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Transcript as amended
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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

GERARD SCOTT, GERARD FRANCIS SCOTT AND GERARD MARTIN SCOTT trading as SCOTT FERGUSON BUILDING COMPANY

Plaintiff;

and

BELFAST EDUCATION & LIBRARY BOARD

Defendant.

WEATHERUP J

[1] These proceedings are by way of Originating Summons between the plaintiffs as contractors and Belfast Education and Library Board as employer. Maurice Flynn & Sons Ltd, rival contractors to the plaintiffs, are notice parties in the proceedings.

[2] The present application is for an interim injunction. The plaintiffs seek in the first place an order against the defendant restraining the defendant from proceeding with a tendering process in respect of the award of measured term contracts for general building works in two areas, being Belfast East and North and Belfast South and West. Secondly, the plaintiffs seek an order restraining the award of any measured term contract for this maintenance work. On 31 October 2006, upon the ex-parte application of the plaintiffs, I granted an interim injunction in the terms now sought and the matter now comes before the Court on an inter partes hearing.

[3] The Originating Summons seeks a number of remedies. First, a declaration that there was an implied contract between the Board and the plaintiffs in respect of

the tendering process and in that regard they seek to enforce two particular terms of the implied contract which are expressed as follows:

(i) Tenderers that represent best value will be informed five working days prior to interview to attend; and

(ii) The interviews will be conducted by independent consultants re-visiting the quality criteria and re-assessing the marks previously given at the desktop study stage to those companies that were selected for interview.

Further, the plaintiffs seek a declaration that the Board owed a duty of care to the plaintiffs to carry out the tendering process in accordance with the tender documents. Thirdly, the plaintiffs seek an order setting aside the decision of the Board of 25 October rejecting the plaintiffs tender. Further the plaintiffs seek damages for breach of implied contract and negligence.

[4] Three issues have emerged for consideration in relation to the mechanics of the tendering process. The first concerns the five working days' notice of interview. The second concerns interviews being conducted by independent consultants. The third issue, which is not referred to expressly in the Originating Summons, concerns what I will describe as "the dayworks issue". I will return to the details of those issues in a moment, but first I should say something of the background to the proceedings.

[5] The affidavit sworn by Gerard Martin Scott on behalf of the plaintiffs records that a limited liability company was originally established for the business in 1975 which was known as Scott Ferguson Building Company Limited and was dissolved in 1995. The business continued as a partnership and the present partners, namely, Gerard Scott Senior, Gerard Francis Scott and Gerard Martin Scott, have operated together since 2000 with a business address at Work West Enterprise Centre on the Glen Road, Belfast.

[6] The business that the company has been carrying on involves maintenance work for the Belfast Education & Library Board and it is stated that from about 1998 the business provided its services pursuant to conditions of engagement contained in a letter from the Board. The rates agreed in 1998 were revised in 2001 and new conditions of engagement were applied. The arrangements continued, but by a letter of 8 May 2006 from the Board the plaintiffs were advised that the use of the approved list of contractors for maintenance and capital works would cease on 25 September 2006. Thereafter the Board advertised in June for expressions of interest for the undertaking of maintenance works for three sets of contracts which included the two areas in Belfast. The advertisement stated that the contracts would operate until March 2008 with the possibility of annual extensions. The plaintiffs responded to that advertisement for both Belfast areas. The partnership was notified that it had successfully pre-qualified in July 2006. Because the responses were low the matter was re-advertised in July. The plaintiffs applied again and they

successfully pre-qualified in August and were provided with the tender documentation for the maintenance work.

[7] The tender instructions which were issued by the Board to the tenderers included a provision that the tender competition was based on a price/quality ratio. Price had been allocated forty per cent of the marks, quality sixty per cent of the marks. Tender evaluation would be carried out by independent consultants for both price and quality. The tender documentation also included a quality evaluation questionnaire and this stated that it was intended that interviews would be held for up to three tenderers who represented best value at the desktop evaluation service. Those who represented best value would be informed five working days prior to interview to attend. Failure to attend was to result in that tenderer being eliminated and the Board would not consider any alternative dates. It was emphasised that the interviews would be conducted by independent consultants.

[8] The plaintiffs submitted a tender in September 2006 and the grounding affidavit states that because they recognised the importance being placed by the defendant on quality of service they engaged the services of a Charles Bloomer, who ran a consultancy service known as CBM Associates, and he assisted in the preparation of the tender submission. On 26 September the Board faxed to the plaintiffs notice of interview on Monday 2 October. Now, that was in effect notice for three working days rather than the five working days as specified in the tender documents. The plaintiffs contacted Mr Bloomer, their consultant, but he was unavailable on the interview day. However he was able to help in preparation on the Saturday in advance of the interview. Accordingly, Mr Bloomer did not attend the interview.

[9] The plaintiffs attended the interview and the panel comprised of Mr Geoff Connor, a Quantity Surveyor who was employed by the Board, and a Mr McClean and a Mr Wilson, who were Chartered Surveyors employed by EC Harris, the consultants. The grounding affidavit states that there was "surprise that an employee of the Board was on the panel" – this being a reference to Mr Connor - given that the documents had referred to interviews being conducted by independent consultants. It was stated that Mr Connor played a full role in the interview, including asking questions, as did Mr McClean and Mr Wilson.

[10] After the interview, on 12 October, Mr Connor telephoned to advise the plaintiffs that they had been unsuccessful. The firm of M. Flynn & Son were the successful tenderers. On 24 October the plaintiffs' solicitors wrote to the Board advising that the Board had acted in breach of its tendering procedures. The letter referred to the five-day requirement which had not been honoured and to the independent interviews which it was said had not been honoured and further referred to the assessment of tenders.

[11] The point made in relation to the assessment of tenders was that the plaintiffs' dayworks adjusted percentage for labour was forty per cent and it was said that, as

most of the work required by the defendant was properly defined as dayworks, that percentage rendered the plaintiffs' tender extremely competitive. The plaintiffs believed that the assessors had failed to take into consideration the actual nature of the work in assessing the tenders on value for money. By letter of 25 October from Mr Connor, the plaintiffs were advised that their tender had not been accepted. The plaintiffs proceeded to seek an ex-parte injunction, which as I have stated, I granted on 31 October. The plaintiffs say that the consequence of the defendant rejecting the partnership's tender is that the partnership will be unable to carry on doing work that has constituted eighty eight percent of their turnover and will go out of business. Further they say that the plaintiffs could not be adequately compensated by damages if it were to be determined that there had been a breach of contract.

[12] In relation to the grant of an injunction the plaintiffs refer to the White Book and the principles and guidelines to be applied in applications for interlocutory injunctions. Reference is made to American Cyanamid [1975] AC 396 and it is stated that in the exercise of the court's discretion an initial question falls for consideration, that is –

> (1) Is there a serious issue to be tried?
>
> If the answer to that question is 'yes' then the further related questions arise, they are -
>
> (2) Would damages be an adequate remedy for a party injured by the Court's grant of, or its failure to grant, an injunction? If not, where does the 'balance of convenience' lie?"

[13] The first matter is whether there is a serious question to be tried. The serious question that is raised by the plaintiffs is that this tender process gave rise to an implied contract between the tenderer and the Board, the terms of which were determined by the published tender documentation furnished to the plaintiffs. Alternatively, it is said that the publication of the tendering procedures gave rise to a duty of care on the part of the Board to comply with the tender procedures.

[14] There were a number of cases referred to by the parties. This is not a subject on which I believe the law is fully developed. The first case is Blackpool and Flyde Aero Club v Blackpool Borough Council [1990] 3 All ER 25 which involved a tender for an air operator for the Council. The tender procedures required that the tender documents be submitted by 12 noon on a particular day. The tenderer complied with that requirement in that it placed its tender in a post box at the Council Offices at 11.00 am, in advance of the deadline. However, the Council did not clear its mailbox before 12 noon so that the tender was not received by officials until after the deadline. The Council marked the tender as late and did not take it into account. Accordingly, in proceedings by the tenderer against the Council it was held that there had been a breach of contract. The tenderer also sued in negligence, as has

happened here, and although successful at first instance, on appeal the finding of a duty of care was doubted, but it did not become necessary for the Court of Appeal to consider that matter. The Court found that there was an obligation on the Council to consider the tender and that this had arisen by way of a contractual right that was to be implied into the arrangements between the parties.

[15] It is clear from the judgment that the Court was concerned to limit the scope of its decision because it placed it in the context of tenders being solicited from selected parties all of whom were known to the invitor and there being a clear, orderly and familiar procedure which had been set down involving draft conditions, common forms of tender, employers seeking anonymity and the statement of an absolute deadline. In those circumstances the Court held that there was a conforming tender in this case, in that it had been placed with the Council before the deadline, and that gave rise to a contractual right to consideration of the tender which was to be implied into the arrangements. It was found to be apparent that there was an intention to create legal relations between the parties and a mechanism had been provided in the tender documents for offer and acceptance and there had been compliance.

[16] The second case takes the matter a little further. It is a decision of the Privy Council in Pratt Contractors Ltd v Transit New Zealand [2003] UKPC 83. The tenderers were a substantial contracting firm that had contracted for highway development in New Zealand. The contractor claimed that the terms of the request for tenders gave rise, immediately upon the submission of the tender, to a preliminary contract which contained express and implied terms as to the method by which the employer would select the successful tenderer. It was claimed that the employer had acted in breach of those terms. It should be noted that the employer accepted that the request for tenders was not a mere invitation to treat and did give rise to a preliminary contract requiring it to comply with certain procedural obligations and it also accepted that the contract included an implied duty to act fairly and in good faith.

[17] The Court stated that at the centre of the dispute lay the question of the extent to which the procedure for competitive tendering should be judicialised. I emphasise that the Court proceeded on the basis of two obligations which all parties to the case accepted arose out of the tender process, namely, that the tender documents gave rise to a preliminary contract requiring the employer to comply with certain procedural obligations and secondly, that the contract included an implied duty to act fairly and in good faith.

[18] The issue was whether or not there had been a breach of the two obligations. In New Zealand there was a statutory obligation upon the Highway Authority to employ approved competitive pricing procedures and the employer had drawn-up such procedures which were known as the "Manual of Competitive Pricing Procedures". The manual, which represented the tendering documentation, imposed obligations upon the employer in the course of the tendering procedure. The first

issue was whether or not certain internal tendering documents which the employer had drawn-up to guide itself and its employees as to how it would process the tendering procedure, created implied terms in relation to the tenderer. The Court held that the employer's internal tendering documents did not create implied terms in any preliminary contract with the tenderer.

[19] The second issue concerned the independence of the Evaluation Team. A Mr Young who was appointed to the Evaluation Team was connected to a firm that had some misgivings about the contractor because of previous involvement with each other. The contractor was concerned about the involvement of this man and raised the issue of prejudice. Nevertheless, the process proceeded with Mr Young on the Evaluation Team. There were two tender rounds and the plaintiff was unsuccessful and the company did go out of business as a result.

[20] The issue concerned the implied duty to act fairly and in good faith. The Privy Council found that there was no obligation such as might arise in judicial review proceedings in relation to apparent bias. The prejudice that might arise from the engagement in the evaluation process of someone whom the outsider might think was prejudiced against the contractor was based not on a finding of actual bias, but a finding of perception and therefore raised an issue of apparent bias. The obligation to act in good faith and by fair dealing gave rise to a number of obligations which they stated as follows. First, a duty to act honestly, secondly, a duty to treat the tenderers fairly, thirdly, it did not mean that the employer was obliged to appoint people to the assessment who did not have any views about the tenderers, whether favourable or adverse, and, fourthly, the obligation did not mean that there was a duty to act judicially, that is it was not necessary to accord the tenderer a hearing or to enter into a debate with him. That was the character of the duty to act fairly and in good faith and it did not extend to avoiding apparent bias. In the light of that the Privy Council found that there was no breach of express or implied terms of the preliminary procedural contract at either of the tender rounds.

[21] I have been referred to Professor Arrowsmith's text on the Law of Public and Utilities Procurement. Reference is made to Fairclough Building Ltd v Borough Council of Port Talbot [1992] 62 BLR 82, a case of apparent bias because the managing director of the tenderer was the husband of the principal architect in the Council. The Court found that an implied contract arose under which the Council must act reasonably in removing the tenderer from the tender process because of the conflict of interest between the husband being in the tenderer's firm and the wife being the architect in the Council. Professor Arrowsmith comments that it was clearly contemplated that the Court may exercise control over the criteria and procedures for considering bids and seemed to have adopted a test based on reasonableness. Professor Arrowsmith contrasts that with Pratt Contractors which she believes adopted a narrower approach, being that the obligation of fairness and good faith in tendering required merely that the evaluation should express views honestly held by those involved. Professor Arrowsmith's view is that "The fear of

unreasonable judicial intrusion into commercial discretion is well-founded…. Thus the approach adopted by Pratt is to be welcomed."

There is authority for the argument that is being advanced by the plaintiffs in this case that the tender documents can provide the terms of an implied contract that the employer will comply with the procedures that are set out in the tender documents. I say nothing at the moment of the duty of care which did not find favour with the Court of Appeal in Pratt Contractors.

[22] Having accepted that there is a good arguable claim for the existence of an implied contract, I turn to look at the three issues which it is said give rise to obligations under this implied contract. The first issue is the five-day rule. That there was a five-day obligation is not in dispute and that there was a three-day notice given is not in dispute. The non compliance with the five-day requirement specified in the tender documents is established. The defendant says that this breach is of no consequence; the plaintiffs would and should have been preparing their submission to the interview in advance of receiving notice of the day of interview and ought to have been prepared. The plaintiffs on the other hand say that they had a consultant who was going to guide them; that they needed details of the interview process in order to fully prepare their responses and prepare for the questions that they were going to be asked and the subjects that had been identified for questioning; that in the event they were unable to secure the services of their consultant at the interview who they say would have been of added assistance had he been present.

[23] It is impossible to determine what impact the consultant might have had, had he been present at the interview, but I proceed for the moment on the basis that there is an arguable case that the non-compliance with the five-day rule impacted on the plaintiffs. I must be wary, of course, that I do not decide this case on affidavits because evidence will have to be heard in relation to these issues.

[24] The defendant says that in any event the plaintiffs waived the requirement for a five-day rule by their conduct. By this they mean that when the three-day notice was given, the plaintiffs did not object, they proceeded to prepare as best they could, they came to the interview, they proceeded with the interview, they awaited the outcome of the interview and it was only when they lost the contract that they raised the issue. This, says the defendant, amounted to waiver of any breach of the five-day requirement. The plaintiffs on the other hand say that one has to recognise the commercial pressures that applied in this case, it would not have been prudent to raise such an issue in advance and in any event the contract stated that the interview date could not be changed. I am against the plaintiffs on this point. It seems to me that where it is stated that there will be five days notice the plaintiffs can be expected to seek a change when the time stated is not met. The tender documents stated that the interview date would not be changed and if the requisite five-day notice had been given I would accept that the date would not have changed. But when five days' notice is not given, when there is short notice, it is not to be expected that the

Board will reject a request for five days notice and there is no good excuse for not asking for the proper period.

[25] The plaintiffs further say that there can be no waiver in this case as this is a term which is included for the benefit of both parties, that is the five-day rule gives both sides time to prepare. I interpret the requirement in relation to the benefit of both parties to be an obligation that means that one party cannot unilaterally waive a term that has been included in a contract. A waiver is something that arises because one party has not complied and the other party has accepted that non-compliance. It does not arise unilaterally. Here the action of the defendant sets aside the five-day term, that is they ignored it, maybe by mistake, and imposed a three-day notice in relation to the interviews. The actions of the plaintiffs acceded to that setting aside. They concurred with a three-day interview period, they did not object to it as they were entitled to do and it seems to me that that amounts to a waiver. They cannot then wait until they have failed in the tender and then come back and say we didn't get our five days. That amounts to a waiver and I do not accept the argument about commercial pressure being a ground for not speaking up.

[26] Accordingly, in relation to the first ground of complaint, my conclusion is that there was non compliance by the defendant with the five day requirement but there was a waiver of that requirement by the plaintiffs.

[27] Next, the independent assessment. Again, the facts are not in dispute on the essence of this matter. Mr Connor was a part of the panel, he asked questions in the course of the interview, he was employed by the Board. It had been stated that there would be independent assessment. The defendant's explanation is that Mr Connor was not involved in the decision-making and therefore did not contribute to the conclusion that had been reached.

[28] The quality assessment document produced by the Board sets out the evaluation process and provides that the quality assessment will be analysed by an independent firm of consultants and that the cost analysis would also be undertaken by independent consultants. After the desktop exercise they moved to the interview stage and the assessment document states that the interviews will be conducted by independent consultants re-visiting the quality criteria and re-assessing the marks previously given at the desktop study stage to those companies that were selected for interview.

[29] The defendant's affidavit is to the effect that the interviews were conducted by independent consultants and that while Mr Connor of the Board was present he did not conduct the interview nor did he contribute to any assessment that was made of the quality criteria, nor did he make any decisions in relation to this matter.

[30] The plaintiffs do not allege any actual bias in the assessment nor do they challenge the role of Mr Connor as described by the defendant. The case is put on

the basis of apparent bias, that is to say that by Mr Connor's presence at the interview there was a perception that this was not an independent assessment.

[31] In Pratt Contractors the two obligations referred to included a duty of good faith and fairness and the Court found, in relation to the issue of bias, that while there was an indication of apparent bias that was not contrary to the duty of good faith and fairness. The perception of bias was not a ground of challenge under the duty of good faith and fairness. However, the plaintiffs in this case do not rely on that ground but on the implied term adopted from the tender documents that the matter would be dealt with by independent consultants conducting the interviews. Thus says the plaintiffs there has been a breach of that requirement and therefore of the implied term.

[32] This turns then on whether or not the role of Mr Connor was, indeed, in breach of the requirement for interviews being conducted by independent consultants. The plaintiffs are not challenging that Mr Connor was not a decision-maker and have not suggested bad faith on the part of Mr Connor. I am not deciding this matter on the basis of conflicting affidavit evidence but on the facts that are not in dispute between the parties. On the basis that the plaintiffs accept that Mr Connor was not a decision-maker and was not conducting an assessment of the quality criteria, and that it is not suggested that he was acting in bad faith to the extent that he contributed to the interview process, I find that this was an independent interview. It was conducted by the consultants as required by the term in the tender documents and Mr Connor's role did not involve him in conducting the interview or being a party to the assessment at the interview. Therefore, I am satisfied on the papers that there was no breach of the obligation that the interview be conducted by independent consultants.

[33] The third ground that is relied on is the dayworks issue. The plaintiffs say that some seventy per cent of the works in the past and thus in the future will be conducted on a dayworks basis. The plaintiff put in a low rate for dayworks. It is then said that the Board by their assessors did not recognise the high percentage dayworks that would be undertaken and the low rate for dayworks provided by the plaintiffs and so have undervalued the plaintiffs' tender price for this contract.

[34] The defendant on the other hand says the plaintiffs are quite wrong about this. Dayworks will not be the major part of these works, indeed, they will only be some seven per cent of the works rather than the seventy per cent of the works as was formerly the case and therefore the plaintiffs premise is mistaken.

[35] The Board has restructured the contract arrangements. They are moving from what was largely dayworks to a measured term basis in the future. They are doing that deliberately to save costs and anticipate savings of fifteen per cent in the overall cost of these contracts. The measured term will replace the dayworks approach. A second aspect is that the payment for dayworks under the new contract will also be changed and will not be paid for all emergencies as seems to have been the position

in the past. Accordingly, the defendant says that the dayworks cost of the total contract will be very much diminished. This second aspect takes the plaintiffs by surprise.

[36] The calculation of dayworks and the circumstances in which dayworks will be paid emerged in the course of the hearing rather than being apparent beforehand. This has led the plaintiffs to complain that they tendered on a certain basis which, in the light of the explanation that the defendant has now given of the tender documents, the plaintiffs were not aware of at the time. On the other hand the defendant says that the plaintiffs tendered on the basis that the dayworks would be seven per cent so they cannot complain about that issue.

[37] It is necessary to refer to the contract in order to appreciate that there has been some confusion about this issue and it seems that a mistake has been made in the tender documents. At page 89 of the papers are contained the amendments that will be made to the standard form measured term contract, and included in that are amendments in relation to priority work where there are six priorities which have been introduced. Priority 1 provides for responses that are required to be immediate, defined as health and safety issues and as emergencies. There is then an entry which reads:

> "Work orders containing work of an Emergency nature (Category F orders) shall be carried out immediately on the instructions of the Contract Administrator.
> Further work to complete the Order may be carried out within the Contractor's normal schedule of works. Payment shall be on the basis of dayworks or invoice for the emergency aspect only and further work necessary to complete the order paid in accordance with the Schedule of Rates."

This indicates that Priority 1 works, being works which are immediate, defined as health and safety issues and those giving rise to emergencies, would attract dayworks payments for the emergency aspect of the works and that further works will be completed in accordance with the Schedule of Rates. On this basis the plaintiffs made their tender because they, appreciating the extent of health and safety issues because of their previous experience, appreciating the extent of emergency work and noting that it will be paid for on a dayworks basis when it is an emergency, have estimated, based on their experience, that there will be a high level of works paid as dayworks. This takes them some way along their argument that if there is a high percentage of dayworks and a low dayworks rate that might provide better value. Indeed, when I asked for some assessment as to whether that might be correct in relation to values the indication from the defendant was that it may be so.

[38] However, that does not complete the matter because it is necessary to refer to page 112 of the papers which contains a different term which is to be added into the

contract in relation to emergency repairs. This provision provides that the contractor will be required to provide twenty-four hour, three hundred and sixty-five day on-call cover to respond to emergencies within two hours of notice and the contractor will be paid £50 for emergency call-outs in addition to the measured value of the work. The payment will only be made for call-outs outside normal working hours on Mondays to Fridays, all day Saturdays, Sundays and public holidays.

Thus there are two different methods of assessing emergency work. The first, which the plaintiffs rely on, is that payments will be made on the basis of dayworks for the emergency aspect of the work. The second, which the defendants rely on, is that emergencies will be paid on a £50 call-out and measured rates for work out of hours. If there is a high percentage of dayworks then it may be that the plaintiffs value will be different, but the defendant says that the way in which they have structured this cover for emergency repairs means that there will now be low dayworks payments, although there may, indeed, be high numbers of emergencies as was the case in the past. Hence, the defendant says that the plaintiffs approach is mistaken.

[39] It is necessary in analysing these two different approaches to distinguish between the percentage of emergency works, which may or may not be high in future, and the percentage where dayworks rates might be applied, which on the defendants case, will be low whatever the extent of emergency work. The plaintiffs now say that their tender price has been affected by the terms that are advanced by the defendant. This has arisen because of a mistake by the defendant at page 89 in that the part there referred to for dayworks for emergency work was lifted from another contract and placed there in error and that the governing provision is that which appears on page 112. So, there we have a mistake and confusion which has led to the contest that now arises on this point between the two parties.

[40] The plaintiffs' case is based first of all on the implied contract. On the Pratt Contractors approach the tender documents can give rise to an implied contract that there will be compliance with the procedures in the tender documents and secondly, there is a duty of good faith and fairness in the procedure. On the dayworks issue what is the implied term that is alleged to be broken? What is the absence of fairness that is said to arise in these circumstances? The plaintiffs have not pleaded the point. While they have referred to the issue of the assessment of the value of the tender in relation to dayworks they were not aware of the Board's approach to the tender documents in relation to dayworks. The essential reason for the position we are now in is that this point was not appreciated until it emerged in the course of the hearing. It will be necessary to amend the pleadings.

[41] The ground has shifted now that there is a fuller appreciation of the Board's interpretation of the tender documents in relation to dayworks. The term in the tender documents in relation to the dayworks issue on which the plaintiffs tendered for the contract may not be a term of the contract at all. The implied term that is alleged to have been broken is a term in relation to the payment of dayworks which the plaintiffs believed to be the basis of tender.

[42] On the obligation of good faith and fairness the plaintiffs would have expected to tender on the terms expressed in the tender documents and if there were conflicting terms some clarification ought to have been sought and provided. The plaintiffs appear to have tendered on a mistaken basis. A tenderer could not rely on a unilateral mistake made in his interpretation of the documents, but there must clearly be good arguable grounds for being entitled to rely on a mistake that has been made by the employer that misleads the tenderer. Whether that is the case will be a matter of evidence.

[43] The result is that this issue about the dayworks has not been pleaded because it only emerged at the hearing. I consider that there is an arguable case in relation to the dayworks issue as it has now developed. The first step is to require the plaintiffs to amend the pleadings to reflect the issue on dayworks. That is going to require a little time and subject to what I now hear from counsel what I propose to do is to continue the injunction that presently exists pending amendment. On considering the proposed amendment I propose to consider whether the injunction should continue or not. The balance is in favour of the continuation of the injunction pending a review of the case in the light of the amendment.