JUDGMENT : JUDGE DAVID WILCOX. TCC. 22nd May 2001

1. The claimant is the assignee of RDB Interiors Limited contractors and shop-fitters. The defendant is a well known retail store operator who has a retail store in the prestigious Bluewater Shopping Development near Greenhithe in Kent. This claim relates to the fitting out of the shell.

2. On 11 February 1998 a letter of intent was issued to RDB. At this stage the intention was: "*. . . to enter into a formal contract with you on the basis of a JCT Standard Form of* ***Building Contract*** *yet to be determined.*"

3. The claimant ultimately assumed the role of management contractor under a management contract.

4. Work was commenced on site in June 1998 and practical completion was certified on 15 March 1999. This dispute does not concern the quality of the work or the speed of completion. The work done was of a satisfactory quality and was carried out with commendable expedition.

5. The contemporary documentation between the Claimant and the Defendant, and the Claimant's and the Defendant's Contract Administrator's evidence this.

6. RDB's engagement was as a Management Contractor under the JCT Standard Form of Management Contract 1987 Edition. It was not finally agreed and entered into until December of 1998 by which time the works were substantially performed. The contract was agreed to have retrospective effect.

7. It was originally anticipated that the Form of Contract would have been a **building contract** of the JCT family.

8. One of those principally involved in the project, the Mechanical and Engineering Contractor, Haden Young never became a works contractor under the scheme of the Management Contract. They were originally engaged under a letter of intent dated 3 June 1998. This letter provided:

"We have been instructed by the House of Fraser to negotiate with Haden Young Limited, a second stage offer for the execution of the engineering services installation . . . we would confirm that those negotiations are to be conducted on the basis of the following . . .

The Form of Contract stipulated in the first stage of documentation, will be replaced by the JCT Standard Form of Management Contract (1987 Edition) accordingly Haden Young Limited will become a Works Contractor in accordance with section 8 thereof . . . "

9. By a letter of 11 June 1998 Haden Young responded accepting the Letter of Intent subject to three points. In particular, they sought the incorporation of amendments to the JCT Contract Conditions to deal with the differences between that form and NSC/C upon which their first stage submission was based. They made reference to the inclusion of a direct payment provision. The lack of such provision exercised them because RDB was a company registered in Jersey.

10. Throughout they refused to enter into a Works Contract with the Claimant. They were not satisfied with the financial standing of the Claimant Company, on the basis that it was registered in Jersey and not subject to the obligation of filing the detailed financial information required had they been an English registered company. Their commercial judgment was perhaps justified, because RDB went into administration in December 2000 leaving accounts unpaid. On the 11 November 1999 the defendant and Haden Young entered into a direct agreement bypassing the mechanism of the Management Contract. At no stage, it seems was any real pressure put upon Haden Young by the Defendant to enter into a Works Contract with RDB covering the mechanical and engineering component of the works, in spite of the Defendant's clear obligations to do so under the Management Contract.

11. It is evident that Haden Young, until December of 1999, were treated as a Works Contractor, as if a Works Contract had been entered into with RDB the Management Contractor. This was with the knowledge and the active encouragement of Messrs Robinson Low Francis Quantity Surveyors (RLF). They occupied two roles in relation to the Management Contract and the project. That of Contract Administrator, and that of Project Quantity Surveyors advising the Defendant Employer. The Project Manager and Contract Administrator was Mr Steven Barker, RLF's responsible partner. The QS team was headed by Mr Richard Green an associate partner of RLF who reported to Mr Barker. It is evident that RLF found it difficult to keep these roles entirely separate. There were occasions when the Contract Administrator forgot his obligation to be seen to be acting impartially and independently as when he sought advice from and instructed the defendant's solicitors, in preference to his own solicitors who had already acted competently in relation to earlier matters of contractual dispute. Moreover, making all due allowance for the heightened feelings of the parties toward each other, the language adopted by Mr Barker in his correspondence was on occasions inflammatory and partisan. It is essential that a Contract Administrator whilst being firm and resolute nonetheless continues to be seen to act impartially and independently.

RDB were not experienced in operating under a Management Contract. There was no Works Contract with Haden Young for the Electrical and Mechanical work. In relation to the shop fitting and joinery works there was no Works Contract either because the shop fitting contractor was RDB. Despite protracted and convoluted negotiations no price was ever agreed for the shop fitting and joinery component of the project. The approach of both parties to the shop fitting pricing was in error.

12. In the absence of agreement as to price it is now accepted by the parties that the sum due should be valued on a quantum meruit. It is accepted that this should have been approached on a cost plus basis.

13. For much of the period of negotiation between the parties, they proceeded on the sterile basis that figures should have been produced by the Claimants and substantiated as if the costs of the shop fitting items arose under a Works Contract. When, ultimately, this information conceived to be commercially sensitive by RDB, was produced in confidence to the Defendant, the Contract Administrator caused it to be returned to RDB, unread and unconsidered. He took the view that the Claimants had been uncooperative and dilatory in the provision of necessary substantiation information that strictly the Defendant was not entitled to. As a matter of good practice however it is desirable that there is openness in sharing such costings. The failure to comply with the Defendant's requirements was a source of constant recrimination thereafter. RDB's reticence in providing this information however was not without good reason. Earlier the project quantity surveyor had breached commercial confidences relating to RDB's financial standing, albeit inadvertently.

14. The project works were complex and had to be accomplished to a high standard within a very tight time schedule. The fact that speed was imperative perhaps explains why the contractual framework and formalities were neglected for so long, and also explains in part why the parties agreed to tolerate practices at variance with or supplementary to, the strict contractual framework retrospectively adopted.

15. The Claimant has two claims arising under the Management Contract.
i) £3,079,558.20 as a prime cost (under the second sch). The Defendant values these items at £2,994,654.18. The difference on the pleadings is £84,904.02.
ii) £761,777.54 for site services (under sch 3). The Defendants valuation is £581,590.85, a difference of £180,186.69.

16. The Claimant also claims £3,351,963.19 as reasonable remuneration for shop fitting and joinery services. The Defendant values these works at £2,311,743.96 a difference of £1,040,220.00.

17. In relation to the Mechanical and Engineering component of the project undertaken by Haden Young, the Claimant claims that this should be reflected in the computation of the Management fee. It contends that the parties anticipated that RDB would enter into a Works Contract with Haden Young, that the Management Contract concluded between the claimant and defendant was entered into upon that basis and reflected the reality that Haden Young throughout had been managed by RDB as if a Management Contract had been operated throughout. Since the Management fee bears direct relation to the prime cost, if the Haden Young expenditure is included the Management fee is enhanced. The Defendant contends that it is does not form part of the contractual prime cost and there is no legal basis for treating it as if it did.

18. Arising out of the Haden Young issue is a further claim. The sum of £280,859.00 on account of claimed contra charges was withheld from Haden Young's remuneration by RDB. This was remuneration paid by the Defendant under certificates provided by the PQS to RDB between the commencement of work and December of 1999 as if the Management Contract was being operated. The Works Contract envisaged by RDB and Defendant which should have been concluded between the Claimant and Haden Young, never materialised, and there was no contractual entitlement to a contra charge under a Works Contract. The Defendant contends that it is entitled to credit in the amount of the contra charges. It subsequently concluded a separate contract with Haden Young on 19 November of 1999, providing that £6,000,000.00 was to be paid to Haden Young. This sum included £283,364.38 the total sum retained by RDB as contra charges against Haden Young. It was further agreed that should Haden Young prove that RDB was not entitled to levy the contra charges and that they were entitled to reimbursement, a sum not exceeding £40,000.00 would be repaid to the Defendants by Haden Young.

19. The principal evidence before me was that of Mr Iain Wishart. He is the joint expert instructed by the parties. He is a distinguished and well respected Quantity Surveyor with a great deal of practical experience, including the administration of Management Contracts. He prepared a draft report on 14 February 2001 which he circulated to the parties, and revised it on 28 February 2001.

20. This revision took account of the Contract Costing Report an extensive bundle of documentation comprising the printout of computerised information held by RDB which became inaccessible after the Company went into administration in September of 1999. The revision also took account of representations made by the parties' quantity surveyors in the course of 8 meetings with Mr Wishart, following their receipt of the draft report of 14 February 2001.

21. Leave was given for Mr Wishart to give oral evidence and he was cross-examined firstly by the Defendants and then by the Claimants.

22. It is inevitable where a report covers a multiplicity of factual issues, and where representations are made by the professionals to an expert such as Mr Wishart, that there may be genuine differences of recollection of what was said and as to what was conceded.

23. I am satisfied that Mr Wishart took great care both in noting representations made to him and recording in his final report any concessions made or qualifications given. His report of 28 February at paras 2.33 to 2.35 touches on one such relating to the approach to contra charges. His oral evidence before me, in my judgment, accurately incorporates all the concessions properly made by the parties quantity surveyors and recorded any qualifications they sought to be incorporated. Had the written report of 28 February 2001, recorded any significant misunderstanding or error, I have no doubt that on receipt of the report, and after reflection, the respective quantity surveyors would have written to Mr Wishart to point out any such mistake or error that he may have recorded. It would have been professionally remiss not to have done so.

24. Where the recollection of the Contract Administrator, Mr Steven Barker, differs from that of Mr Wishart, I prefer the evidence of Mr Wishart as being the more accurate and more reliable. Where the evidence of Mr Green, the Project Quantity Surveyor, differs from that of Mr Wishart, I prefer the evidence of Mr Wishart. His impressive evidence after the testing cross-examination of the defendant and the questioning on behalf of the Claimant grew stronger in its impact.

25. Mr Wishart's brief was wide ranging; it is to be remembered that these were instructions given jointly and Mr Wishart is the expert for both parties assisting the court. He understood his role as follows:

"1) I am to put myself in the shoes of the PQS and provide a report to the account that I would include in the final account for the Contractor in respect of:

A Schedule 1. The appropriate value of the Prime Cost.

B Schedule 2. The appropriate value of the management and site staff and overheads costs.

C Schedule 3. The appropriate value of the shop fitting and joinery works.

D Schedule 4. The appropriate value of the Management fee as far as it relates to the Prime Cost and shop fitting works. With regard to the Haden Young installation service and installation cost I am to calculate the fee on the following assumptions:

(A) That the value of the agreed final account value for Haden Young of £6,000,000.00 should be considered as Prime Cost.

(B) The value of Haden Young's final account should not be considered as part of the Prime Cost.

E Schedule 5. The appropriate value of the day work sheets."

The Claims

26. The Defendant submits that the Court is not concerned with deciding what is the reasonable remuneration for the Claimant's work and Management functions at Bluewater. Mr Mendoza contends that the court is only concerned with an examination of the sums properly due under the Contract at the date of the issue of proceedings. A great deal of criticism is levelled at RDB for not, in the Defendant's view, providing sufficient or timely information under the Management Contract. Mr Mendoza submits that the court's role is to consider what, in the light of the information available to the Project Quantity Surveyor, was the reasonable remuneration due under the contract at the time of certification.

27. It might be an interesting academic exercise. But, it would not assist the parties. If it were proved that more money was due, the Claimant would presumably start a fresh action to recover the balance. It ignores the fact that since the proceedings were issued the amended pleadings have reflected the changing and evolving positions of the parties. Admissions have been made which go beyond the historical position contended for, by the defendant. Furthermore the parties have put before the court the expert evidence of their jointly instructed quantity surveying witness Mr Iain Wishart. It is apparent that in consequence of their instructions and the concessions made in the course of the representations to Mr Wishart in discussions, that there are a number of matters which have ceased to be controversial. Accordingly, Mr Wishart did not go further and consider and enquire into those matters; it would have been a waste of his time and talent and a waste of expenditure and court time to pursue such matters before the court. The evidence of Mr Wishart was not approached by the Defendant in a particular way to identify item by item, what was the proper and reasonable remuneration at the time that he reported and what would have been a reasonable remuneration at the time of certification by RLF. The admissions made in the pleadings, and the concessions and agreements made did not follow that course for the very good reason that it would have been an impractical and a sterile exercise. The Management Contract contains an arbitration clause in the usual Crouch form and the parties have conferred this power upon the court. In any event in the light of ***Beaufort Development (NI) Limited v Gilbert-Ash NI Ltd*** [1999] AC 266, [1998. 2 All ER 778 I am satisfied that not only does the court have the power to consider remuneration under the contract in the round it has an obligation to the parties to do so, when the evidence is before the court and where it comes principally from the parties own jointly instructed expert. Should it be the case that information due to the quantity surveyor only became available to the joint expert only after the commencement of proceedings, the court's powers in relation to costs and the award of interest, are sufficient to compensate any party who may have been prejudiced in consequence.

28. Overall, by far the largest part of these claims, in terms of value and the trial time devoted to it, it is the shop fitting and joinery claim which does not arise under the Management Contract at all.

The Claims individually

Schedule 1 Item Prime Cost

29. The Claimants pleaded case is that £3,790,558.20 is due under this head. Mr Wishart's evidence is that the proper figure is £3,415,928.00. The Defendant's figure, based upon RLF's assessment is £2,994,654.00.

30. The Defendant contends that the Claimants cannot recover more than their originally pleaded figure under this head. The reason for the uplift in Mr Wishart's assessment is that he has transferred all of the on-site labour under the contract to the first schedule. It follows of course that he has reduced the labour charges elsewhere. The Defendant, it would appear, urges me to accept the counterpart reduced figures but not the enhanced figures. I see no logical basis for this. I accept the joint expert's evidence as to the assessment of the Prime Costs under Sch 1. This figure includes £30,000.00 which was paid to A J James a joinery contractor. As the documentary evidence put to the witnesses shows and Mr Wishart accepts, a significant proportion of the work done was either completion of contractual works after the practical completion date 15 March 1999, or freshly instructed work.

That which was described as 'snagging' was not the remedying of work executed by A J James. This was confirmed by Mr Purnell of RDB, and I accept his evidence. A J James were not Works Contractors on a lump sum price, but labour only subcontractors doing day works on a daily basis. In my judgment the payment to A J James properly forms part of the price cost under Sch 1 and no deduction therefore is justified. The Prime Cost figure under Sch 1, I find to be £3.415,928.00.

Schedule 2 Site Services

31. The Claimant sought £761,777.54. The parties joint expert arrived at a figure of £613,019.97. The claimant accepts this figure. The Defendant contends that the proper figure is £581, 590.85 a difference of £31,429.00. It challenges the joint expert's figures as to the amount allowed for scaffolding in the sum of £38,388.21.

32. This matter was raised shortly before trial by the Defendant and investigated in the course of the trial. In reply to the documentation disclosed by the defendant from the scaffolding contractors, SGB, additional invoices were forthcoming from the Claimants. On a consideration of these, Mr Wishart concluded that his report figure needs to be adjusted by £341.41. Mr Mendoza nonetheless contends that the court should only award the RLF assessment sum for site services, since he contends that there is no reasonable material before the court to suggest that RLF at the time of certification had material and documentation available to them allowing a greater sum. Firstly I reject that approach as being artificial and unreal for the reasons already given. Secondly I am satisfied that the ascertainment by Mr Wishart is reasonable and properly available to him. Thirdly it is evident from the **adjudication** carried out by Mr Christopher Dancaster in relation to RLF's number 13 certificate that there was documentary substantiation in September of 1999 before him which would have warranted a much greater figure than now contended for by RLF. The adjudicator in his award was of course constrained by the period covered in the reference as the extent of his award on the **adjudication**. That documentary substantiation was available to RLF.

33. In my judgement the proper figure for Sch 2 site services is £613,019.97

Subtracting	£ 343.41
Balance	612, 676.56

Schedule 3 Shop Fitting and Joinery

34. The Claimant originally claimed £3,351,963.00. The Defendant submits that £2,301,743.00 is the proper figure on a quantum meruit for the reasonable cost of shop fitting and joinery works and contends that the evidence of the single joint expert should not be accepted. His revised figure is in the sum of £3,200,002.00. The only expert evidence before me is that of Mr Wishart. I judge him to be an independent witness, who is both highly experienced and impressive. The court's duty is to consider his evidence as evidence in the case in the light of the instructions he has been given by the parties and to give it the appropriate weight after cross examination and any testing there may be, together with all of the other evidence there may be. Merely because a witness is a jointly instructed expert does not mean that he is deciding the case on these issues. Nonetheless, where the approach of the expert is careful and reasoned and where by his approach he demonstrates that he is both an experienced and well qualified witness in the field that he is giving evidence in, the court would have to have very good reason for substituting another view and for not giving considerable weight to his evidence. It is evident in this case that Mr Wishart was put under pressure of time. That of course can affect the degree of care that can be given to the consideration of the technical issues. Where it did so, Mr Wishart properly pointed that out. Where he would have wanted substantiation, and either none was available, or incomplete substantiation was provided, he said so and the effect upon his ascertainment figures was apparent and clear to the court.

35. The parties asked him to stand in the shoes of the PQS to value the shop fitting and joinery for which there were competing and unagreed rates.

36. He valued these works by ascertaining the cost then adding to it a reasonable allowance for overhead of 10% and profit of 6%. Mr Wishart deposed that "one has to judge these things in the round. I do not think you can simply take a piece out of it in isolation. What I have done is to look at the whole thing in the round". In App 11 to his report he considered the component parts of his assessment of a fair valuation. It is evident that his examination of the data was critical and detailed. Where he had doubts as to the accuracy of the figures these were expressed, as for instance, the costs of some materials which were then manufactured into fittings in the claimant's factory. The possibility of duplication in labour costs was addressed and reflected in his assessment. For example where site preliminaries had already been charged.

37. The Defendant contends that the mark up over costs should not exceed 10%. Mr Mendoza submits that the claimants in respect of materials and services, throughout were content to apply a general 10% mark-up on base costs. Mr Williamson accepts that was so where there was no manufacturing element. Where this happens it is akin to a handling charge. But where there were rates discussed for comparable activities, such as the work on the interior columns, RDB sought £16.80 per hour plus 10%. The £16.80 rate itself included a substantial hidden up-lift on account of overheads. Generally however, as Mr Wishart confirmed in evidence and from a consideration of the contemporary documentation, RDB contended for a 20% or even 25% mark-up. I do not accept that for comparable manufacturing of shop fitting components and shop fitting works, RDB expressed themselves content in negotiations to accept a gross 10% mark-up representing both overhead and profit.

38. The proper approach is cost plus. This approach was offered on behalf of RDB by Messrs J R Knowles claims consultants, acting on behalf of RDB in a letter dated 19 July 1999. This basis was rejected by the defendant.

Both parties now accept that it is the proper basis upon which to approach the assessment of the value of the shop fitting and joinery work. I can see no good reason why I should not, on the evidence, accept the figures put forward as appropriate by the joint expert. I do so. In my judgment the proper figure is £3,200,002.00.

The Management Fee

39. The principal issue is to decide how Haden Young should be treated in relation to this project. Haden Young never became a Works Contractor. It was expected by both the Claimant and Defendant that as the mechanical and electrical contractor responsible for one of the most substantial parts of the project, they would become a Works Contractor. The Contract Administrator, Mr Barker, clearly hoped that in the fullness of time Haden Young would overcome their commercial reservations about the Claimants and sign. He accepted that throughout Mr Purnell and Mr Sargant of RBD managed Haden Young's work on site as Management Contractors and that Haden Young had submitted their payment applications to RDB. Until the end of 1999 RLF issued interim certificates which included monies due to Haden Young, as if they were a Works Package Contractor. In other ways, as was known to both the Contract Administrator, Mr Barker and the Project Quantity Surveyor, Mr Green, RDB operated as if a works contract with Haden Young was in force throughout. As for instance by making deductions from Haden Young's certified entitlement under the management contract machinery. The Defendant knew through Mr Green and Mr Barker of these deductions and in correspondence indicated that they were essentially matters for the claimant. Significantly it was never suggested that in principle, no deductions should have been made. Later on criticism was made as to the extent of the deductions. But it was accepted in principle that there was an entitlement to withhold in the position in which the claimant found themselves, even in the absence of a Management Contract.

40. In May 1999, 2 months after final completion, the view of the Contract Administrator, Mr Barker expressed to Haden Young in a memorandum, was: "*As far as I am concerned you do have a contract with RDB and your continued reliance on what is a limited letter of intent is ridiculous,* given the performance of the parties throughout the contract." *(My emphasis)*

In evidence he said, "*Question; what did you think was the basis of the contract between RDB and Haden Young?*

Answer; Well although it was not concluded we were hoping that eventually they would come to terms and sign a Works Contract at the time.

Question; There was nothing signed obviously.

Answer; No

Question; You thought that was a formality because there was in reality a Works Contract relationship between Haden Young and RDB.

Answer; we had hoped that that would be the case."

41. One can readily understand the foundation of Mr Barker's strong hope. RLF had left the Employer without the protection of a contract both in relation to the mechanical engineering works package and in relation to the other substantial part of the project works, the shop fitting and joinery package. I have no doubt that the imperative was to get the project completed on time and to an excellent standard. It is evident that these goals were achieved within a tight time-table. I am satisfied that whilst RLF did not strictly operate the procedure for the selection of Works Contractors under s 8.2.1 of the Management Contract, by issuing formal instructions, nonetheless, the parties did agree that the mechanical and engineering contractor was to be Haden Young. The Defendant's choice was informally accepted by RDB who waived their right to receive a formal instruction. None of the chosen Works Contractor's who entered into Works Contracts did so using the formal mechanism of s 8. This epitomises the way in which the contract was implemented. In part of necessity since whilst both parties accepted the principle that the Management Contract should govern their obligations, it was not concluded until December 1999 when it was signed by the Claimants.

42. The Defendant submits that since Haden Young never signed a Works Contract, it follows they were never a Works Contractor. As such the cost of Haden Young's work does not fall within the definition of Prime Cost as defined in the Second schedule of the Contract, and it cannot be taken account of in the provisions governing the adjustment of the Management Fee under the Contract. The adjustment mechanism is contained in the payment provisions of the contract clause 4.10.

"*4.10*

1. No adjustment of the Construction Period Management Fee shall be made except in accordance with clause 4.10.2 and 4.10.3.

2. If prior to the issue of the Final Certificate the Prime Cost exceeds the Contract Cost Plan Total by more than 5% (or such other percentage as is stated in the Appendix) the Construction Period Management Fee shall be adjusted in accordance with the formula set out in clause 4.10.4.

3. If the Prime Cost exceeds or is less than the Contract Cost Plan Total by more than 5% (or such other percentage as is stated in the Appendix) the Construction Period Management Fee shall be adjusted in accordance with the formula set out in clause 4.10.4.

4. The Formula referred to in clause 4.10.2 or clause 4.10.3 is:

ACPMF = CPMF x 100 = (D – T)/100

where

ACPMF is the adjusted Construction Period Management Fee
CPMF is the Construction Period Management Fee as stated in the Appendix
D is the increase or decrease of the total Prime Cost when compared with the Contract Cost Plan Total expressed as a percentage of the Contract Cost Plan Total.
T is 6 or such other number as is stated in the Appendix under the reference to clause 4.10.2 and 4.10.3.
= shall be + (plus) if the total Prime Cost exceeds the Contract Cost Plan Total or – (minus) if the Prime Cost is less than the Contract Cost Plan Total."

43. It can be seen that the yardstick against which comparison is made warranting adjustment is the Contract Cost Plan Total.

44. The Contract Cost Plan Total is defined as: "*The total of the Contract Cost Plan as stated in the appendix which total does not include the Management Fee.*"

45. In the appendix at Pt 2 the Contract Cost Plan Total is £11,480,000.00. That sum significantly includes the figure of £5,200,000.00 for the services of Haden Young. The joint expert in his evidence deals with the management fee on two bases. His first approach was to exclude Haden Young from the calculation of Prime Cost, but then to adjust the Contract Cost Plan Total by excluding the Haden Young works and then purport to operate the adjustment provisions under clause 4.10. His alternative approach was to include Haden Young's work as part of the Prime Cost.

46. Mr Mendoza submits that the second approach is wrong. He contends that the first approach is only partly correct. He contends that Haden Young's work cannot be part of the Prime Cost since they were not Works Contractors. Nevertheless, he submits that the Contract Cost Plan figure is sacrosanct as the yardstick and cannot be adjusted.

47. The projected cost of the Haden Young works as Prime Cost works in the Contract Cost Plan is £5,200,000.00. The actual price paid by the Defendant to Haden Young was £6,000,000.00. The projected cost of the shop fitting and joinery works, never the subject of a Works Contract, and known to be so at the time that the Management Contract was signed, was nonetheless included in the Contract Cost Plan as a Prime Cost element. It is accepted by the Defendant that the shop fitting and joinery works are part of the Prime Cost, even though there was not a separate agreement relating to these works as clearly anticipated in the note to the Contract Cost Plan. This agreement, as with the Haden Young Works Contract never materialised.

48. There is no logical basis for distinguishing the position of RDB in relation to the shop fitting and joinery elements and that of Haden Young in taking account of them in the Contract Cost Plan figures. There is good reason why both figures appear in the Contract Cost Plan. It is because both parties acknowledged at the time that there was no agreement either with Haden Young in relation to the mechanical engineering installation and services or between RDB and Defendant in relation to shop fitting and joinery but recognised and agreed nonetheless that the contract yardstick for the adjustment of the Management Fee should be the Contract Cost Plan total inclusive of both the Haden Young work and the shop fitting and joinery work as part of the prime cost.

49. Thus in December of 1998 the Defendant agreed a Management Fee of £520,000 when both parties knew that from October 1998 Haden Young had made it clear that they were not minded to enter into a contract with RDB. In their letter of that date: " . . . *And for the avoidance of doubt we would formally advise you that we are unable to accept this or any order from you for the execution of these works.*

We confirm that we are currently in discussion with the Employer as to how we can proceed."

50. When RDB placed the purchase order of 7 September 1998 with Haden Young they wrongly anticipated in the event that RLF would agree the second stage tender with Haden Young thus enabling a Works Contract to be entered into.

51. Mr Barker, the Contract Administrator, deposed that from October onwards negotiations were carried out between Haden Young and RLF inconclusively and " . . . *in a rather desultory manner*". He confirmed that RLF never got as far as completing their review of the second tender stage. During 1999 the Defendants did not conclude their contractual negotiations with Haden Young or take steps to resolve the impasse between Haden Young and RDB.

52. I am satisfied however that Mr Barker gave reassurance to RDB that RLF were dealing with Haden Young. Mr Barker was candid when he told the court that he always hoped that Haden Young would enter into a Works Contract. He said he did not remember giving reassurance to Mr Wilson, RDB managing director, but I am satisfied that Mr Wilson of RDB was truthful and accurate when he said: " . . . *The mechanics of all this were being dealt with by RLF. Stephen Baker gave me assurance that this was being dealt with and that they would become a Works Contractor and one dealt with them as a Works Contractor.*"

53. Such an assurance was wholly consistent with Mr Barker's expressed belief. The state of affairs between the parties thereafter is wholly consistent with such assurance having been given and accepted by RDB. Thus they continued to administer and manage the project including the Haden Young mechanical and electrical element. They signed the Management Contract agreeing, inter alia, the fee, the adjustment mechanism and the agreed Contract Cost Plan base.

54. Despite the absence of a concluded Works Contract with Haden Young, RLF permitted Haden Young to remain on site and continue its works under its letter of intent, and then concluded an agreement directly with Haden Young, thereby cutting out RDB the Management Contractor. In my judgment in the light of the Defendants' conduct and assurances the Claimants did all that could reasonably be expected of them to co-operate in bringing about a Works Contract with Haden Young under the Management Contract.

55. By negotiating separately with Haden Young, and by not copying RDB into the crucial correspondence, the Defendants demonstrated that Mr Barker's assurances given earlier, and intended to be relied upon had no real substance.

56. By entering into negotiations and by concluding the separate agreement with Haden Young the Defendants breached its implied contractual obligation to co-operate and to ensure that within its powers, that it was possible for RDB to conclude a Works Contract with Haden Young. It is not open for a party to take advantage of the non fulfilment of a condition, the performance of which has been hindered by himself. See *Roberts v Bury, Commissioners* (1870) LRCP p 310 at p 326. Particularly having regard (a) to the absence of a concluded works agreement covering Haden Young at the time that the Management Contract was signed by RDB; (b) the Defendants' conduct by negotiating and directly concluding an agreement outside the Management Contract; (c) the assurances given to RDB by Mr Barker of RLF; (d) by permitting RDB to continue to manage and organise the mechanical and electrical works, as if under a Works Contract and by the Management Contract payment mechanism through the Claimants to Haden Young.

57. Throughout the period of the contract until the Defendant concluded its separate agreement with Haden Young both parties in relation to each other acted as if the Haden Young works package was being performed as if under a Works Contract. They acted under a common assumption of fact that Haden Young would enter into a Works Contract. It would clearly be unjust to permit the Defendants who promoted that assumption by assurance and conduct to resile from it.

58. In my judgment there is no basis for permitting the adjustment of the Contract Cost Plan total agreed between the parties when all the material facts were known to them. The Haden Young final account clearly should be treated as part of the Prime Cost. The management fee therefore should be adjusted in accordance with Clause 4.10 on this basis.

Schedule 5 Contra Charges

59. Payments made to Haden Young were made by the Defendants through RDB on the basis of certification by RLF. From these payments £283,366.00 was deducted by RDB as contra charges. The Defendant contends that because no Works Contract was entered into by Haden Young there is no contractual entitlement for RDB to retain £283,366.00. Haden Young are not party to this action and have already been reimbursed the whole sum of £283,366.00 in their separate agreement concluded with the Defendant. The fact that contra charges were being made by RDB, and deducted from the Haden Young payments was known both to the Project Quantity Surveyor and the Contract Administrator. On 16 February 1999, RLF wrote to RDB about the contra charges in relation to payments number 9.

"Further to our discussion yesterday regarding receipt of payment number 9 and ongoing payments to the Works Contractor, Haden Young *I wonder if it would be prudent to consider not deducting any contra charges from a current payment to Haden's at this time but rather call a meeting to discuss the whole situation with a view to finalising an amount acceptable to all parties.*

Obviously it is difficult for us to intervene in this process, but if you think we can be of assistance we will be pleased to attend any meeting set up. I know you intend to send a cheque to Haden's today, so I would be pleased if you would consider your thoughts and advise me of your decision.".

60. Clearly the Contract Administrator accepted in principle that there was an entitlement to make contra charges and declined to intervene. Four days before he had written to Mr Austin of Haden Young: *"I am in receipt of your letter 10 February, regarding the latest progress payment and, at the risk of repeating myself, would say that you will* not *be receiving* any *payments direct from the House of Fraser. You must continue to recover the costs of your work through the Management Contractor. I and my client grow weary of your attempts at undermining the basis of the contract at Bluewater."*

61. The Second Schedule of the Management Contract provides that the Prime Cost of the Project payable; *". . . shall comprise the sum of the following costs insofar as they have been incurred in accordance with the Contract but shall exclude any costs incurred as a result of any negligence by the Management Contractor in discharging his obligations under the Contract or any costs recovered as part of the Pre-Construction Period Management Fee . . .*

On-site labour as defined in Part for A . . .

Pt 4A On site labour employed by Management Contractor

1. Subject to paragraphs 2, 3 and 4 payments in respect of work people directly and properly engaged by the Management Contractor upon the Project and working on the site . . ."

In relation to £52,460.35 of the contra charges there was challenge by the Defendants on the basis that there was either double charging or no adequate substantiation. On the second day of trial a schedule was provided particularising the individual challenges on these basis.

£9,139.50 related to payments made to Fullers a labour only contractor. It was accepted by Mr Wilson of RDB that in relation to payments to this contractor there had been irregularities. RDB had been wrongly overcharged by Fullers and RDB were complicit in this over charging. That improper payment was taken account of by the parties quantity surveyors during the course of the trial when a revised figure was agreed with the joint expert. The sum of £9,139.50 is therefore no longer in contention. The discovery of irregular payment to Fullers fuelled the existing distrust between the parties and has understandably fuelled suspicion in relation to other figures.

£3,270.75 relates to damage caused to an area of installed ceiling by the operation of a scissor lift or mobile tower and damage caused to a ceiling component called a doughnut. There is no real issue as to whether damage occurred. The Defendant contents that it was not caused by Haden Young. In my judgement having regard to Haden Young's operations and the evidence of Mr Purnell and RDB personnel on site it was more likely than not, caused by them. Haden Young had on site a competent and trustworthy team according to Haden Young's director, who gave evidence, Mr Austin. It is inconceivable that had allegations been made of damage by Haden Young that were unwarrantable that there would not have been a contemporary challenge in writing. In the contemporary correspondence written by RBD to Haden Young relating to contra charges, it is clear that they were holding Haden Young responsible for various items of damage and expenditure. That correspondence is wholly consistent with the oral evidence given by the RDB personnel before me. It is significant that none of the Haden Young team who were on the ground at the time, were called to give evidence in relation to these matters. The sum of £25,297.95 comprises £5,587.90 for the cost of repairing further ceiling panels paid to Fuller Brothers, and £19,710.00 paid to A Andrews to repair damage to flooring caused by the operation of plant over corex covered floors.

I am satisfied that the damage to the ceilings, doughnut, and floor was caused by Haden Young and the cost of repairs were incurred by RDB. I reject the defendant's contention that the damage was caused by RDB's failure to co-ordinate the works or to adequately protect the floor. I am satisfied that the contra charges were properly raised against Haden Young. Were it the case that Haden Young were not responsible, since I am satisfied the cost of repairs was incurred, that cost in any event would form part of the Prime Cost. The Defendant's would not be entitled to recover these sums, unless under the Second Schedule, negligence on the part of the Management Contractor could be proved. There is no evidence of negligence, in relation to the provision of floor protection of co-ordination of works. Such allegations in any event do not form part of the Defendant's pleaded case.

The sum of £1,589.00 relates to scaffolding edges and I am satisfied that there is no double recovery demonstrated. The balance of £13,163.15 was challenged on account of inadequate substantiation. £567.00 was related to attendance of workmen on site on 23/24 December 1998, I am satisfied that there were workman on site and that payment was incurred. Mr Austin of Haden Young spoke of his conviction that no operatives other than Haden Young workers were on site that day, I reject his evidence. It was unreliable because he only attended the site infrequently, and his account was not based on his personal observation. Mr Austin purported to give evidence of a video film actually showing a scissor lift in the process of actually causing damage to the ceilings when being operated by others than Haden Young workmen. He was later driven to accept that all he saw was some damage to the ceiling and later made an assumption. Work done by Seals – labour contractor's – to the value of £4,500.00 was challenged although day sheets clearly showed operatives clearly working at the relevant time. By comparison with other documents the identity of those operatives became evident. Drawing and copying charges in the sum of £1,144.00 I am satisfied were properly incurred and justified by the RDB. I accept that the architect's facilities for copying and distribution of drawings was not adequate and gave rise to the necessity for RDB to assist. I further find:

1. £1144.60 was the proper cost incurred for the cleaning by RDB of the Defendant's offices on site, I am satisfied on the evidence that it was a matter that was specifically agreed.
2. £3,561.00 the cost of radios lost by the Defendants has been substantiated. The inference from the contemporary correspondence is clear.
3. £1,672.00 representing additional work done to the columns is now accepted by the Defendant.

In my judgment there is no substance in the Defendant's challenge.

The principle of contra charging was accepted by the Contract Administrator as is exemplified in the correspondence referred to earlier. Mr Green, the PQS in a letter of 7 March 2001 confirmed the position adopted by the Defendants in relation to contra charging at meetings held with the Joint Expert.

"2.34 RLF noted a the meeting held on 24 January 2001, they had not been provided with final accounts or substantiation of the amounts paid to Works Contractors on whose behalf RDB had levied the contra charges to Haden Young Limited.

It should be noted that in sub section C to paragraph 2.34, Mr Wishart considers that these amounts should "properly be recognised and accounted as part of the Prime Cost payable to the Claimant under the Second Schedule of the contract

It is noted that the Claimant has already amended the pleadings to include these sums in the Second Schedule of the claim. RLF considers that, in principle, any contra charges should be reimbursed as part of their Prime Cost payable and paid to Works Contractors. From the information derived from the posting data obtained from RDB's former computer, it is not evidence that the amounts represented by these contra charges were paid to the Works Contractor" [my emphasis].

62. The Claimant's amendment referred to in this letter relates to the framing of the contra charge claim under the Second Schedule and para 4A The Joint Expert, Mr Wishart, in his reports and in his oral evidence, makes clear his understanding of what his role was in relation to the contra charges, as confirmed by the parties. His brief was to consider the appropriate value of the day work sheets accepting the parties agreements, and expressing conclusions only on points of disagreement. He did not conceive it to be his role to adjudge whether the deductions were proper deductions from Haden Young but whether the relevant costs form part of the Prime Cost. In his supplemental report following representations by the parties quantity surveyors, he summarised the position at App 14. "Although claimed as a contra charge RLF agrees that subject to any substantiation of values the amounts are legitimate Prime Cost items. Both parties agreed that whatever RDB have paid there sub-contractor, they should be paid."

63. He confirmed this in his oral evidence. Mr Green, the Project Quantity Surveyor in cross examination, accepted that Mr Wishart had correctly understood his instructions.

64. I accept Mr Wishart's evidence that under a Management Contract it is not unusual for a Management Contractor to make deductions in the manner that RDB did. Indeed it is often considered wise to secure the charge and argue about it later. I hold that these charges are properly substantiated contra charges against Haden Young. The cost of them falls within the Second Schedule. The Contractors who provided the labour and performed the work are clearly on-site labour employed by the Management Contractor under Pt 4A

65. Payments made or incurred are thus recoverable as part of the Prime Cost. In its representations to Mr Wishart, the Joint Expert, and in the letter referred to earlier of 7 March 2001, the Defendant qualified its concession: " . . . *Subject to any substantiation of values the amounts are legitimate Prime Cost items. Both parties agreed that,* whatever RBD paid their sub-contractors, they should be paid."

66. The words emphasised are to be contrasted with the wording in the Second Schedule:– "*The Prime Costs of the Project shall comprise of the sum of the following costs,* insofar as they have been incurred *in accordance with the contract . . . "*

67. Thus if they arise under the contract it matters not whether they have actually been paid, provided the liability to pay arises. When RDB went into administration a number of contractors remained unpaid. The likelihood of their being paid is now remote. The Claimant as assignee of RDB, in relation to these unpaid costs incurred under the contract, stand to receive a benefit that had RDB not gone into administration, it would not have retained.

68. Mr Mendoza submits, that the Defendant is entitled to recover from the Claimant, the whole amount of the contra charges, because the Defendant has reimbursed Haden Young the whole amount of the contra charges deducted.

69. This entitlement cannot arise in the light of the evidence of Mr Wishart and the concession properly made by Mr Green, the Defendant's Project Quantity Surveyor. The contra charges are part of the Prime Cost subject to substantiation. The fact that the Defendant chose to by-pass RDB and the Management Contract Scheme and conclude a separate commercial agreement with Haden Young cannot deprive RDB of its contractual entitlement. Mr Mendoza further argues that it would be equitable for the Claimant to have the benefit of any costs incurred by RDB but not paid. The alternative would be to give the Defendant the benefit notwithstanding that they were contractually obliged to pay these sums in any event, irrespective of the financial standing of RDB.

70. The proper amount on the evidence for the contra charges is £208,781.20.

Interest

71. Interest is payable from the date when the sums awarded ought reasonably to have been paid. The interest should be at the appropriate commercial rate.

72. The Defendant has argued throughout there was gross failure on the part of RDB to comply with their obligations to give sufficient information to enable the Defendants, acting reasonably and competently, to certify sums due.

73. The obligation under the Management Contract in relation to works and services is clear. A general obligation under 1.4 to co-operate with the professional team, and under 1.5 it is provided that the Management Contractor shall: - *"keep and make available all detailed records prescribed or agreed with the quantity surveyor to enable the quantity surveyor to verify Prime Cost."*

In s 3.2 it provides that the Management Contractor should give access to all documentation relating to the Management Contract.

74. It is not a one-sided matter the PQS also has a duty to co-operate. The Joint Expert gave evidence as to the role of the Project Quantity Surveyor. He had been instructed by the parties to put himself in the shoes of the Project Quantity Surveyor acting reasonably and competently. He emphasised a duty to co-operate with the Contractor. The competent quantity surveyor would, if necessary, go to the contractors offices in order to see costing documents. Whilst the PQS is required to "ascertain" it is not necessary to value items of work at nil, where clearly the work has been done despite not receiving full substantiation. A conservative valuation may of course prompt the contractor to provide adequate and additional substantiation as to the proper cost. The process of resolving the account, according to Mr Wishart, is an iterative, interactive one. The PQS may go back to the contractor and seek further explanation and information. On occasions he must make an assessment or do a deal in relation to small items of dispute. Ideally the parties should enter into a constructive dialogue each applying a great leavening of common sense.

75. It was in relation to the shop fitting and joinery works that a great deal of time was spent by the parties trying to agree a price. Eventually RDB proposed the cost plus formula, adopted by the Joint Expert and now accepted as the appropriate approach. That approach was unreasonably rejected by the defendant. I am satisfied that the requisite detailed information to enable the cost of shop-fitting and joinery work to be ascertained and agreed, would have been available by August of 1999. Sadly the PQS, Mr Green, as he admitted, had limited experience in valuing shop-fitting and joinery works. Mr Shearer who had relevant experience was engaged by Mr Green in late March 1999 to go to RDB's premises in Dudley. He did so in April with Mr Allen, a colleague, but only to report on whether Mr Green would have sufficient information to value these services and manufactured units. Curiously he was not instructed to value them or even to inspect them. It is understandable therefore, although regrettable, that as Mr Wilson of RDB confirmed, there was not real dialogue with RLF, despite a number of valuations being submitted by RDB in the spring and early summer of 1999. A body of confidential information was sent to RFL in August 1999. Mr Shearer would have been content to consider this information but it was not to be so. Mr Barker, the Contract Administrator, disappointed at the delay in receiving RDB's additional information, sent it back unconsidered and unread. In so doing, he deprived the PQS, Mr Green and himself as Contract Administrator, of the opportunity to appraise RDB's information. They had an obligation to consider it. There was no justification for using unsubstantiated and unagreed rates from another project to value this work, or for Mr Barker's conduct, even if he was irked by what he considered was delay.

76. The Defendant in my judgement would have been able to have conclude their valuation of the shop-fitting and joinery works by 1 August 1999, on the basis of the information used by the Joint Expert and reasonably available by 1 August 1999. Interest therefore on the shop-fitting and joinery element of the award should date from then.

Prime Cost Schedule 1

77. I am satisfied that RLF had sufficient information to certify the sums I adjudge due by 1 August 1999.

Site Services Schedule 2

78. I earlier made reference to the **adjudication** of Mr Christopher Dancaster of September 1999, this was against payment application number 13 in the sum of £800,000.00. RLF certified a sum a £500,000.00. Mr Dancaster concluded that £645,000.00 should have been certified but indicated that more was due on the basis of the additional information contained in the **adjudication** evidence. In December 1999 there was certification in the sum of £578,000.00. I am satisfied that no significant and additional information has become available since November 1999 and the amount awarded therefore could and should have been certified by a reasonable and competent PQS in December 1999. Interest upon this element of the award should run from that date.

Schedule 4

79. The full management fee could have been certified by 15 March 1999, the date of practical completion.

Schedule 5 Contra Charges

80. The contra charges I am satisfied were incurred between November 1998 and April 1999. Had both parties been operating the Management Contract properly these sums could have been certified by April 1999.

81. The parties elected not to do so as they were entitled. In relation to the Fuller account, misleading figures were submitted. There was also a mark-up on many of the contra charge labour elements, which was not justified. It was not until full discovery and further discussions at the outset of trial, that Mr Wishart, the Joint Expert, was enabled to come to a view as to a proportion of the contra charges.

82. The Claimants already have the benefit of the full deduction subject to adjustment, of £170,063.87 on account of credit giving to the Fuller's account overall of £29,476.03 and accruals in the sum of £28,994.59. My view is that this should not affect the overall rate of interest that I will award. The default in providing sufficient and timely information to enable the expert and parties to arrive at a sensible view can be reflected in any costs award.

Financial Summary

Schedule 1 – Prime Cost	£3,415,928.00
Schedule 2 – Site services	£612,676.56
Schedule 3 – Shop fitting	£3,200,002.00
Schedule 5 – Haden Young contra charges	£208,781.20
The management fee due is	£569,100.00
Judgment	£990,999.00 and interest thereon.

Judgment accordingly

A Williamson for the Claimant instructed by Nicholson Graham & Jones;
N Mendoza for the Defendant instructed by Dechert