was prepared to provide a “refocused” milestone in respect of the amended Game. This milestone is variously referred to as Milestone 6, 6.1 and 6.2 in the contemporaneous documents. The Claimant

> circulated a written summary of proposed revised requirements for this milestone shortly after the meeting on 14 January 2010."

And the same points are made by Mr Hill (Counsel for the claimant) at paragraph 15 of his skeleton argument.

35. On 15 January 2010, Mr Hart sent an email to Mr O'Driscoll and copied to Mr Cheung entitled "Rift Greenlight Deliverables - MS6.1", with an attachment "Green light to do.doc". The email from Mr Hart said this:

> "See attached for what we intend to deliver to draw the first green light to a close."

Then attached to it is a one-page document entitled "Green-light Deliverables: MS6.1", and it starts off by saying this:

> "Following yesterday's feedback from SEL [the defendant], in order to get the first greenlight milestone signed off, Rebellion proposes to deliver the following ..."

Then there is a shopping list of four items. When one looks at that list of items and compares it, for example, with the schedule of items set out in the milestone schedule for milestone 6, one can see that they are not the same.

36. I do not know on the evidence before me whether there is overlap between them or not, but on my comparing what is set out, a document on page 206 with the document at page 133, the items listed on page 206, which is MS6.1, there (i) look to be a different list of matters which the claimant agreed to provide, and (ii) there are items which the claimant agreed to provide by dint of the requirement for refocus which are now identified by the defendant.

37. In any event, on 5 February 2010, the claimant delivered to the defendant more material, which is set out in the one-page document at tab 10 at page 169 of the bundle. In the top left-hand corner in the small font is entitled "Rift_MS6.2_Deliverables" and headed "Rift: Milestone #06.2: Delivery 5th February 2010". It has a heading entitled "Overview" which says:

> "Documentation showing Rebellion's latest refocus efforts."

Then it says:

> "NOTE: all documentation is pending final sign off from senior management at Rebellion."

There are headings "Art", “Design” and “Production", and seven different items have been identified, which are delivered to the defendant together with a documents bundle under the heading "Physical Deliverables". As with the documents submitted for milestone 6, there is a heading "Publisher Comment", and there is a blank area on the right-hand side of the page allowing for the publisher's comments.

38. On 8 February, Mr Cheung emailed Mr Hart, and the email is headed "Re MS6 uploaded" and informed Mr Hart that he had downloaded MS6.2 and had a quick look

over the weekend, and in the contents of the email he then said he agreed with the details there and would come back with any questions.

39. On 19 February, Mr Kingsley emailed Mr Cheung under the heading "Rift MS", informed him that he was going to be out of the office, and then said this:

> "I thought I'd also send you the latest invoice - see attached."

And attached to that email is an invoice from the claimant which is dated 5 February 2010. Its description is "Milestone 6 – Greenlight 2", and the invoice is for £460,000 plus VAT, demanding the total sum of £540,500.

40. On 25 February 2010, Mr O'Driscoll from the defendant emailed Mr Hart, copied to Mr Cheung. The subject matter of the email is "RIFT milestone 6th/6.2 [Non-Approved]". The email says this:

> "Hello Steve,
> I am writing to formally advise you that Rift Milestone 6.2 delivery received on Friday February 5th, 2010, is currently Non-Approved.
>
> Areas of non-approval are:
> Design
> Rift_Refocus_High_Level
>
> Production
> DLC option
> Preliminary_Rift_Refocus_Costs,
> Rift_Pre_Production_Goals
> Rift_Risk_Register.
> I've attached two documents to this email with our feedback on the above…"

He then refers to the documents. He concludes his email by saying:

> "Please digest the documents and advise when you may be able to resend."

41. It is interesting and perhaps important to note that this email simply refers to milestone 6.2 delivery received on 5 February 2010 as not being approved. It does not make any reference to the milestone 6 delivery.

42. I am clear and I do not know why the term "6.2" is used, but on documents before me, it does not appear to be the same as milestone 6. However, what 6.2 and 6.1 do appear to be referring to, and it appears in the Particulars of Claim, are the requirements on the part of the defendant for the claimant to refocus on milestone 6.

43. On 4 March 2010, Mr Hart sent the following email to Mr O'Driscoll, also copied to Mr Cheung, and is entitled "Rift MS6.2 - response to feedback". The email says this:

> "Thank you for your email of the 25th February. We have discussed this internally and it does appear that there is a very important difference of opinion as to where we are in this project.

We submitted milestone 6 in November and this met all of the agreed requirements for Milestone 6. However, following receipt of Milestone 6, Square Enix asked us to undertake additional work as you wanted us to change the direction of the project, in particular by shifting attention onto a more multiplayer focussed solution, whilst also concentrating on Rift's key USPs of Capture and Summon, and incorporating a new 'Trading' feature. This was discussed during our meeting on 14th January, following which we agreed a list of 'Green-light Deliverables' (set out in my email of the 15th January). The principal objective of this list was to set out an alternative creative vision for the project, as you required.

We then delivered all of the work described in that document during February and accordingly we do not accept the reasons given for failing the Milestone. We have looked through the reasons you sent to us in your email of the 25th February and our position on each of these is set out in the attached document.

In relation to the feedback inserted into the Refocus document, we should stress again that the agreed objective of the Refocus document was not to create a final, fully detailed design document. Instead, the objective was to outline a "refocus" of the project in a different direction, as you had specifically asked us to do. However, notes added into to the Refocus document appear to request far more detail than was ever envisaged at this particular stage. For instance, it was agreed that we would provide a summary document addressing the multiplayer feature, and we did exactly that. However, the response to our proposals for the multiplayer feature demand far more detail from us than we agreed, or than is required to meet the objective of this document.

Having said this, we have tried in the attached documents (Rift_MS6.2_Extended.zip) to provide as much additional information as possible within the available time. Ultimately, though, we are in a position where we have not been paid anything since 11th December 2009 and it is imperative that we address this problem immediately. This will require a separate discussion on existing financial exposure, but also a rapid conclusion of Milestone 6. (We also need to discuss simplifying and streamlining communications between both companies). May I suggest that we meet up in person or on conference call with Roger, Jason and Chris as soon as possible (ideally this week) to progress this further. Please let me know when would be convenient to you."

44. It was the day after the receipt of this email that the defendant terminated the agreement on 5 March 2010. In the meantime, in February 2010, the parties had signed a letter which is said to comprise the terms which they had agreed. The letter was written by Chantal Reid of the defendant to Chris Kingsley of the claimant. The heading in the letter refers to the agreement as varied by a side letter dated

10 September 2009. The letter, which is a part of this summary judgment application, says as follows, and I shall read it all:

> "Further to your discussions with Roger Cheung, I understand that you and Roger have agreed that the date of delivering the Deliverables for Milestone 6 shall be 5 February 2010 instead of the 15 November 2009 date agreed in the Side Letter.
>
> We therefore look forward to receiving the Deliverables by close of play tomorrow. If you anticipate any difficulties in meeting this deadline please let Roger know.
>
> All terms not otherwise defined in this letter shall be as per the Development Agreement and this letter shall be governed and construed in accordance with English Law.
>
> I should be grateful if you would confirm the acceptance of the contents of this letter and the revised Milestone 6 delivery date by kindly signing and returning the enclosed copy of this letter to me at the address below."

45. The letter itself is dated 4 February 2010, and on 9 February 2010, it was signed and returned by Chris Kingsley on behalf of the claimant to Ms Reid on behalf of the defendant. In response to this application, the claimant by its solicitor, Mr Jeffrey Smele has filed a witness statement dated 11 March 2016. At paragraph 13 of that witness statement, he says this about the letter:

> "The first sentence of the Letter, which was addressed to Chris Kingsley of Rebellion, is *"Further to your discussions with Roger Cheung [of SEL], I understand that you and Roger have agreed [...]"*. This was raised in my firm's letter of 24 November 2015 ... and SEL have to date been silent as to what these discussions were, save to say that they are not relevant to the Application. No notes or emails (or any other document) around these discussions have been disclosed by either party; Rebellion has searched for relevant material and can confirm that there is none in its control. I am informed by Mr Kingsley that he has no recollection of conversations with Mr Cheung about this letter. Given that the Letter explicitly refers to these discussions (about a third of the length of this short letter is spent in mentioning them), and given also the very serious consequences that SEL allege the Letter to have for Rebellion, the discussions are highly relevant as part of the factual matrix underlying the Letter, and it is not satisfactory for this not to be properly scrutinised."

46. The other point made by the claimant in relation to the letter is set out at paragraph 22 of its Particulars of Claim. The claimant has noted this:

> "The 4 February 2010 letter did not refer to changed specification for the Game. Nor did it in any way extinguish, waive or modify, any liabilities to make payments or breach of contract which had accrued prior to the date of the agreement."

47. So Mr Kingsley cannot remember anything about the letter. As for Mr Cheung, I am told he is no longer employed by the claimant. Mr Cleaver, counsel for the defendant, tells me that this is the reason he is unable to give any relevant evidence because he is no longer an employee. I have no idea where Mr Cheung is and whether he is in this country or in Japan, but the fact that he is no longer employed by the defendant does not impress me as a very good reason why he cannot give evidence. Having said that, one of the important questions is of course whether he can actually give any relevant evidence.

48. In relation to these proceedings, the claim was issued on 5 March 2015. The defence was served on 11 September 2015 and a reply was served on 23 October 2015. Directions questionnaires were submitted on 26 November 2015.

49. The claimant maintains that the defendant is in breach of the agreement and has failed to pay it the sums to which it is entitled in respect of milestones 6, 7, 8 and 9. Its claim is for the sums due under the agreement, alternatively quantum meruit and also has a claim for damages. The defendant accepts that there is a dispute of fact as to what sums if any the claimant is entitled to for milestone 6. However, it says the remainder of the claim is suitable for summary determination and this is based on the content of the letter dated 4 February 2010.

50. The application notice for summary judgment dated 29 January 2016 says this:

> "The Defendant applies under CPR r.24.2 for summary judgment in relation to the Claimant's claims in respect of Milestones 7, 8 and 9 (as defined in the Particulars of Claim).
>
> It is common ground that the parties agreed by the 4 February 2010 Letter to reschedule the Milestone 6 delivery date for 5 February 2010.
>
> The Defendant's position is that the 4 February 2010 Letter extinguished any existing claims in respect of the previous submission of the Milestone 6 or 7 deliverables: it is wholly inconsistent with the idea that the requirements of those Milestones had already been met. Further, since the Agreement was terminated by the Defendant upon consideration of what were agreed to be the Milestone 6 deliverables, the relevant termination provision was the second part of clause 13.1, and there is therefore no entitlement to any payment in respect of Milestones 7 to 9.
>
> The Defendant believes the above matters are suitable for summary determination."

51. The application was supported by the witness statement of Mr Tregear, a partner of Russells, which is dated 29 January 2016. The application notice itself was obviously defective as it failed to comply with paragraph 2(3) of the Practice Direction CPR part 24 and did not state that the application was made because the applicant believed that on the evidence the respondent has no real prospect of succeeding on the issue (see page 697 of the 2016 White Book). Mr Hill, counsel for the claimant, did not really take any

point on this and in any event that defect was corrected during the course of yesterday's hearing by a supplemental witness statement of Mr Tregear dated 26 May 2016.

52. I should also mention that in relation to the directions questionnaire, the questionnaire filed by the defendant flagged up the possibility of a summary judgment application, and that is quite plain in terms of it. But interestingly at paragraph F the questionnaire asked:

> "Which witnesses of fact do you intend to call at the trial or final hearing including, if appropriate, yourself?"

53. The answers provided were that the defendant intended to first of all call Matt O'Driscoll, Roger Cheung and Chantal Reid. And as to the facts which they are said to be giving evidence, Mr O'Driscoll is said to be giving evidence about revisions to the milestone schedule, he accepts there are a lot of changes to the material served by the claimant to the defendant on 14 January 2010 meeting. Roger Cheung is going to be giving evidence about amendments to milestone 6, exchanges with the Kingsleys, the 14 January 2010 meeting, and Chantal Reid is giving evidence about the 4 February 2010 letter.

54. So those are basically all identified as witnesses of fact giving evidence on the issues I have just mentioned, although to be fair to the defendant it does say also in that box the witnesses are subject to the outcome of the summary judgment application.

55. Mr Tom Cleaver, who is counsel for the defendant, in his skeleton argument says that milestone 6 was accorded particular significance in the agreement as it was a point at which the defendant had enhanced rights of termination. He then says that the claimant submitted deliverables in purported compliance with the milestone 6 requirements on 16 November 2009, but those deliverables were never approved by the defendant.

56. He says the claimant submitted deliverables in purported compliance with the milestone 7 requirements on 17 December 2009 but those deliverables were never approved by the defendant either. He then refers to the letter of 4 February 2010, which he says clearly changed the delivery dates for milestone 6 from 15 November 2009 to 5 February 2010. He says that 5 February 2010 was the delivery date for the milestone 6 deliverables and the enhanced termination provisions were clearly invoked within the 30-day period. The result is that the claimant had no entitlement in respect of that termination except a possible claim in respect of the milestone 6 payment itself, a claim which depends on disputed issues of fact.

57. However, he says the claimant's claims go further. This is because the claimant seeks (i) payment in respect of milestones 6 to 9, on the grounds that the termination in March 2010 was not within 30 days of the submission of the original milestone 6 deliverables in November 2009 and therefore not within the enhanced termination provisions, or alternatively (ii) payment in respect of three milestones 6, 7 and a notional further milestone outside the agreement) on the grounds that claims in respect of milestones 6 and 7 had accrued prior to the rescheduling in February 2010 and were therefore unaffected by it.

58. At paragraph 8 of Mr Cleaver's skeleton argument, he sets out the defendant's submissions, which are in short that the claim in respect of payment for anything other than milestone 6 is wholly untenable and should be dismissed summarily. The reasons for this are as follows, and I will read here from paragraph 8 of his skeleton argument:

> "a. The letter [of 4 February 2010] constituted a clear and binding agreement by which the parties agreed that the date for the delivery of the Milestone 6 deliverables was rescheduled to 5 February 2010.
>
> b. That is inconsistent with any claim to payment in reliance on the idea that the Milestone 6 deliverables had already been submitted. The only meaning which the Letter could have conveyed to a reasonable reader is that the parties agreed that they were still working towards Milestone 6 and that the deadline for the submission of the Milestone 6 deliverables would be 5 February 2010.
>
> c. In entering into that agreement, the Claimant waived any right to claim any sum from the Defendant on the grounds that the Milestone 6 deliverables (or any subsequent set of deliverables) had already been delivered prior to 5 February 2010 and/or it became estopped from asserting that they had been so delivered for the purpose of maintaining such a claim.
>
> d. At the very least, the effect of the Letter was that the Defendant's termination on 4 March 2010 was within 30 days of the receipt of the Milestone 6 deliverables, such that the enhanced termination provisions in clause 13.1 applied and there could be no claim in respect of Milestones 8 or 9.
>
> e. The result is that, subject to an argument as to whether the Claimant is entitled under clause 13.1 to be paid the sum in respect of Milestone 6 itself - which the Defendant accepts cannot be resolved at this hearing - the Claimant is entitled to no other payment."

59. As I have mentioned before, the upshot of that is that the defendant maintains that the application gives rise to a short question of law as to the meaning and effect of the letter dated 4 February 2010 and the case can and should be determined summarily. In addition to that, Mr Cleaver says the court does not need any more information about the factual background to decide this case. Indeed, he says the claimant has been requested to identify what if any further fact or background factual matrix it wishes to rely on in answer to the defendant's construction of the letter dated 4 February 2010 and has failed to do so.

60. The defendant says that by a letter dated 11 November 2015, its solicitors Russells requested further information from the claimant's solicitors and the claimant has failed to provide this, and it regards to the claimant's solicitor's response dated 24 November 2015 as inadequate.

61. What the claimant's solicitors said at the end of their letter dated 24 November 2015 was as follows:

> "As to your letter of 11 November dealing with the application itself [that is the application for summary judgment] and seeking our

> comments, our view is that the application as you propose it is misconceived and will fail. As you will appreciate, it is difficult to address the matter in great detail without sight of an actual application, but even so it appears to us that the point to be decided is not as simple as merely the construction of the 4 February 2010 letter.
>
> The factual background to the letter has not been established - for example, what was discussed or agreed between Chris Kingsley and Roger Cheung, as referred to in the letter? There is relevant context to the letter that may need to form part of disclosure prior to any application being heard, which will increase costs and complexity, making it less suitable for a summary judgment application. We have tried to give an accurate costs estimate in our budget, but this may need to be amended once we have had sight of the application and as matters progress.
>
> Also, even if your client were to succeed in the application it would not 'leave our case in tatters' as you suggest ... Given this, we do not accept that this is suitable for summary judgment, as too many issues would remain live to make it worthwhile."

62. Mr Jonathan Hill, counsel for the claimant, summarises his client's position at paragraphs 2 to 5 of his skeleton argument, where he says this, and I am going to read from his skeleton argument:

> "2. When D terminated the Agreement, C had long since submitted the deliverables in respect of Milestones 6 and 7 and was working on Milestone 8 as it was contractually obliged to do. C argues that D was by that time plainly in breach of contract by failing to test and approve Deliverables 6 and 7 as required under the Agreement, and that, upon termination by D, C was entitled to be paid certain specified sums for Milestones 6-9 in accordance with the terms of the Agreement. C also alternatively makes claims to damages or sums due by way of quantum meruit.
>
> 3. D would have the Court find that by signing an extremely brief letter dated 4 Feb 2010 ... which mentions none of these things, C lost its ability to make any claim for payment in respect of Milestones 7 and 8 and agreed to extinguish any existing claims against D for breach of contract. C's case is that the Letter -- with hindsight a shameless device put forward by D in an attempt to liberate D from the Agreement at reduced costs -- achieved neither of these things.
>
> 4. On the current application, D asks the Court to summarily dismiss C's 'claims for payment in respect of Milestones 7, 8 and 9 (as defined in the Particulars of Claim)' (draft order 1 1/6/50), ie it does not relate to the damages or quantum meruit claim. The application

> should be rejected as the claim has substantial prospects of success and is in any case not suitable for summary disposal.
>
> 5. There are also compelling reasons why the claim should be disposed of at trial. As mentioned above C makes an alternative claim for a quantum meruit in respect of the work done on Milestones 6-8. D has not applied to strike out or dismiss this alternative claim, meaning that the factual investigation into these milestones and whether D would be justified in not accepting them will have to be undertaken regardless of whether this application is successful. D's application will accordingly not result in any tangible savings in terms of time or costs."

63. The defendant's position is that the point on this summary judgment application is a short question of law. Mr Tom Cleaver, counsel on behalf of the defendant, says that on a true construction of the letter dated 4 February 2010 is that (1), the delivery date for milestone 6 was 5 February 2010, (2) the agreement was terminated on 5 March 2010, which was within the 30-day period, (3) the consequence of this that only the second limb of clause 13.1 of the agreement was engaged, (4) that means that as milestones 7, 8 and 9 were not approved at the date of termination, the claimant is not entitled to any payment in respect of them, (5) the first limb of clause 13.1 had no application in the present circumstances, and (6) he accepts there is a dispute about what sums if any the claimant is entitled to as a result of milestone 6, and that is a matter which has to go off to trial.

64. There is no dispute between the parties as to the relevant principles of contractual construction. Most recently, those principles have been considered by the Supreme Court in a case called **Arnold v Britton** [2015] AC 1609, and I was referred in particular to paragraphs 14 to 23 of the judgment of Lord Neuberger of Abbotsbury.

65. There is no dispute between the parties that, as set out in paragraph 15 of Lord Neuberger's speech, when interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language of the contract to mean". It does so by focusing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of a number of different factors which are identified by six different Roman numerals and, in particular, commercial common sense is one of them (see **Arnold v Britton** at para 15, per Lord Neuberger).

66. It is also important to remember what is said at the end of paragraph 25 of **Arnold v Britton**, namely "when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party".

67. Earlier in this judgment, I went through with some care the factual material before me in the bundle as clearly it was important to do so in order to identify the facts available and understand the factual background of this case.

68. So what is the factual background to this case in relation to construing the letter dated 4 February 2010? The first item which is relevant in relation to the factual background is of course the agreement dated 16 June 2009, which includes the milestone schedule.

69. Secondly there is the fact that the claimant had delivered items to the defendant on 16 November 2009 in the context of a document entitled "Milestone 6", which is the document referred to at tab 10, page 165 in the bundle before me.

70. Third, the defendant having received all the materials in November 2009, on 11 December 2009 the defendant wrote to the claimant saying:

> "Also I want to say thank you for to you and your team for all the hard work you've put in ahead of this, and it's by no means wasted work as the materials are all just as needed for a GL in Japan."

71. Fourth, there is fact that on 17 December 2009, the claimant had issued an invoice in respect of milestone 6 which was referred to in the email of 17 December 2009. And although that invoice is not before the court, the amount as recorded in the agreement itself in respect of milestone 6 is for some £460,000. But in any event, that invoice had been issued and provided to the defendant.

72. Fifth, there is the fact that on 18 December 2010, a presentation took place in Japan in relation the documents which had been provided by the claimant to the defendant in November 2009.

73. Sixth, there is the fact that by the end of December and the start of January, the claimant had not received any notification from the defendant identifying that milestone 6 had not been approved. Rather, the claimant had not heard anything by from the defendant either way.

74. Seventh, in January 2010, the claimant was asked to "refocus" the product by the defendant.

75. Eighth, the fact that there had been a request made for refocusing the product led to discussions about the production of items in relation to what are described as MS6.1 and MS6.2. Those do not appear to be the same as milestone 6, rather the documents before me appear to be part of the refocus of the product requested and appear to supplement milestone 6.

76. So it seems to me that those are the key factual matters which are part of the background against which the letter of 4 February 2010 should be construed. The defendant says the effect of the letter dated 4 February 2010 is that it wiped the slate clean in relation to MS6 and the time the contract started running from 5 February 2010, and that is the date the parties agreed would be the date the deliverables for MS6 were to be delivered, rather than 16 November 2009.

77. This means, says the defendant, that first of all that the deliverables delivered by the defendant on 16 November 2009 had no effect under MS6, and secondly, the invoice for example sent by the claimant to the defendant on 17 December 2009 was completely ineffective. This is because the defendant says everything in relation to milestone 6 now flows from 5 February 2010 under clauses 2.4 and 13.1 of the agreement.

78. I am not at all persuaded that that is the correct approach, particularly in the factual context of this case, and even more so in the context of a summary judgment application.

When one looks at the letter dated 4 February 2010, the following points strike me. First of all, the first paragraph of the letter makes it clear that the letter is recording an oral agreement between Mr Cheung and Mr Kingsley. Secondly, the only deliverables that the parties were, on the documents before me, discussing on or before 4 February 2010 were milestones 6.1 and 6.2. The deliverables for milestone 6 had been delivered in November 2009. It was therefore the deliverables in respect of the "refocus work" that was the context of this letter and the factual background to it. Third, there is nothing in the document, (that is the letter of 4 February 2010), which expressly acknowledges that the Defendant would, for example, be giving up rights to payment of invoices dated 17 December 2009 which related to all work which had been done on MS6, that had been delivered on 16 November 2009. Indeed, in order to do so, one would expect to see very clear wording to that effect.

79. In that context and the facts which I have explained, I find the letter of 4 February 2010 far from clear certainly for the purposes of a summary judgment application, and I certainly cannot be satisfied that that it had the draconian effect contended for by the defendant.

80. Accordingly, I do not accept the defendant's construction as to the meaning and effect of the document dated 4 February 2010. In these circumstances, I have formed the clear view that the defendant's construction, at this stage of the proceedings, is not one I can accept and for those reasons all the Claimant’s claims in respect of 6, 7, 8 and 9 have a real prospect of success. I therefore dismiss the defendant's application.