

JUDGMENT : His Honour Judge Richard Seymour Q. C. : 11th December 2001. TCC.

Introduction

1. The Claimant, **Discain** Project Services Ltd. ("*Discain*"), carries on business as a manufacturer and installer of structural steel fabrications. The Defendant, Opecprime Development Ltd. ("*Opecprime*"), is a member of a group of companies which, collectively, seems to be known as "*Comer Homes*". The chairman of Opecprime, is Mr. Luke Comer. Opecprime carries on business as a developer of property. Another company in the Comer Homes group is Miltonland Ltd. ("*Miltonland*"). In 1996 Miltonland purchased the property known as and situate at Davy House, Lyon Road, Harrow on the Hill, Middlesex ("*the Property*"). On the Property at the date of its purchase by Miltonland was an office block ("*the Block*"). The Block was in part of five storeys and in part of six storeys. The object of the purchase was that the Block should be converted into residential flats which would then be sold on. In due course planning permission was obtained for the conversion of the Block into 156 flats. The development of the Block into 156 flats was undertaken by Opecprime. The Property is now called Platinum House.
2. As part of the development of the Block into flats it was desired to provide balconies around it at each floor level. As originally constructed, the Block had no balconies. The conceptual design of the balconies was undertaken by a company called Hayes Industries Ltd. ("*Hayes*"). So far as the plan view of the balconies was concerned, at each floor level, other than the first, there were straight runs of walkway type balcony along the sides of the Block save over the entrances. Above the entrances, as a feature, balconies curved outwards. For construction purposes a grid was laid over the plan of the existing Block. The Block was not orientated precisely North to South, but for the purposes of describing the construction grid it can conveniently be treated as being so orientated. On the construction grid the Block was divided into lines numbered from North to South between 1 and 21. From West to East the Block was divided into lines lettered F to A. The curved balconies were at gridlines 1 to 3 and 19 to 21 at gridline F and at gridlines 11 to 12 at gridline A. Between gridlines 13 and 19 on gridline F the plan of the Block was inset to the East as far as gridline C. At first floor level in this location a feature called "*the Garden Deck*" ("*the Deck*") was proposed. It was not intended that there would be balconies at first floor level around the edges of the Deck.
3. Discain was engaged by Opecprime to undertake the fabrication and installation of part of the balconies for the Block and also the Deck. There is a dispute between the parties as to the terms of the contract between them and as to exactly what works **Discain** initially agreed to undertake. It is accepted that the initial contractual arrangements, whatever they were, were varied at least to the extent that Discain agreed to supply and fix as extras what were called in the language of the trial "*dividers*" at a price of £300 each. There is a dispute on the statements of case of the parties as to whether it was agreed that any other items would be supplied as extras at additional cost. It is common ground that, whatever contractual arrangements were made between the parties, those arrangements were terminated by Miltonland on behalf of Opecprime on 7 June 2000. It is Discain's case that the termination was wrongful, while Opecprime's case is that it was entitled to terminate the contractual arrangements with Discain on account of the repudiation of those arrangements by **Discain**. I shall have to resolve the disputes which I have mentioned in this paragraph. In this action **Discain** claims a sum of £103,772.17, calculated as £88,316.74 plus Value Added Tax at 17.5%, as the unpaid balance of the price of the fabrication and erection of the balconies and the Deck so far as completed by 7 June 2000. Opecprime denies any liability to pay any further sum to **Discain**, but advances a counterclaim in respect of alleged defects in the balconies and in the Deck, and also in respect of allegedly incomplete work.

Contractual arrangements

4. Those involved in negotiating the contractual arrangements between Opecprime and Discain were, principally, Mr. Luke Comer for Opecprime and Mr. Michael Purfield for **Discain**, so far as oral negotiations were concerned, with Mr. David White, a director of the company, taking an active role in composing correspondence for **Discain**. Unhappily there are vigorous differences between these gentlemen as to who said what to whom and as to the accuracy of what was said in contemporaneous correspondence. Mr. Comer was accused by Mr. Jonathan Lee, who appeared on behalf of **Discain**, of making, as Mr. Lee put it in his written opening,
"persistent attempts from day one to twist and spin the truth in order to get something for nothing."

Mr. Nicholas Collings, who appeared on behalf of Opecprime, did not express himself in such colourful language in his written opening, but relied heavily on the fact that Mr. Purfield gave evidence on behalf of Opecprime broadly in support of the accuracy of the account given by Mr. Comer. In particular, Mr. Purfield said in his evidence that a letter dated 11 January 1999 signed by him was in fact written by Mr. David White and was a deliberate attempt to go back on what had previously been agreed.

5. It is common ground that it was Mr. Purfield who first approached Opecprime in relation to the possibility that **Discairn** might undertake the construction of the balconies at the Block. Mr. Purfield had been passing the site of the Property and had seen a mock-up of a balcony. It is fair to say, however, that Mr. Purfield had been alerted by Mr. David White to the fact that there was a site with a mock-up of a balcony in relation to which there might be an opportunity for **Discairn** to obtain business. Mr. David White had visited the site with another potential customer which was interested in the possibility of engaging **Discairn** as a sub-contractor to fabricate balconies. Mr. Purfield made contact with Mr. Comer and, as a result, **Discairn** was afforded the opportunity to provide a quotation for the proposed works. The quotation was in writing in a letter dated 15 October 1998 addressed to Comer Homes Ltd. and marked for the attention of "Mr. Brian Comer". The letter was signed by Mr. Purfield, but bore upon it the reference of Mr. David White. The material part of the letter for present purposes was in the following terms:-

"Thank you for your valued inquiry on the above project we have pleasure in submitting [sic] our quotation for the Design, Manufacture, Galvanised/Paint Finish and Erection of Structural Steelwork Balconies all as similar to site sample.

Our Price. (Ex. VAT) £592,000.00...

Terms. T. B. A [i.e. to be agreed]

Delivery. T. B. A....

Exclusions.

- Building Design.
- All Civil Works.
- All Glass Panelling including seals. (Quotation of this item to follow.)
- Non Slip Paint Finish to all Steelwork Floors. (Quotation of this item to follow.)
- Local Authority Permits/Road Closures.
- Hard Standing for Cranes/Safety Hoarding.

We do hope all of the above meets with your approval but should you require any further information please do not hesitate to contact the undersigned. "

6. The managing director of **Discairn** was in 1998, and remains, Mr. Michael White. Mr. Michael White is the father of Mr. David White. At some point, which Mr. Michael White put as before the quotation dated 15 October 1998 was submitted on behalf of **Discairn** to Opecprime, but which Mr. Comer and Mr. Purfield put as later, perhaps on 27 October 1998, Mr. Purfield introduced Mr. Michael White to Mr. Comer. In the event I do not think that the precise date of the meeting matters. The general circumstances of the meeting were not in dispute. Mr. Purfield suggested to Mr. Michael White that he should meet Mr. Comer and it was arranged that Mr. Purfield and Mr. White would collect Mr. Comer from Heathrow Airport. The three of them then drove to the Block and walked round. Mr. Comer suggested that they all go to another property owned by one of the companies in the Comer Homes Group, the former American University at Bushey in Hertfordshire. After that Mr. White suggested that they have dinner together. At dinner they discussed what Mr. Comer wanted constructed at the Block, what programme he had in mind and how the work would be paid for, that is to say, when payments would be made. It was made clear that work was required to start more or less immediately. It was discussed that payment would be made on completion of every four sections of balcony. What is, or may be, of significance is the discussion of what it was that Mr. Comer was interested in having **Discairn** provide. Mr. White's evidence was that all that was being contemplated was the provision of steelwork for the balconies. In his witness statement dated 19 October 2001 Mr. Comer said that:-

*"At that meeting it was agreed that payments would only be made to **Discairn** on handover of balconies in sections of 4 units which were to be completely built including the installation of glass and the application of non-slip paint."*

Mr. Purfield in his witness statement dated 18 October 2001 at paragraph 5 gave evidence to the same effect. In cross-examination Mr. Comer accepted that the conversation with Mr. White on this occasion

had been about the possibility of **Discain** tendering and that no agreement had been made. Mr. Purfield stood by the evidence in his witness statement.

7. The response to the letter dated 15 October 1998 was a letter dated 19 October 1998 written by Mr. Luke Comer on the printed stationery of Opecprime. In the letter dated 19 October 1998 Mr. Comer wrote, so far as is presently material:-

"Further to your fax of 15th October 1998 we are pleased to instruct you to design and erect balconies at Davy House, Harrow. The design and specification shall be as per our sample and your quotation dated 15th October and will include round sections at each of the three entrances, as previously agreed.

We are agreeable and confirm the quotation price of £592,000.00 plus VAT.

Payments shall be made within 30 days of receipt of your accounts and we confirm that invoices should be rendered after completion of each of the four units equivalent to the size of samples seen on site. Best prices to be achieved on glass and non-slip floors and to be supplied and fitted for us at cost.

Timescale – We will need at least four units described as above completed by the 7th November 1998 and at least three sections weekly thereafter, unless otherwise instructed by ourselves. "

In his witness statement Mr. Comer said that he considered his letter dated 19 October 1998 to be a part of a binding agreement with **Discain**, presumably as from the date it was dispatched. In cross-examination Mr. Comer characterised the reference in the letter to the inclusion of round sections having been agreed as a request to include them. He said that the reference to glass and non-slip floors being supplied at cost would have been based upon what Mr. Purfield would have said in a telephone conversation **Discain** was prepared to do. Mr. Purfield himself did not give any evidence about any such conversation.

8. **Discain** in its turn replied to Mr. Comer's letter dated 19 October 1998 in a letter dated 26 October 1998 signed by Mr. Purfield but bearing the reference of Mr. Michael White. Mr. White's evidence was that, although the letter bore his reference and the usual practice within **Discain** was that the reference on a letter indicated who had drafted it, he had not in fact drafted this letter. Mr. David White's evidence was that it was he who had drafted the letter, The letter included the following:-

"We thank you for your letter of intent dated 19th October 1998, value £592K excluding VAT.

Our price is based on your existing sample Design and Fixings and as requested we have allowed for the structure to be hot-dipped galvanised before painting. We have made no allowance for the fabrication of the radius areas over the three entrances as inadequate information was available at the time of tender, other points that we wish to made [sic] being other aspects not allowed for within our tender price are referred to in paragraphs numbers b, c, d, e, f, g, h, and i.

a. Quotation

Our quotation has been based on the current sample erected at Davy House with inevitable design changes due to a galvanised finish required on steelwork. (eg Existing support tees are fabricated with stitch welding, we will be proposing a folded plate connection or structural tees) details to be forwarded for approval.

b. Glass Panelling

We have not allowed for it's [sic] supply or fixing, we are however searching the market for prices on your behalf. If you wish us to incorporate the installation programme management within our brief our costs will be based on suppliers cost plus 15%. We await your instructions on this matter.

c. Non-Slip Finishes

Here again the same as (b.) applies...

j. Programme

Work to commence A.S.A.P. immediately approval has been given to our design drawings.

j. Payment Terms

As agreed by yourself and Mike White the first nine sections will be paid for straight away, minimum 3 No. sections per invoice thereafter nett 30 days from date of invoice.

As discussed an official order from Comer Homes Group would be appreciated.. "

Mr. Michael White agreed in evidence that he was the person referred to in the paragraph about payment terms. He said that he had discussed payment with Mr. Comer at the meeting with him to which I have already referred.

9. Mr. David White then wrote a letter dated 29 October 1998 to Comer Homes Ltd., marked for the attention of Mr. Comer, on the subject of non-slip flooring. Mr. White said:-

"With regard to the abovementioned item and subsequent instruction to find suitable Non-Slip Finishes to all Balconies we comment as follows.

Due to the fact that plates forming the balconies floors are galvanised the number of finishes available are highly restricted, we have found through research that the average rate per sq/mtr is averaging between £29/£30 per sq/mtr.

However two companies have emerged who can put forward specification with 20 yr guarantees.

[The names and telephone numbers of the two companies were then set out.]

They are both prepared to price the works subject to a site inspection Budget rates offered range from £13/£18 per sq/mtr. Winter working using the products is a problem i.e. moisture and temperature. How ever this can be over come [sic]. "

10. Documentation put before me indicates that Mr. David White sought from a company associated with Hayes quotations in relation to the fitting of glass panels to balconies at the Block. Mr. Purfield then wrote a letter under his own reference dated 3 November 1998 to Mr. Comer which began:-

"Further to our letter of 26th October, 1998 and our telephone conversation of 27th October, 1998 please find enclosed details of glazing and non slip floors as promised for the above project.

As with the non slip floors (our letter of 29th October, 1998) because of the specification ie type of glass, holes and sizes, there are only two suppliers who can meet our specification requirements.

In our summary sheet, we have allowed a p.c. sum for glass fixings, as cost can vary widely, depending on which type you chose.

Should you wish to incorporate the above, within our scope of works, we will be pleased to do so on the basis of nett invoices plus 15% management fee.... "

11. The next letter which is relevant to the dealings between the parties in relation to a possible contract is one dated 10 November 1998 written under the reference of Mr. David White but signed by Mr. Purfield. This was the first letter in which **Discain** gave an indication of the likely cost not only of the fabrication and installation of steelwork for the balconies at the Block, but also of the installation of glazing and the provision of non-slip flooring. The letter was, so far as is material, in the following terms:-

"Further to our meeting of Thursday 5th November we wish to confirm the following, we are currently manufacturing Sample No. 2 which will incorporate the changes you have suggested. We are aiming to have the final sample ready for inspection week commencing 16th November 1998. On receipt of your written acceptance of the same we will then be in a position to commence full-scale manufacture.

As per your instructions please find following a break down of the envisaged total cost of the balcony installations.

Price Breakdown.

1. Steelwork Balconies. (Design, Manufacture, Galvanise, Paint Finish and Erection. 1440 Linear Mtrs.) £592,000.00

2. Glazing. £136,784.00

3. Non-Slip Flooring. £031,043.00

Total (Excluding Radius Areas) £759,827.00

4. P.C. Sum for Entrance/Void areas. (Assuming a curved Steelwork specification. £100,000.00

Grand Total (Including P.C. Sum) £859,827.00

Note.

Item 2 and 3 are based on the acceptance of Specification and Quotations obtained from the following companies."

[Details of the relevant companies were then set out]

"Any deviation from the specification could result in increased costs."

12. In a letter also dated 10 November 1998, also bearing the reference of Mr. David White, but this time signed by him, **Discain** submitted a quotation to Opecprime for the design, manufacture and installation of the Deck and a possible mezzanine floor. The sum quoted for the design, manufacture and installation of the Deck was £29,038.

13. Mr. Comer wrote a curious, but significant, letter to Mr. Purfield which was dated 11 November 1998. That letter was in these terms:-

"Further to your fax of 10 November 1998 I now write to remind you that you are in grave danger of being in breach of your contract even before you commence work on site. On or about 12th October 1998 you approached me directly at the Davy House site to enquire if you could quote for balconies for that development. I informed you that we were just about to give out the contract as it was essential that we commence erecting the balconies on site by the end of October, or at the very latest, the first week in November. You assured me that your company could reach this target.

Discairn Project Services Ltd v. Opecprime Developments Ltd [2001] Adj.L.R. 12/11

With this assurance I agreed to let you quote for balconies. I handed you a measured sketch totalling 1598 linear metres. I explained that over each of the three entrances the balconies were to be curved, as per the sketch, and apart from one or two minor changes, ie 50mm higher hand rail etc., straight sections were to be as sample on site.

My letter appointing you on 16th October clearly states this. Since then you have sent us a series of letters trying to back-track from our original agreement and price, which is completely unacceptable to us. You have also delayed this £25 million development by a further 4 weeks, which will have disastrous knock on effects for us, costing approximately £250,000.

*I now put you on notice that unless I have written confirmation from you by 4pm today that you will supply and erect balconies, including all glass and non-slip flooring, curved sections etc. of approx. 1600 linear metres over 6 floors, for a total cost of £740,000 plus the cost of tinting the glass (to be charged at cost to you), and that you will commence installation of the balconies by no later than Monday 16th November 1998 and complete at least 100 linear metres per week, as per our original discussions (unless otherwise instructed). In the absence of this confirmation I will have no alternative but to immediately dismiss **Discairn** from the project and sue for recompense for the month's delay you have caused to date. I will regret having to take this course of action but I simply cannot continue with your inaction and waffling letters."*

14. Mr. David White replied to Mr. Comer's letter dated 11 November 1998 in a letter of the same date. "We acknowledge receipt of your faxed letter dated 11th November 1998 Ref: LC/Discairn.

We wish to clarify the following points yet again.

Our original quotation dated 15th October 1998 was based upon the existing site sample with galvanised and painted finish as per your request. At no time was 1600 Linear Mtrs refer [sic] to, we believe that this figure is the complete perimeter of Davy House. I have enclosed for your attention extracts from Drg. No. which clearly shows voids marked at the 3 No. Entrances. We understand that the building structures in these areas are not suitable for the fixing off Balconies.

On receipt of your incorrect letter of intent dated 19th October 1998 we felt the need to clarify certain points against our quotation DJW/mg/CLQ dated 15th October 1998. We dually [sic] submitted our confirmation letter MJW/mg/297 dated 26th October 1998, which we believe clearly clarifies our scope of works and our position. We have to date received no confirmation of the same and therefore assumed that all points raised were acceptable.

We in good faith have continued with the Design requirements and the production of a sample for your approval. During a workshop inspection on Thursday 5th November 1998 of the said sample further design changes were requested by your good self, which we are currently incorporating into the design/detailing process, with a second sample due for inspection week commencing 16th November 1998.

We believe that from the out set we have been open and honest in our efforts to achieve a quality product at the right price for Comer Homes Group it would appear from the tone of your letter that these efforts have not been appreciated. However we hope that it will be possible to amicably resolve this matter and that mutual respect will be restored as little is achieved from mud slinging.

However we must make you aware that substantial costs have been incurred to date, which we will seek to recover from Comer Homes Group should the current situation not be resolved by the close of business on 12th November 1998."

15. It appears that the letter dated 11 November 1998 from Mr. David White provoked Mr. Comer to telephone Mr. Purfield on 12 November 1998. In a letter of that date to Mr. Comer Mr. David White wrote:-

"With regard to the abovementioned project and subsequent conversation with our Mr. Mike Purfield we wish to table the following.

We have examined all aspects of our quotation of the 15th October 1998 and present our finding on the enclosed spreadsheet. We have made a commercial decision and are prepared to undertake the project as specified in the sum of £853,498.00 Based on a total Linear Meterage of 1659 mtrs as measured. Any deviations up or down will be calculated at the rate of £514.45 per linear mtr.

Curved Areas

We have assumed that the curved areas will be of similar construction to the existing and the maximum point of curve will be 2.5 mtrs from the edge of the building. We have equally assumed that we will be fixing to the existing concrete structure.

Glazing & Non-Slip

Should you wish to peruse [sic] alternative sources for the Glazing & Non-Slip Floors we would have no objection.

Programme

We will be in a position to submit a detailed programme on your written approval of the galvanised sample.

We await your instructions. "

16. At paragraph 7 of his witness statement Mr. Comer said this about the events of 12 November 1998:-
"I spoke to Mike Purfield at length on 12th November 1998 with a view to resolving the matter once and for all. I insisted that I would require an inclusive quotation for the complete circumference of the building. The Claimant then wrote offering to complete the whole project at an overall price of £853,498.00 which was based on a price of £514.45 for a linear metre for 1659 metres. I spoke to Mike Purfield again by telephone on that day and told him that I would not move from my figure of £500.00 per metre for straight sections and £600.00 per metres [sic] for the radius sections with the provision of glass and non-slip paint finishes to be included in the price. Eventually Mike agreed those prices and that was the settled contract price from that date. Subject to approval of the Claimant's prototype and designs all terms of the contract were by then agreed."

In cross-examination Mr. Comer said that as at the end of 1998 he had not finally agreed a contract with **Discain**, but he had agreed prices of £500 per linear metre for straight sections of balcony and £600 per linear metre for curved sections.

17. At paragraph 6 of his witness statement Mr. Purfield gave this account of the events of 12 November 1998:-

"I then spoke to Luke Comer who told me that he wanted an exact price from me for completed balcony units to include all finishes as a result of which conversation David White sent his letter of 12th November 1998 to Luke Comer. I believe it was on the same day that Luke called me to discuss prices further. Michael White was sitting next to me listening to the conversation whilst I was talking to Luke. By this stage we were offering to build complete sections of balcony including glass and paint finishes at the rate of £514.45 per linear metre. Luke told me that the highest price that he was prepared to pay for complete units was £500.00 per linear metre for straight sections and £600.00 per linear metres [sic] for curved sections. I spoke to Michael White during the phone conversation with Luke Comer and said words to him to the effect of "do you want the job or not? There's so little in it" and he then told me to agree to Luke's prices which I did. From then on the agreed prices per linear metre were £500.00 for straight sections and £600.00 for curved sections to include all glass and paint finishes."

At paragraph 8 of his witness statement Mr. Purfield said:-

"Luke was pushing for manufacture and erection of some balconies before Christmas but we could not proceed without full approvals from the structural engineer, Peter Zussman. I recall a heated discussion that I had with Luke Comer late in November or early in December 1998 about our progress. He was telling me that we were just delaying and nothing was happening. He threatened to sue us for breach of contract. I told him repeatedly that we had to follow a proper process and that I had already told him that we would not be on site until January. I was aware that we could lose the whole contract. Shortly after that Luke called me and said that he was giving half of the contract to Hayes Industries and that he would give us the other half."

At the commencement of his evidence in chief Mr. Purfield sought to correct the references in paragraph 6 of his witness statement to Mr. Michael White to references to Mr. David White.

18. In cross-examination Mr. Purfield gave a completely different account of the conversations with Mr. Comer dealt with in paragraphs 6 and 8 of his witness statement. He said that the agreement of prices of £500 per linear metre for straight sections of balcony and £600 per linear metre for curved sections and the indication that **Discain** would have to share the supply and installation of balconies at the Block with Hayes happened in the same conversation. At the time of that conversation Mr. Purfield was not in the offices of **Discain** and neither Mr. Michael White nor Mr. David White was with him. Instead Mr. Purfield was at a dinner party in Cardiff. The conversation was nearer the end of November 1998 than the beginning. At his dictation I took down this note of Mr. Purfield's evidence:-
*"It was at the dinner party in Cardiff that I spoke to Mr. Comer and he said that **Discain** would be offered half of the work of fitting balconies at Davy House if **Discain** would agree to accept a price of £500 per linear metre for straight sections and £600 per linear metre for curved sections. The next day I spoke to Mr. David White and he agreed to that proposal. I then spoke to Mr. Comer and told him that **Discain** was agreeable and would go ahead. When I made my witness statement I was muddled in the accounts which I gave in paragraph 6 and paragraph 8. My evidence is as I have given it from the witness box."*

That evidence was not supported by the evidence of Mr. Comer, who gave his evidence before Mr. Purfield. That account of Mr. Purfield was not put either to Mr. Michael White or to Mr. David White, both of whom gave evidence before Mr. Purfield.

19. The instructions anticipated by Mr. David White in his letter dated 12 November 1998 were slow in coming. Nothing relevant was heard from Opecprime in writing during the rest of the calendar year 1998. However, it does appear that a meeting took place on 19 November 1998. Such a meeting was referred to in a letter dated 19 November 1998 written by Mr. Purfield to Mr. Comer. In that letter Mr.

Purfield quoted a rate of £1,425 per tonne as a general rate for the design, manufacture and installation of structural steelwork. That elicited no response from Mr. Comer. In another letter dated 19 November 1998 to Mr. Comer Mr. Purfield confirmed that in a telephone conversation of that day Mr. Comer had indicated his approval of a sample of a balcony fabricated by **Discairn**, subject to a number of minor matters, but recorded that it would be necessary to receive

"Confirmation by Mr. Luke Comer to commence manufacture."

20. It appears that at about the end of November 1998 Mr. Comer decided that the manufacture and installation of the balconies for the Block should be split between Hayes and **Discairn**. In a letter dated 26 November 1998 to Mr. Stephen Smith of Hayes Mr. Comer wrote as follows:-

"Further to our various meetings and discussions I am now pleased to formally instruct you to immediately commence fabrication and installation of balconies at Davy House.

Design to be as per your sample and incorporating the following alterations:-

Handrail now to be 1175 mm high, all mild steel work to be galvanised and glass to be blue tint.

Your contract is for approximately 850 linear mtrs. at the rate of £510 per mtr. for straight sections and £610 per mtr. for curved sections. Extra charge for tinting glass above cost of clear glass to be at cost.

Please find enclosed £12,000 deposit cheque. I will expect installation of balconies to begin by the 2nd week of December or before."

However, the position so far as **Discairn** was concerned was indicated by a letter dated 30 December 1998 written by Mr. David White to Messrs. Zussman Bear Partnership ("*the Engineers*"), structural engineers acting on behalf of Opecprime, in which he said:-

"We are currently waiting for clarification from your client on his intention in relation to this project, until such clarification are forthcoming we are unable to present any further information. "

21. A meeting took place on 7 January 1999 between Mr. Alex Golding of Allied Building Contracts Ltd. ("*Allied*"), which was the main contractor for the building works intended at the Block, Mr. Peter Zussman of the Engineers, Mr. Mark Lees, who was the architect for the project, two representatives of Hayes, one of whom was Mr. Christopher McGreevey, three representatives of **Discairn**, including Mr. David White, and a Mr. Crookes of Spa Systems. Minutes of the meeting, and of two others on the same day, were taken by Mr. Lees and embodied in a single set of minutes. A copy of these minutes was put in evidence. At the meeting attended by representatives of **Discairn** it was, according to Mr. David White, agreed that **Discairn** would adopt the design of Hayes for straight sections of balcony. Mr. White said that it was also agreed between him and the representatives of Hayes that Hayes would order and install all of the glass required for the balconies at the Block. The minutes recorded only that:-

"SS [of Hayes] agreed with DW [Mr. David White] to order all the glass for the building to prevent differences in appearance from different manufacturers and different batches."

However, there was no real dispute at trial that the agreement of which Mr. David White spoke was that which was in fact made at some point round about this time. Mr. McGreevey in his evidence put it as being made after the meeting on 7 January 1999. The fact of the making of the agreement and of its terms were confirmed by a letter dated 14 May 1999 written by Mr. Purfield to Mr. McGreevey, which included the following:-

"...We would ask you to note as agreed at the site meeting of 9th January 1999 and meeting at our office on the 10th February 1999 Hayes Industries Limited were given the contract for glazing on all balconies on Davy House.

Your request for attendances therefore should be directed to the Davy House Project Team, as glazing does not form part of our contract with Comer Homes Limited..."

22. The second of the two further meetings held on 7 January 1999 was, according to the minutes, concerned with the question of inspection of a sample of the balcony and was attended by Mr. Comer, Mr. Golding, Mr. Lees and Mr. Crookes. The relevant part of the minutes recorded that Mr. Comer
- "...Approved the sample of the blue glass for the balcony panels.*

[and]

In general approved the design, workmanship and appearance of the sample with the following reservations:-

a) The paint finish generally was very poor.

b) The top curved section had a weld which had not been ground flush prior to painting and the curve still showed signs of reduction which it was claimed would not be present on this sample.

c) Water was noted to be laying in some of the integral box gulleys.

d) No drain rod outlets were noted at ground floor level.

e) Several junctions between elements have not been fully welded and this may lead to areas which cannot be guaranteed to be 100% galvanised. This may lead to future deterioration. "

23. It appears that, following the three meetings on 7 January 1999, a copy of the minutes of all three was sent to, amongst others, Mr. David White. He seems to have considered that, in the light of the discussions in which he participated, including one with Mr. Comer after the meeting on 7 January 1999, and the contents of the minutes in relation to the meeting to inspect a sample of the balcony, the question of what exactly **Discairn** was to be asked to provide had been resolved and that all that was required was the fabrication and installation of structural steelwork. He wrote a letter dated 11 January 1999 to Opecprime marked for the attention of Mr. Comer of which the material part read:-
"With regard to the abovementioned project and subsequent conversation with our Mr. David White we wish to confirm the following points raised.

Site Sample

- As agreed we shall be manufacturing as per the site sample, with the following alterations.
 1. **Discairn** to use a pressed angle fabrication on the support tee's/drain gullies instead of fabricated tee's, with all seams fully welded.
 2. Floor Plate support to horizontal C.H.S. to have plate lugs welded on as per **Discairn** sample.

Exclusions

- **Glazing supply and installation.**
- **Non-Slip flooring.**

Rate

- **Linear Mtr. Straight. £411. (Ex.VAT.)**
- **Linear Mtr. Curved £511 (Ex. VAT)**

Payment Terms

- **Payment in full on the installation of every 4th No. Balconies.**

We do hope all the above meets with your approval but should you require any further information please do not hesitate to contact the undersigned.

We await your written instruction on the above."

It appears that **Discairn** did not receive any written response to this letter, but the evidence of Mr. David White was that Mr. Comer agreed verbally to what was set out in the letter. At paragraph 10 of his witness statement Mr. Comer said:-

"On receipt of the letter of 11th January 1999 I called Mike Purfield and told him that the agreed prices were £500.00 and £600.00 per linear metre to include paint and glass and he confirmed that that was the case."

However, Mr. Comer in cross-examination seemed to accept that he had agreed with **Discairn** the terms set out in the letter dated 11 January 1999. He said that agreement of those rates was not the end of the World for Opecprime and that he was quite prepared to pay **Discairn** on that basis. He said that his concern was that **Discairn** would be dependent on another company to complete its work and that he had serious doubts about **Discairn's** ability to deliver. He said that to the best of his recollection he received the letter dated 11 January 1999 in the ordinary course of post.

24. Mr. Purfield in his evidence did not support either version of Mr. Comer's evidence about the letter dated 11 January 1999. At paragraph 12 of his witness statement Mr. Purfield said:-

"On 11th January 1999 David White produced a letter of that date addressed to Luke and asked me to sign it and post it to Luke Comer. This letter was an attempt to go back on what was already agreed and proposed prices excluding glass and non-slip paint finishes. I told David that there was no point in sending the letter because Luke would not accept it. David then told me to send the letter because he wanted to establish the prices of £411.00 and £511.00. He told me that he intended not to install glass and paint and the letter would enable him to bill at the rates of £411.00 and £511.00 per metre. I then signed and sent the letter."

In cross-examination Mr. Purfield added the detail to that account that Mr. David White had threatened him with dismissal if he did not sign the letter. That allegation was not put to Mr. David White when he was cross-examined. Mr. Purfield also added the detail in cross-examination that he believed that Mr. Comer had been absent on holiday for much of January 1999. That was not the evidence of Mr. Comer himself.

25. Mr. David White gave evidence that **Discairn** started to commence fabrication of the balconies for the Block on 15 February 1999. However, despite his verbal agreement with Mr. Comer, he seems to have been concerned that he had received nothing in writing from Opecprime. On 26 February 1999 Mr. Purfield was sent to Opecprime's offices to seek to obtain a written order. What Mr. Purfield came back with was a letter dated 26 February 1999, addressed to Mr. David White and signed by Mr. Comer, which was in these terms:-

"Further to your recent correspondence please proceed with manufacture and erection of balconies as agreed at £500 per linear metre on straight areas and £600 on curved sections.

Should Hays Industries install the glass, we understand you will credit us as accordingly.

Delivery is required immediately. Payment as agreed, on completion of 4 no. balconies."

Mr. David White said in his evidence in chief that he did not know why Opecprime had sent the letter. In cross-examination he said that it was a typical ploy on the part of Mr. Comer which did not trouble him as he knew what he, that is, **Discairn**, was supplying, namely steelwork. Mr. Comer in his witness statement at paragraph 11 said that when Mr. Purfield came to his offices on 26 February 1999 seeking a letter of intent he, Mr. Comer, told Mr. Purfield to go outside and dictate to Mrs. Terri Green whatever was required. The letter which I have just quoted was the result. He said in chief and in cross-examination that he signed the letter because it appeared to record the existing agreement between the parties. However, in cross-examination he sought to reconcile the terms of the letter with the terms of the agreement which he seemed to accept he had made with Mr. David White and to which I have already referred. In his cross-examination Mr. Purfield contended that he had checked the contents of the letter dated 26 February 1999 with **Discairn's** offices for accuracy before accepting it. That allegation was not put to either Mr. Michael White or to Mr. David White in their respective cross-examinations.

26. The first invoice which was raised on behalf of **Discairn** in relation to the fabrication and installation of balconies at the Block was dated 30 April 1999. It related to a total quantity of 214.884 linear metres of straight balcony and, on its face, indicated that the rate of charge sought was £411 per linear metre. The total sum sought in that invoice, inclusive of Value Added Tax, was £103,772.89. As "Your Ref" the invoice stated "Letter of intent 26. 02. 1999". That invoice drew forth neither payment nor any other reaction from Opecprime immediately. **Discairn** raised a further invoice dated 17 June 1999. By that date the first invoice remained unpaid. The second invoice set out again the quantity of 214.884 linear metres, showing a rate of charge of £411 per linear metre, and a further quantity of 114.3 linear metres, showing a rate of charge of £411 per linear metre less 20%. The total sum payment of which was sought in the second invoice was £44,158.62. "Your Ref" was completed in the same way for the second invoice as for the first.

27. Towards the end of June 1999 Opecprime did provide a post-dated cheque to **Discairn** in payment of its first invoice. However, payment of that cheque was countermanded. Mr. Comer wrote a letter dated 25 June 1999 to **Discairn** which read as follows:-

"We write to record our total dissatisfaction with your performance in respect of manufacture and erection of external balconies at the above.

We would refer you to our letter of acceptance of your quotation dated 19th October 1998 which details our program requirements and also the many verbal commitments of performance received from your company. It is now very apparent to us that you give no respect to our program requirements.

Your lack of performance in erection and balcony completions has caused major disruption to other trades on site, ultimately resulting in very timely delays in apartment completions. Such delays have serious financial repercussions and are completely of your own making.

We therefore wish to advise that we will deduct from you [sic] account all direct and consequential costs incurred by ourselves and our sub-contractors resulting from your non-performance.

Finally, we confirm that we are unwilling to continue further on this basis and accordingly would suggest that you give this matter your must [sic] urgent attention.

We also advise you that the post dated cheque for £103,000 has now been stopped. It was issued to you in good faith that you would meet the deadline of 22 June to have the curved section of the balconies completed. Incidentally this should have been your first section to complete on the deadlilne [sic] of January 1999. We would also advise that all future payments for this

development should be dealt with through Allied Building Contracts direct, provided of course that you overcome the vast problems aforementioned. "

28. The question of what was due to **Discaïn** in respect of the first invoice which it raised in respect of fabrication and installation of balconies at the Block was indeed dealt with by Allied. Mr. Golding of Allied wrote a letter dated 29 July 1999 to Mr. David White, with a copy to Mr. Comer. That letter included:-

"The balcony area that has been erected to date from gridlines 4e to 12e has been measured as 216 linear metres. The price agreed being £411 (ex VAT) per linear metre. The total price for works carried out to the area stated would be £88,776 + VAT at 17½% = £104,311.80. "

That sum of £104,311.80 was paid by two instalments, the first of £70,000 on 1 July 1999 and the balance of £34,311.80 on 2 August 1999.

29. Under cover of a facsimile transmission apparently sent by Mr. Zussman to Mr. Purfield on 18 May 1999 Mr. Zussman sent to **Discaïn** a general arrangement layout of the steelwork for the Deck. That prompted Mr. Purfield to send to Mr. Comer a quotation for the Deck in the sum of £32,568 plus Value Added Tax by a facsimile transmission dated 2 June 1999. The facsimile ended, *"We await your instructions to proceed."* Under cover of a facsimile transmission dated 14 June 1999 Mr. Zussman sent to Mr. Purfield a revised drawing of the Deck. **Discaïn** did proceed to manufacture and instal the Deck and raised an invoice dated 28 September 1999 in the sum of £45,382.59 in respect of it. The justification for the particular sum claimed was said in the invoice to be *"Rate as per letters £1425 per tonne"*.

30. From a letter dated 26 October 1999 written by Mr. Purfield to Mr. Golding, of which a copy was put in evidence, it appears that meetings took place between representatives of **Discaïn** and Mr. Golding on 23 and 26 October 1999 at which the progress of the installation of balconies at the Block was discussed. The letter included:-

"At our meeting of 23rd October 1999 you demanded completion of Grid Line 12 C/E by 7th November 1999. Our programme for Grid Line 12 C/E to 18 is 31st [sic] November 1999.

As per your request we have examined the possibility of completion of 12 C/E and our best forecast is 20th November 1999.

At our meeting of the 26th October 1999 you stated that this time scale was unacceptable and you will now appoint Hayes Industries to take on this section of the works.

It was stated that you wish to purchase our materials and have Hayes Industries complete the entire works including snagging 4/12 and 1st Radius Area.

*We wish to state **Discaïn**'s position to the foregoing as follows:-*

***Discaïn** will complete Grid 4/12 and 1st Radius Area including all snagging.*

We would request your written snagging list by return and on receipt will immediately submit our programme and implement works. "

The letter went on to draw attention to the state of account between Opecprime and **Discaïn** and to propose a schedule of payments. It appears from a consolidated statement of account dated 23 May 2000 prepared on behalf of **Discaïn** that on 25 October 1999 a payment of £50,000 was made on behalf of Opecprime to **Discaïn** by a company called Placement Mews Properties Ltd. When asked about that Mr. Comer said that the correct name of the company was Princess Mews Properties Ltd. and it was an associated company of Opecprime. It seemed to me from his answer in relation to this payment that Mr. Comer was not accustomed to differentiate between the various companies in the Comer Homes Group when it came to making payments, and that any necessary payment would be made by any company in funds, regardless of the company upon which the liability to pay in fact rested. However, the timing of the payment is interesting in the light of the correspondence from Mr. Golding which succeeded it and in the light of the attitude later adopted on behalf of Opecprime.

31. Mr. Golding replied to Mr. Purfield's letter dated 26 October 1999 in a letter dated 29 October 1999 as follows:-

"We acknowledge receipt of your letter dated 26th October, 1999, following our meeting on the 23rd October when we reviewed the current situation regarding your progress on the above project.

It is our opinion that you have not proceeded regularly with the works or with due diligence and have made no effort to integrate your works with the requirements of the main contract. The programme was agreed for your works which has not been adhered to and all subsequent promises by you to complete by specific dates have not been met.

It is essential that all works up to gridline 12 are completed so that practical completion of the flat units can be achieved and funding released to the employer. Given the minimal amount of work to this area, as detailed in your letter, we require you to complete to the required standard within seven days of the date of this letter.

In order to assist you with the completion of the outstanding works, we suggest that we employ Hayes Industries to carry out the works to gridline 12/13 C-E, as you have not commenced production of the materials for this area. This will allow you to concentrate on gridlines 13 – 18, once you have completed works up to gridline 12, and will ensure that the units abutting gridline 12/13 are completed as soon as possible.

We trust you will use your best endeavours to achieve the above and mitigate the effect that your delays have caused to the regular progress of the works.

Please confirm your agreement to our proposals concerning gridline 12/13 C – E immediately. "

32. **Discain** did in fact agree that Hayes should undertake the fabrication and installation of balconies on gridline 12/13 C – E, and that was done. In a letter dated 5 November 1999 to Mr. David White Mr. Golding wrote thus:-

"Further to my letter to your Mr. Purfield dated 29th October, in which I extended a deadline of today's date for completion.

As it is clear that this deadline will not be made, I am prepared to extend this until 12 noon on Monday 8th November.

If completion is not achieved by this time, I will have no alternative but to determine your contract.

I enclose a list of works still outstanding as at today's date."

33. The complaints about the progress of **Discain** made by Mr. Golding in the latter part of October and the early part of November 1999 formed the background to a meeting which took place on 11 November 1999 between Mr. Michael White, Mr. David White and Mr. Purfield, for **Discain**, Mr. Comer for Opecprime, and Mr. Golding. The meeting took place at the Block and took the form of the participants walking around the balconies which had been installed by **Discain**. It was common ground that at the meeting Mr. Comer insisted that **Discain** should not only supply steelwork for the balconies which it was erecting, but also supply and fit glazing and non-slip flooring. Mr. Michael White and Mr. David White said in evidence that they agreed on behalf of **Discain** that **Discain** would go out to sub-contractors to obtain prices for the supply and fitting both glazing and non-slip flooring, and that **Discain** was prepared to undertake that work but as extra work at an extra cost. Their evidence was that Mr. Comer accepted that and agreed to it. Mr. Comer accepted in his witness statement at paragraph 16 that he agreed to pay extra, at a rate of £300 per divider, for the provision of glass dividing panels on the balconies to separate the balcony of one flat from the balcony of the next. In cross-examination he accepted that he also agreed on that occasion to pay extra for skirtings. He was somewhat equivocal as to whether he agreed to pay extra for glazing and non-slip flooring. He said in cross-examination that he thought that only dividers and skirtings had been discussed at the meeting. However, his evidence in relation to glazing and non-slip flooring generally was that he was prepared to pay at the rates of £500 per linear metre for steelwork, glazing and non-slip flooring for straight sections of balcony and £600 per linear metre for the same elements on curved sections. It did seem, therefore, that he accepted that some sum in excess of £411 per linear metre for straight sections and £511 per linear metre for curved sections would have to be paid if **Discain** was to supply and fit glazing and non-slip flooring. Mr. Purfield's evidence was that at the meeting on 11 November 1999 Mr. Michael White made it clear that he did not consider that the supply and fitting of glazing and non-slip flooring was within the scope of what **Discain** was contractually bound to provide but that **Discain** would provide those elements within overall rates for the supply of balconies of £500 per linear metre for straight sections and £600 per linear metre for curved sections. He said that Mr. Michael White gave indications as to the likely prices of dividers and skirtings and agreed to obtain firm prices and get back to Mr. Comer. In his witness statement at paragraph 18 Mr. Purfield said that it was agreed at the meeting that dividers and supports for them would be treated as extras at a price of £350.

34. Mr. Purfield told me in cross-examination that he was involved on 11 November 1999 in working on a document a copy of the first page of which was put in evidence. The document was a draft of a letter to Mr. Comer, but it appears that it was never sent. The text of so much of the draft as has survived is interesting. It included:-

"Further to our meeting today, 11/11/1999, we wish to propose the following as the way forward to resolving the situation at "Harrow".

AREA 1 Gridlines 4/12

a) All snagging as per Alex Goldings letter 5/11/99 to be addressed immediately and where appropriate items to be actioned.

b) **Discairn Project Services Ltd.** to arrange for installation of non-slip flooring immediately 15/11/99.

This will be charged to Opecprime Ltd. @ £-----L/M.

c) Flat partitions to commence Wed 17/11/99 - **Floors 1-5**

This will be charged to Opecprime Ltd. @ £350.00 each supplied and fitted.

d) Flashing to upstands in Stainless Steel

This will be charged to Opecprime Ltd. @ £-----L/M supplied and fitted.

e) All remaining unglazed areas to commence Wed 17/11/99

This will be charged to Opecprime Ltd. @ £66.00 L/M supplied and fitted."

The terms of the draft which I have just quoted seem to be consistent with the account given by Mr. Michael White and Mr. David White of the meeting on 11 November 1999. When that was pointed out to Mr. Purfield by Mr. Lee during cross-examination Mr. Purfield, drawing a figure from a document to which I shall turn in a moment, made out that the figures for glazing and non-slip flooring, when added to the rates of £411 per linear metre for straight sections of steelwork and £511 per linear metre for curved sections, produced the figures of £500 per linear metre for straight sections of balcony and £600 for curved sections which he and Mr. Comer contended were correct.

35. Mr. Michael White told me that, following the meeting on 11 November 1999 he had prepared and sent a letter dated 18 November 1999 to Mr. Comer which read as follows:-

"Re: Glazing/Non Slip Floor

*Further to our site meeting during which you insisted that **Discairn** now supply the glazing and non slip flooring to all balconies supplied, we wish to confirm the additional costs associated with this work, which are as follows.*

1. Glazing @ £115 per linear mtr

2. Non Slip Flooring @ £25 per linear mtr

Terms.

1. Glazing Pro Forma

2. Non Slip Flooring Monthly Valuations "

Mr. Comer said in cross-examination that he had no recollection of receiving a letter in the terms of that dated 18 November 1999. Mr. Michael White told me that he did not receive any reply to the letter, but he saw no reason to chase for a response.

36. So far as correspondence between the parties is concerned, what followed the meeting on 11 November 1999 was an extended period of silence. There were no more complaints of incomplete work or of lack of progress until towards the end of February 2000. Even at that point the complaints were communicated to **Discairn** only indirectly, by copy of a letter dated 23 February 2000 written by Mr. Lees to Mr. Philip Little, a project manager employed by Comer Homes Group. The letter said this:-

"Following my site visit to the above property earlier today I was again dismayed to find that even on a cursory inspection of the balconies many faults were apparent on both the balcony sub-contractors works. The faults were in the main:-

1. Bolt connections between the building and support brackets missing.

2. Backing plates missing to above mentioned support bolts.

3. Floor plates not connected or bowed and holding water. This problem has been ignored and had led to a resident in an occupied flat slipping on ice that had formed from such a puddle.

4. No support steelwork in the public car park area for straight column supports.

5. No return strut steelwork to the rear curved balcony section.

6. No connection made between balcony support posts and first floor garden deck steelwork.

7. Rainwater outlets positioned below the garden deck finish level.

In addition to these problems the size of washers used on the bolt/plate connectors below the garden deck worries me as does the fact that these problems are being ignored in favour of erecting further balcony sections. On a job of this size and complexity I would expect each balcony sub-contractor to check their own works prior to my snagging marking up each area of balcony that has been checked and approved and issue this to the site manager.

These are basic structural requirements for the balconies and should be treated as such and carried out prior to completing the decorative finishes and my own and the structural engineers' certification of the works.

I hope this reflects our conversation on the matter but please do not hesitate to contact me if you require any further clarification of the issues raised."

As the last paragraph of the letter rather suggests, Mr. Lees was, so he said in re-examination, asked to write the letter.

37. From the consolidated statement of account dated 23 May 2000 to which I have already referred it appears that further payments were made to **Discain** in relation to work at the Block by Allied of £58,750 on 29 November 1999, by J. Rose, who Mr. Comer said in evidence was his solicitor, of £58,750 on 10 December 1999, and by Miltonland of £60,000 on 30 March 2000. Work thus seems to have been progressing essentially to Opecprime's satisfaction up to the end of March 2000. By that point it appears that the structural steelwork which **Discain** was to supply had been supplied and installed, although there are serious issues in this action as to the quality of the work which had been done. In a facsimile transmission dated 31 March 2000 to Mr. Little Mr. Michael White wrote:-

"Please find attached up-to-date statement on the Harrow project. I would like to arrange to meet Luke & yourself on site to agree the finances. We urgently need a further payment to pay suppliers. I would also like to agree a programme for the remaining radius end. With regard to floor finishes if Alex would like to make out a programme we will pass it on the flooring people or alternatively he can contact them direct.

I look forward to hearing from you later today."

38. The meeting desired by Mr. Michael White took place on 17 April 2000 at the offices of Opecprime. Those present were Mr. Michael White, Mr. Comer and Mr. Little. What happened was ultimately not really in dispute. Mr. Comer measured off plans of the Block to calculate what sum would ultimately be due to **Discain** when it had finished its work. Mr. Michael White in his evidence, with which Mr. Little agreed in cross-examination, said that the measure indicated that the sum payable to **Discain** would be £470,000, but that Mr. Comer insisted that he would pay no more than £445,000, which figure Mr. Michael White accepted. Mr. Comer said that the measure indicated that the sum payable was £445,000. He and Mr. Little both said, however, that they later checked the measure and found that in error they had included a section of balcony which had in fact been fabricated and installed by Hayes. The erroneously measured section was, so Mr. Comer asserted, some 26 linear metres in length, worth some £13,000.

39. Although Mr. Little in cross-examination more or less accepted the accuracy of the evidence of Mr. Michael White as to what had happened at the meeting on 17 April 2000, the account which he gave in his witness statement dated 19 October 2001 was curiously different:-

*"In April 2000 I went round all of the **Discain** balconies with David White of **Discain** and Luke Comer and we measured what had been done and what was to be done. We calculated a final figure for when **Discain** completed the installation of the balconies but the figure was slightly wrong as we had included a section erected by Hayes Industries in the measurement. We agreed to pay **Discain** the sum of £70,000.00 generally on account if they would sign a letter acknowledging that the final contract price was £432,000.00 which was to include all balconies including dividers, glass, flashings, floor coatings and handrails all of which was to be constructed to our satisfaction and that of the Structural Engineer. **Discain** refused to sign that letter and eventually commenced adjudication proceedings."*

The indication that the measurement undertaken was a physical one on the site of the Block mirrored the witness statement of Mr. Comer in paragraph 18 where he said:-

"During April 2000 I attended a meeting at Davy House with Michael White from the Claimant and I was accompanied by Phil Little who is an employee of the Comer Group. We went round the site and measured the work to achieve a final figure for when the project was completed. The figure agreed was £445,000.00 but after the meeting we realised that the measurement included a section installed by Hayes and the correct figure was £432,000.00. At the meeting we had agreed to pay the Claimant £70,000.00 on account on their promise to complete all works by mid June. We required the Claimant to countersign our letter dated 20th April 2000 acknowledging the measurement made and confirming their willingness to complete the work. The Claimant refused to sign the letter and the payment was not made to them and no further work was carried out by the Claimant."

Mr. Comer was quite unable to explain how he had come to say in his witness statement, incorrectly, as he accepted, that the meeting on 17 April 2000 had taken place at the Block and to create the impression that the measure referred to in his statement had been a physical measurement.

40. After the meeting on 17 April 2000 Mr. Michael White sent to Mr. Comer a facsimile transmission dated 18 April 2000 in which he sought to confirm what had been agreed as he understood it at the meeting on 17 April 2000. What he said was:-

"Further to our recent meeting I wish to confirm the following points discussed.

- a) Final Account - £445,000 including final radius as agreed.
- b) That there will be men and steel on site to erect the remainder of the radius area at the end of May, subject to the hoist being removed by mid May. Glazing and non-slip floors will be completed by mid-June, subject to all building works being completed.
- c) That a cheque for £70,000 be available for collection on 19th April as agreed.
- d) All outstanding monies due on this project will be paid in full immediately after you have carried out a final inspection of the site around mid-June."

41. Mr. Michael White gave evidence that he went the next day to collect the cheque as arranged but was told by Mr. Little that Mr. Comer was not in the office and he should return the following day. Mr. Little did not dispute that evidence. He accepted that he did not on that occasion mention anything about an error in the measure undertaken on 17 April 2000. Mr. Michael White said that he returned the following day and was kept waiting in Mr. Little's office for some three hours or so. Mr. Little said that he did not remember that, but it could be so. Mr. White said that Mr. Little entered and left his office on a number of occasions while Mr. White was there and eventually Mr. White followed Mr. Little over to Mr. Comer's office. Mr. Comer would not see Mr. White, but Mr. Little emerged from Mr. Comer's office with a letter which he gave to Mr. White. Again Mr. Little said that he did not remember any of this, but he did not dispute it. The letter handed to Mr. White, which Mr. Little said he thought had been drafted on 20 April 2000 by him jointly with Mr. Comer, was in the following terms:-

"We are in receipt of your faxed message in relation to the final account at the above.

We agree that the final figure is £432,000 as is claimed and is to include all balconies including dividers, glass, flashings, floor coatings and stainless steel handrails. This is all to be constructed to the total satisfaction of Zussman Bear Partnership and Comer Homes. These are marked on the enclosed drawings. Also included in this figure is the supply and erection of the garden deck.

We understand from Hayes Industries that glass has been supplied to you by them and we require you to undertake that you will settle this account.

Upon signing this letter we will release £70,000.00 on account as agreed with Mr. L Comer and the balance of monies will be made available on completion of the contract in June 2000."

All are agreed that Mr. Michael White would not sign the letter and that Opecprime was not prepared to pay any further sum unless he did. In his cross-examination Mr. Comer suggested that Mr. Michael White had agreed at the meeting on 17 April 2000 to sign a letter along the lines of that dated 20 April 2000. Mr. Comer even went so far as to suggest that Mr. Michael White had had a hand in drafting it. Those suggestions did not appear in the witness statement of Mr. Comer, were not put to Mr. Michael White in cross-examination, and were not supported by the evidence of Mr. Little that he and Mr. Comer drafted the letter.

42. Mr. Michael White wrote to Mr. Little a letter dated 30 April 2000 which said, simply:-

"Please find attached our Invoice no. 1108 for the payment on account of £60,000 (received) [i.e. the payment made on 30 March 2000 by Miltonland], and our April valuation for works completed at Harrow."

A copy of the valuation attached was put in evidence. It clearly set out rates for non-slip floors of £25 per metre and for glazing of £115 per metre. Mr. Little replied to the letter dated 30 April 2000 in a letter dated 8 May 2000. That letter began:-

"We are in receipt of your letter of 30th April 2000 together with your valuation for April.

Before any further money can be paid on this account, we shall require the following undertakings and work to be satisfactorily carried out.

1. *That you shall sign our letter of 20th April 2000 (Copy Enclosed)*
2. *That we receive an indemnified 10 yr. Guarantee in relation to all balconied [sic] erected by Discairn.*
3. *That you will undertake to complete the following works entirely to our satisfaction:-*
All glass, dividers, non-slip flooring, flashings, grouting and generally leave the entire works complete to our total satisfaction.
4. *That the following items are addressed and dealt with to our total satisfaction."*

There followed a long list of matters relating to the work of installing balconies at the Block. The letter concluded:-

Discain Project Services Ltd v. Opecprime Developments Ltd [2001] Adj.L.R. 12/11

"As you can see from the above there are many fundamental issues which need to be addressed before any further money can be paid on this account. We therefore demand that you advise us immediately how you intend to tackle the serious issues that have been raised in this letter."

Mr. Little did not, in his letter, raise any point as to the accuracy of the valuation enclosed with Mr. Michael White's letter dated 30 April 2000. When asked about that in cross-examination Mr. Little said that his letter had not been about valuation matters but about defective works.

43. The case pleaded in the Amended Particulars of Claim as to how a contract between **Discain** and **Opecprime** was concluded was as follows:-

"4B. During meetings held on or about 7th January 1999, and as confirmed in a letter from the Claimant to the Defendant, dated 11th January 1999 with reference DJW/mg/CL561/5, it was agreed orally between David White and Luke Comer

(a) that the Claimant was to fabricate balconies in accordance with the design produced by Hayes Industries Limited, save that **Discain** were to use a pressed angle fabrication on the support tees/drain gullies instead of fabricated tees, with all seams fully welded, and that floor plate support to horizontal CHS were to have plate lugs welded on as per the sample which had been produced by the Claimant;

(b) that supply and installation of glazing and non-slip flooring was excluded from the scope of the Claimant's works;

(c) that the rates of £411 (Ex. VAT) per linear metre of straight balcony, and £511 (Ex. VAT) per linear metre of curved balcony (exc.VAT) were to apply.

4C. In the premises either there was a contract formed on or about 19th October which was varied by the agreement set out in paragraph 4B above, or alternatively a contract was formed for the first time on the terms set out above in paragraph 4B. "

No other particular terms of the contract contended for were pleaded.

44. Paragraphs 6A to 6H of the Amended Particulars of Claim were in the following terms:-

"6A. On or about 11th November 1999, and during a meeting on site between Michael White of the Claimant and Luke Comer of the Defendant the Claimant was instructed to supply and install glass and non-slip finish. By letter dated 18th November 1999, the Claimant offered to do so at the rates of £115/m and £25/m respectively. That offer was accepted by the Defendant by its conduct in allowing that work to proceed without further query.

6B. During the course of the works the Claimant was instructed by the Defendant to provide (and did provide) additional items of steelwork, being 45 perforated stainless steel gully plates, 150m of painted metal skirtings, 46 glass dividers and 60 steel support brackets for the glass dividers. The Claimant is entitled to be paid for that work at reasonable rates, and reasonable rates for these items are £42 each, £12/m, £300 each and £60 each respectively.

6C. In addition to the above, in about November 1998 the Defendant provided the Claimant with a drawing (DRg. L/5498/1b) showing an additional steel structure known as the garden deck, and the Defendant asked the Claimant to quote for the fabrication and erection thereof.

6D. By letter dated 10th November 1998 the Claimant quoted a lump sum price of £29,038 for the garden deck as then designed.

6E. On 19th November 1998 and following a meeting between Mr. Purfield (of the Claimant) and Mr. Comer (of the Defendant), the Claimant explained that its quotation for the garden deck was based on the rate of £1425.00 (exc. VAT) per tonne of steel (shot blasted and one coat of primer).

6F. The design of the garden deck was changed by the Defendant and following the supply of amended general arrangement drawings to the Claimant on 18th May 1999, the Claimant (by fax dated 2nd June 1999) revised its price by applying the same rate. The Claimant's quote then stood at £32,568 (exc. VAT).

6G. Following that quotation the Defendant changed the design of the deck still further culminating in the design shown on drawing L/5498/15E which was sent to the Claimant on 9th August 1999 under cover of a letter which requested the Claimant to commence work on the garden deck by production of fabrication drawings. The revised design included 31.8 tonnes of steel.

6H. The Claimant did fabricate and erect the garden deck in accordance with drawing L/5498/15E and in the premises the Claimant is entitled to be paid for the garden deck on the basis of the previously quoted rate of £1425 per tonne (exc. VAT), or alternatively the Defendant [sic] is entitled to be paid a reasonable price which it is averred should be calculated on the same basis, giving a total price of £45,382.59."

45. In the Defence and Counterclaim as originally served Opecprime's case as to the contractual arrangements between itself and **Discain** was pleaded thus:-

"4. Save as is admitted paragraph 5 of the Particulars of Claim is denied. Following discussions between the parties they had agreed in principle that straight sections of the balcony would be provided at a price of £411.00 per metre and curved

Discairn Project Services Ltd v. Opecprime Developments Ltd [2001] Adj.L.R. 12/11

- sections thereof at a price of £511.00 per metre. The Claimants confirmed their proposed revised prices by letter dated 11th January 1999 and then offered to include the supply and fixing of glass panelling and to provide non-slip finishes for an additional charge of £116.54 per metre.
5. Following further discussions between the parties agreement was reached on or about 26th February 1999 that the Claimant would manufacture and erect sections of balcony at the price of £500.00 per metre for straight sections and at a price of £600.00 per metre for curved sections and that included in that price the Claimant would supply and fix glass panelling and provide non-slip finishes. It was further agreed that in the event that Hayes Industries actually installed glass panelling then the Claimant would give the Defendant credit for the cost of this. Payment was to be made to the Claimant on completion of each set of 4 units.
6. On or about 2nd June 1999 the Claimant agreed to design fabricate and erect the Garden Deck Area at the price of £32,568.00."
46. The Amended Defence and Counterclaim included the following in relation to the contractual arrangements between the parties which were contended for:-
- "3B. On or about 12th November 1998 during a telephone conversation between Mike Purfield for the Claimant and Luke Comer for the Defendant it was agreed that the price to be paid by the Defendant per linear metre of balcony was £500.00 for straight sections and £600.00 for curved sections to include all glass and non-slip paint finishes...
- 3D. Save as admitted paragraph 4B of the Particulars of Claim is denied. Luke Comer did not meet or talk with David White on or about 7th January 1999 and it is denied that the letter of 11th January records an agreement made by them either orally or otherwise...
- 3F. The letter of 11th January 1999 under reference DJW/mg/CL161/5 was written by David White and signed by Mike Purfield on David White's instructions. David White told Mike Purfield to sign and send the letter because despite previous agreements he had no intention of installing glass to the balconies or of applying non-slip paint finishes and he wanted to establish the prices of £411.00 and £511.00 per metre on behalf of the Claimant. On receipt of the letter dated 11th January 1999 Luke Comer telephoned Mike Purfield to talk about the letter and told him that the agreed prices were £500.00 and £600.00 per linear metre with which Mike Purfield agreed...
5. Paragraph 6 of the Particulars of Claim is denied. The Claimant would not commence manufacture without a written order and the Defendant had not sent a written order to the Claimant upon which the Claimant was willing to rely. On 26th February 1999 Mike Purfield attended at the Defendant's offices and dictated the letter from the Defendant to the Claimant bearing that date to a member of the Defendant's sales staff which letter she typed on the Defendant's notepaper. Mike Purfield then took the letter to Luke Comer and asked him to sign it which he did. Immediately after Mike Purfield's delivery of the letter dated 26th February 1999 to the Claimant the Claimant commenced manufacture of parts of the balcony to be erected along gridline E4 to E12. The letter evidences the agreement previously reached between the parties that...the Claimant would manufacture and erect sections of balcony at the price of £500.00 per metre for straight sections and at the price of £600.00 per metre for curved sections and that included in that price the Claimant would supply and fix glass panelling and provide non-slip finishes. It ... recorded that it was agreed that in the event that Hayes Industries actually installed the glass panelling then the Claimant would give the Defendant credit for the cost of this. Payment was confirmed to be made to the Claimant on completion of each set of 4 units.
- 5A. Save as is admitted paragraph 6A of the Particulars of Claim is denied. There was a meeting on 11th November 1999 between Michael White and Mike Purfield on behalf of the Claimant and Luke Comer on behalf of the Defendant at Davy House at which the prices for work previously agreed were confirmed and it was agreed that the Defendant would treat dividers as an extra for which the Defendant would pay the Claimant £300.00 for each divider installed. It is denied that the letter bearing the date 18th November 1999 was ever received by the Claimant. It is further denied that the letter could have amounted to an offer to supply and install glass and non-slip finish because it was a term of the existing contract between the parties that the Claimant would install glass and non-slip paint finish. It is further denied that the Defendant accepted the terms contained in the letter bearing the date of 18th November 1999 by conduct or otherwise.
- 5B. Paragraph 6B of the Particulars of Claim is denied. The Defendant agreed to pay the Claimant £300.00 for dividers because these were not included in the original design of the balconies but the contract price included the provision of gully plates, dividers and support brackets.
- 5C. Paragraphs 6C and 6D of the Particulars of Claim are admitted.
- 5D. Paragraph 6E of the Particulars of Claim is denied. The letter of 19th November 1998 was written by Mike Purfield to provide the Defendant with a guideline to how the Claimant charged for steelwork. The Defendant informed the Claimant that the Defendant would require quoted prices for future work rather than for work to be priced on the basis of the letter dated 19th November 1998.

6. *Save that no admissions as to the basis on which the price was reached is made paragraph 6F of the Particulars of Claim is admitted. On or about 2nd June 1999 the Claimant agreed to design fabricate and erect the Garden Deck Area at the price of £32,568.00.*
- 6A. *Save as is admitted paragraphs 6G and 6H of the Particulars of Claim are denied. It is admitted that the design of the Garden Deck was further revised and that the Claimant produced fabrication drawings and then built and erected the Garden Deck. The Claimant did not seek a variation in price and is bound by the quoted price of £38,568.00 [sic]. It is further denied that the final version of the Garden Deck required more steelwork than was to be used in the earlier design for which the quotation had been given and accepted."*
47. For the reasons which I have already indicated, conclusions as to the contractual arrangements made between the parties depend, to a degree, upon my conclusions as to the reliability of the evidence of the witnesses called on behalf of each party which was relevant to contractual issues. Having seen and heard the witnesses give evidence, and having considered not only what the witnesses said, but how they gave evidence, and how, if at all, the evidence was consistent with the picture presented by the contemporaneous correspondence, I have come to the firm conclusions that I cannot accept the evidence of Mr. Comer or that of Mr. Purfield or that of Mr. Little on any contested issue.
48. It was, I thought, apparent that Mr. Comer's style of doing business was to seek to pressurise and to intimidate those with whom he dealt. In his letter dated 19 October 1998 Mr. Comer purported to accept an offer from **Discairn** which had not been made, namely an offer to supply not only straight sections of balcony, but also curved sections, for £592,000. I am satisfied that in writing as he did Mr. Comer was not labouring under any misunderstanding as to what had been offered: he was manoeuvring for advantage. When, after **Discairn** sent its letter dated 10 November 1998, it was apparent that he was not going to obtain the favourable prices for balconies which he hoped for from **Discairn**, his reaction was to write his letter dated 11 November 1998 threatening a claim for damages of substantial amount, £250,000, so as to try and persuade **Discairn** to agree to provide that for which it had quoted £859,827 for £740,000. The claim for damages was without the shadow of justification, as even on Opecprime's case no contract had been concluded at this point. The same application of economic pressure to seek to achieve his wishes can be seen again in the stopping of the cheque for £103,000 odd referred to in Mr. Comer's letter dated 25 June 1999, and in the unilateral deduction of £13,000 from the otherwise agreed final contract sum of £445,000 in preparing the letter dated 20 April 2000. I am satisfied that in order to advance Opecprime's case Mr. Comer has deliberately and falsely stated events as he would wish them to have been. He has done that in stating that he agreed the rates of £500 and £600 per linear metre verbally with Mr. Purfield on the telephone on 12 November 1998. He has done it in saying in his witness statement that he did not accept the rates set out in Mr. David White's letter dated 11 January 1999. He has done it in his account of the meeting of 11 November 1999. He has done it in saying that the meeting which he had with Mr. Michael White in April 2000 was at the Block and that the measure of the balconies was a physical measure, evidence which he accepted in cross-examination was incorrect, but the inclusion of which in his witness statement he was quite unable to explain. He has done it in his suggestion for the first time in the witness box that Mr. Michael White had a hand in the drafting of the letter dated 20 April 2000 which Mr. Little said had been drafted by himself and Mr. Comer. When challenged with the inconsistencies in his evidence, and with inherent improbabilities, during cross-examination Mr. Comer's favoured resort was vagueness. He was in my judgment a totally unreliable witness.
49. Mr. Purfield's evidence was also in my judgment most unsatisfactory. The abrupt and unexplained (save as muddle) change in his evidence as to his alleged discussion with Mr. Comer in November 1998 about rates to be paid for balconies, what was to be included and how much of the balconies **Discairn** was to be asked to supply is enough to discredit him. However, there were other aspects of his evidence which were unsettling. He seemed to have some sort of connection with Mr. Comer which enabled him to comment that Mr. Comer usually returned to London from Ireland on a Tuesday and that Mr. Comer was on holiday for much of January 1999. As to the latter, I think that Mr. Purfield was in error, as Mr. Comer accepted that he was in London both on 7 January 1999 and at the time Mr. David White's letter dated 11 January 1999 would have arrived in the ordinary course of post. However, the significance of the comments seems to me to be that Mr. Purfield seemed to

consider that it was his business to know Mr. Comer's habits and movements, or at least that it was something which it was appropriate for him to know. That suggests some personal friendship between them. The question of some friendship or other connection between Mr. Comer and Mr. Purfield was not really explored in evidence, but I was still left with the impression that Mr. Purfield felt that it was right that he should know more about Mr. Comer than a mere business acquaintance. It seemed to me that Mr. Purfield was prepared, not at all convincingly, but with enthusiasm, to give false evidence on behalf of Opecprime for which he had no motive revealed by the evidence.

50. Mr. Little's evidence at paragraph 3 of his witness statement as to the meeting between Mr. Michael White and Mr. Comer in April 2000 was, no doubt, intended to support that of Mr. Comer in relation to the same meeting. As was obvious, Mr. Little's evidence was extremely economical as an account of what had actually happened to the extent of being positively misleading. Mr. Little was not, in my judgment, a very proficient purveyor of untruths. His tactic to deal with the unwelcome experience of cross-examination was to give his evidence quite unnecessarily loudly. He was virtually shouting. No explanation for such behaviour was offered or emerged.
51. I did have some concerns about some aspects of the evidence of Mr. Michael White and Mr. David White. However, these related to their approach to commercial matters, not to the essential accuracy of the factual account which each of them gave. On all disputed issues concerning the contractual negotiations and discussions between **Discairn** and Opecprime I prefer the evidence of Mr. Michael White and Mr. David White to that of Mr. Comer, Mr Purfield and Mr. Little.
52. I am satisfied on the evidence which I accept that no contract was made between **Discairn** and Opecprime orally between Mr. Comer and Mr. Purfield in November 1998. Rather Mr. David White set out in the letter which he drafted and Mr. Purfield signed, dated 11 January 1999, terms which he, on behalf of **Discairn**, had discussed with Mr. Comer, on behalf of Opecprime, at a meeting between them on or about 7 January 1999 after the minuted meetings to which I have referred, for the supply and erection of the steelwork part of balconies at the Block, other than those to be supplied and erected by Hayes. Those terms included that **Discairn** would fabricate and erect the relevant steelwork at a price of £411 per linear metre, excluding Value Added Tax, for straight sections, and at a price of £511 per linear metre, excluding Value Added Tax, for curved sections. It was understood by that stage that the design of the straight sections of the balconies to be constructed was to be that of Hayes, although **Discairn** was to design the special sections of balcony required. Payment was to be in full on the installation of the steelwork for each fourth balcony. The supply or fitting of glazing or non-slip flooring were not included. There was no express provision as to when the work was to be done. I accept the evidence of Mr. David White that Mr. Comer accepted the offer evidenced by that letter verbally. The original contract between the parties was, therefore, in the terms of the letter dated 11 January 1999. I do not consider that the contract which I have found was varied or affected in any way by the letter dated 26 February 1999. The letter was produced, in my judgment, as a part of the sort of manoeuvrings on the part of Mr. Comer upon which I have already commented. Taking it at face value it could, potentially, have been an offer to vary the then existing agreement between **Discairn** and Opecprime so as to increase both the extent of the work required of **Discairn** by including the supply and fitting of glass and non-slip flooring and to increase the unit rates per metre to be paid. However, approaching the letter as an offer, it is plain that the offer was never accepted by **Discairn**. **Discairn** did not respond to the letter. It cannot seriously be argued that the offer was accepted by **Discairn** by conduct in proceeding to fabricate and supply steelwork for balconies because such conduct was referable to performance of the existing contract.
53. The contract made in the terms of the letter dated 11 January 1999 was, however, varied, in my judgment, by the discussions between Mr. Comer and Mr. Michael White and Mr. David White on 11 November 1999. By the agreement then made **Discairn** agreed to supply and fit not only glass to the front of the balconies, but also non-slip flooring, dividers, structural support for dividers, skirtings and gully covers. Prices for the supply of these additional items were not agreed at the time of the meeting, so it was, it seems to me, an implied term of the agreement as varied that **Discairn** should be paid reasonable prices for the additional work which it agreed to undertake. I find that Mr. Michael

White's letter dated 18 November 1999 was both sent by **Discairn** and received by Mr. Comer. I think it inconceivable that Mr. Comer, whose concern with the budget of Opecprime for the redevelopment of the Block was a recurrent theme of his evidence, would have been prepared for **Discairn** to proceed with additional works without him having a reasonably precise idea of how much **Discairn** was going to want to charge over and above the agreed prices for steelwork. There is no evidence that Mr. Comer or anyone else on behalf of Opecprime ever accepted the prices offered in the letter dated 18 November 1999 in respect of the supply and fixing of glazing or in respect of the installation of non-slip flooring. **Discairn's** pleaded case was that Opecprime accepted the offer by conduct in permitting the relevant work to proceed without further query. On analysis that seems to me to be equivalent to saying that Opecprime accepted the offer in the letter dated 18 November 1999 by silence. In my judgment the position is that, insofar as **Discairn** supplied and fitted glazing or non-slip flooring, it is entitled to be paid a reasonable sum for what was done. What are alleged to be reasonable sums are claimed for the supply of gully plates, skirtings, dividers and support brackets for dividers, and conceptually the nature of the claim in law in relation to the supply and fixing of glazing and non-slip flooring is the same. To recover reasonable rates in respect of the supply and fixing of glazing and non-slip flooring probably an amendment to the Claimant's statement of case is required, but in my judgment it is a minor one not going to the substance of the nature of the claim nor causing any prejudice to Opecprime which could not be adequately recompensed by some order as to costs.

54. It does not seem to me that any contract was concluded between Opecprime and **Discairn** in relation to the Deck. Mr. Purfield quoted a price of £32,568 for the Deck as it then stood in his facsimile transmission dated 2 June 1999. That quotation was never accepted, so far as the evidence in this trial goes. The design of the Deck was altered after 2 June 1999. **Discairn** proceeded on the basis that it had been asked to fabricate and instal the Deck, and it did so. In those circumstances **Discairn** is entitled to be paid a reasonable sum for the work which it did in connection with the supply and installation of the Deck. It is alleged, and accepted on behalf of **Discairn**, that there are defects in the Deck. In calculating what is a reasonable price for Opecprime to pay for the Deck it is necessary to take account of the defects which are admitted or proved to exist in the Deck. The convenient way in which to approach the valuation of the Deck, in my judgment, is to assess the appropriate sum for Opecprime to pay for the Deck had it been satisfactorily completed and then to deduct from the sum arrived at an allowance in respect of the necessary remedial works. A method in which to value the fabrication and erection of structural steelwork is by weight of the steel involved. It was contended on behalf of **Discairn** by Mr. Lee that that is the approach which I should adopt in the present case, but no evidence was led as to why such would be an appropriate basis of valuation. It is unclear on the evidence in the present case what was the effect of the alterations to the design of the Deck after the quotation dated 2 June 1999 was submitted. There is some evidence that the effect may have been to reduce slightly the weight of steel involved. In all the circumstances in my judgment the best evidence of what would be a reasonable sum for Opecprime to pay for the Deck, subject to an allowance for defects, is the amount of **Discairn's** quotation for the Deck in the facsimile transmission dated 2 June 1999, namely £32,568, plus Value Added Tax. Mr. Purfield said that that figure was the result of applying a rate of £1,425 per tonne to the weight of steel involved. In that it seems that he may have been in error. In this action **Discairn** has sought, in effect, to have the Deck remeasured at a rate of £1,425 per tonne, and claimed payment for 31.84743 tonnes of steel at that rate, making a total sum claimed of £45,382.59, plus Value Added Tax. No evidence has been led to the effect that £1,425 per tonne was a reasonable rate of charge, as opposed to the rate which **Discairn** would like to have charged.

Termination of the contract for the balconies

55. I have set out above the history of dealings between Opecprime and **Discairn** up to the writing by Mr. Little of his letter dated 8 May 2000 to **Discairn**. **Discairn** did not reply to that letter as such. Mr. David White wrote a letter dated 23 May 2000 to Opecprime which was in the following terms:-

"Lyon Road, Harrow – Balconies

We refer to our contract at the above address and our detailed Interim Valuation of works completed to 28th April 2000.

In view of the irregular payments received to date and the problem of matching invoices to payments we enclose a "Consolidated Statement of Account" herewith showing a payment now due of £94,542.60 inclusive of VAT. As these monies have been effectively outstanding one month now we would be grateful for your immediate settlement.

We also enclose two Credit Notes and a balancing Invoice to regularise the accounts position between our two companies, following advice from our auditors."

56. In a letter dated 26 May 2000 to **Discairn** written on the notepaper of Miltonland Mr. Little said this:-
"We are in receipt of your letter of 23rd May 2000.

We note that you state an amount of £94,542.00 + VAT is due to you.

We have now once again double checked all measurements (please find enclosed sheet showing these measurements). As you can clearly see from these accurate calculations that even if all the works were totally complete (excluding the final radius section) to the Architects & Engineers satisfaction, then £54,857.00 + VAT less £14,660.00 + VAT (which has been invoiced to us by Hayes Industries for glass supplied to you) would be due to you.

Our total dissatisfaction of your works is well documented by our Architects, Engineer, Allied Builders and our Contracts Manager Mr. P. Little. Mr. Little confirmed his dissatisfaction in his letter of 8th May 2000 to which no response has been received.

We have now received an estimate from Hayes Industries to carry out remedial works to the balconies which have been supplied an [sic] erected by you which comes to £111,576.22. Therefore when these matters are taken into account it can be clearly seen that you have been overpaid by £71,379.22 + VAT.

As you can see from the evidence supplied, in short, the balconies erected by you are structurally unsafe and totally incomplete – See enclosed photographs.

In the circumstances, if we do not receive written confirmation within seven days that you are prepared to immediately correct all defects and complete the outstanding works, we will have no alternative other than to determine your contract and appoint Hayes Industries to complete your Contract – i.e. the final radius and also to carry out remedial works as detailed on the erected sections. In this event we will have no alternative but to look to you for recompense for all incurred costs.

We refer to this point only as a matter of principal [sic]. You mention in your letter of 23rd May 2000 that you have received irregular payments. You will recall prior to commencement of your contract that we made it crystal clear that we would pay £10,000.00 for each vertical section of balcony completed to a fully finished spec. and that the balance would be paid to you on completion of your Contract. If we had adhered strictly to this arrangement we would not find ourselves in this situation, as you would not be due any payment yet due to the fact that to date you have failed to complete even one section."

The suggestion that it had been agreed that payment would be made only of £10,000 on account for each vertical section of balcony completed, with final payment at the end of the job, was untrue, and, I find, known to Mr. Little to be untrue when he wrote the letter. The real purpose of the letter, I am quite satisfied, was to seek to intimidate **Discairn** into not pursuing any claim for further money in relation to the work which had been done at the Block. Ostensibly a purpose of the letter was to seek to make time of the essence in relation to the giving by **Discairn** of *"written confirmation within seven days that you are prepared to immediately correct all defects and complete the outstanding works"*. The letter did not seek to make time of the essence in relation to completing any outstanding work within some particular period of time or in relation to doing any remedial work within some particular time. There was, in my judgment, no obligation on **Discairn** under its contract with Opecprime in relation to balconies at the Block to provide written confirmation of anything, still less to do so within some particular period of time. It seems to me, therefore, that Mr. Little's letter dated 26 May 2000 had no contractual significance.

57. In a letter dated 7 June 2000 to **Discairn**, again written on the notepaper of Miltonland, Mr. Little said:-
*"RE:- BALCONY CONTRACT AT PLATINUM HOUSE, HARROW
Further to our letter of 20 [sic – obviously 26 was meant] /05/00, we hereby determine your contract in relation to the above, as you have neither contacted us nor made any effort to redress the situation on site."*

The justifications put forward for determination of the contract were thus, first, that **Discairn** had not made contact with Opecprime/Miltonland, and, second, that no work had been done on the site of the Block. In my judgment neither supposed justification was valid. There was no contractual obligation to make contact with Opecprime/Miltonland, so failure to do so could not amount to any breach of contract, still less one going to the root of the contract. There was no express term of the contract in relation to the balconies when made as to when the work of fabrication and erection was to be done. Consequently, as a matter of law the obligation was to perform the contract within a time which was reasonable in all the circumstances in which the contract work was done – see *Hick v. Raymond and Reid* [1893] AC 22. If the contract was not performed within a reasonable time, it was, as a matter of

law, open to Opecprime to serve a notice making time for completion within a time which was reasonable as at the date of the giving of the notice of the essence of the contract – see *Charles Rickards Ltd. v. Oppenheim* [1950] 1 KB 616. If the contract was not performed within the time fixed by such a notice, then Opecprime could have treated **Discairn** as having repudiated the contract – *ibid.* However, that course was not that which Opecprime elected to pursue. No time for completion by **Discairn** of its contractual obligations was sought to be fixed by Mr. Little's letter dated 26 May 2000 or by any other notice. The letter dated 7 June 2000 simply determined the contract for no good reason. Technically, it seems to me, the letter dated 7 June 2000 amounted to a repudiation of the contract on the part of Opecprime. **Discairn** accepted that repudiation in that it ceased to do any work, but there is no claim in this action for damages in respect of the repudiation of the contract by Opecprime. The consequence of the termination of the contract on the part of Opecprime being wrongful in this case is simply that it is not open to Opecprime to complain that **Discairn** had not completed work which was outstanding at the date of the determination of the contract.

Defects

58. In this action allegations were made on behalf of Opecprime that the work in respect of which **Discairn** sought payment of the balance of the agreed price or payment of a reasonable sum was defective or incomplete. No fewer than 60 types of particular defective or incomplete work were alleged to exist in the balconies supplied and erected by **Discairn** at the Block. Further matters were alleged in respect of the Deck. Of the 60 types of allegedly defective or incomplete work in relation to balconies, ten in the event were not pursued. In relation to the others which were pursued, there was a fair measure of agreement at trial as to what was a defect and what was not. A Scott Schedule of the alleged defects and incomplete work was prepared on behalf of Opecprime. Responses were given to the Schedule on behalf of **Discairn**. By the time the end of the trial was reached the items in the Scott Schedule numbered, respectively, 18, 19, 31, 39, 52, 53, 54, 55, 56 and 57 were not pursued. The following items listed in the Scott Schedule were accepted on behalf of **Discairn** by the end of the trial as being defects and as requiring the remedy contended for on behalf of Opecprime.

1. Fixings missing.
2. Bolt pick up in cleat re-drilled on site showing signs of rust.
3. Fixing missing lower cleat.
4. No cleat where fixings installed.
5. Floor plate support angle ungalvanised.
6. No spacers between side fixing, intermediate floor support brackets and wall.
7. Open gap between floor plates jointed without closing plate below.
8. Redundant holes not filled.
9. Redundant holes filled with silicon.
10. Redundant holes filled with GP mastic.
11. Gaps between floor plate in excess of 5mm filled with silicon sealer.
12. Ditto above filled with GP mastic.
13. Gaps to floor plates not filled.
15. Upstand of back of floor plate altered/site fixed by stitch welding.
22. Resin finishes delaminating.
23. Resin finishes externally poor and uneven.
25. Fixing tabs to "D" plates/scimitars do not line up.
26. Division post not galvanised.
28. Fixing to tab on main post rusting.
30. Blue glass fitted incorrectly.
33. Fixings missing.
34. Glass support plates...too far apart to allow installation of blue glass corner unit.
35. Plates missing.
36. Gap between external backplate and wall.
37. Incorrectly fitted with 3 nuts showing externally and 2 internally.
- 37A. Expansion joints.
43. Hand rail fitted but not fixed.
46. Weep holes in front of gully sections.
47. Weep holes to rear of gully sections.
48. Unused fixing holes where stainless steel gully covers loose fitted over.
51. Rust weep showing to column connection at low level.
59. No hole in D plate to allow spigot connection of corner unit adjacent to second radius area.
60. Main retaining pins to saddle bracket not galvanised.

59. There were six items listed in the Scott Schedule in respect of which claims were pursued but in relation to which it was contended on behalf of **Discairn** that the matter complained of was not a defect. Those items were as follows.
- 14. *Edge of floor plate not sealed to gully section.* The issue was whether sealing was necessary.
 - 16. *Floor plates not levelled to correct falls.* The question was whether the floor plates needed to be laid to falls. The relevant plates had been installed in accordance with Hayes' drawings and the flatness tolerances of rolled steel plates meant that the modest falls contemplated could be eliminated by such tolerances. Further, so it was contended on behalf of **Discairn**, any appropriate falls could have been created at the stage of laying non-slip flooring, which stage had not been reached when the contract was determined.
 - 17. *Floor plates ponding to internal corner due to edge beam falling into building.* It was accepted on behalf of **Discairn** that this was a defect but it was said that it would have been dealt with at the stage of laying non-slip flooring.
 - 20. *Floor plates ponding generally.* The issues were the same as in relation to item 16.
 - 38. *Gap showing between top of vertical slotted hole and top of threaded bar.* It was contended on behalf of Opecprime that such holes needed to be filled, while **Discairn's** case was that the gaps in question were consistent with the Hayes design.
 - 42. *Handrail not fitted.* **Discairn's** case was that any handrails missing had been removed by others.
60. There were five items listed in the Scott Schedule in relation to which **Discairn's** case was that if there were a defect some party other than **Discairn** was responsible for it, or in fact no claim was made in respect of it. These items were as follows.
- 24. *Excessive deflection to floor plates.* Although the item appeared in the Scott Schedule, no quantity of allegedly excessively deflecting floor plates was specified.
 - 40. *No tightening schedule available for threaded bar.* It was agreed that there was no such schedule but the suggestion seems to have been that it was for Hayes to provide one, if it was required.
 - 44. *Hand rail incorrectly fixed.* The relevant handrail had been fixed using countersunk screws. It was not accepted on behalf of **Discairn** that it was responsible. It was submitted on behalf of **Discairn** that countersunk screws were in any event a satisfactory method of fixing.
 - 50. *No upstand between floor plate at gully position.* **Discairn's** case was that no upstands were shown on Hayes' drawings.
 - 58. *Water outlet at bases of post at wrong level.* The level of the outlet did not take account of the finishes applied to the Deck. **Discairn's** case is that no level for the water outlet was specified and it was not for **Discairn** to make allowance for matters of which it had not been told.
61. In respect of six items listed in the Scott Schedule **Discairn's** case was that the item in question was incomplete work which it would have completed had the contract not been determined. The items are:-
- 21. *No resin finishes to floor plates.*
 - 27. *Division posts not installed.*
 - 29. *Blue glass missing.*
 - 32. *Division glass not installed.*
 - 41. *Cill flashing not fitted.*
 - 49. *No gully cover fitted.*
- In respect of item 29 there was some photographic evidence that some glass originally fitted had been removed to enable chutes and such like to be installed as part of the continuing building operations at the Block.
62. Item 45 in the Scott Schedule was "*Paintwork damaged, rust contaminated and BZP fixings not paint protected.*" **Discairn's** case was that, while some repainting was necessary as a result of matters for which it was responsible, specifically repainting of between 300 and 500 mild steel nuts, others had damaged paintwork during building operations at the Block.
63. Ten defects were alleged on behalf of Opecprime to exist in the Deck. Seven of the alleged defects were accepted on behalf of **Discairn**. These were:-

2. *Threaded bar to main column connections has not been grouted in and in places is too short. Washers of insufficient size.*
 3. *Bolts to steelwork connections used are of insufficient length.*
 4. *Inadequate or over-drilled fixing cleats.*
 5. *Holes to main connector plates altered in situ and are over large, therefore no bearing to threaded bar.*
 6. *Web stiffeners under balcony support columns are in wrong position.*
 7. *Back plates not sealed, allowing ingress of water to main column connections.*
 9. *Continuous threaded bar across buildings, expansion joint.*
64. The disputed items of alleged defects in the Deck were:-
1. *Penetration to columns undertaken by Diamond Core Drilling, causing possible damage to main reinforcement bars.*
 8. *H beam in support on radiused section of main balcony support column, which creates excessive load on column.*
 10. *All steelwork sections showing considerable signs of rusting.*

So far as the first of these items is concerned, Mr. Graham Reeve, who gave expert evidence on behalf of Opecprime at the trial accepted in cross-examination that there was no evidence of any damage to the main reinforcing bars caused by drilling into existing columns so as to fix the Deck. It seems to me that there was no substance in the suggestion that there might have been damage. Item 8, both Mr. Reeve and Mr. Scott accepted, was the same as item 57 in the Scott Schedule relating to the balconies, which was not pursued. Mr. Scott accepted that some repainting of the Deck was necessary, amounting to about 20% of the total.

65. Quite apart from the differences, such as they were, between the parties and their respective experts as to the substance, or lack of it, in particular complaints, Mr. Reeve and Mr. Scott addressed the question of the number of instances of each type of alleged defect or item of incomplete work. A considerable measure of agreement as to quantities was achieved, which was recorded in a joint witness statement made by Mr. Reeve and Mr. Scott dated 28 November 2001 which was put in evidence. Attached to the statement were two schedules, one setting out quantities which were agreed, although recording differences in relation to five quantities, and the other setting out additional quantities for which Opecprime contended, but which were not agreed. The evidence in support of the existence of the items of alleged defect which were not agreed was that of Mr. McGreevey, who had compiled the original schedules from which the non-agreed items were taken. In those schedules the location of each alleged defect was indicated. The reason that Mr. Scott and Mr. Reeve had not reached agreement as to the existence of such alleged defects was simply that they had not been able to inspect the locations in question. I accept the evidence of Mr. McGreevey that the matters he recorded in his schedules were to be found in the locations which he recorded. Mr. McGreevey also gave evidence in support of the Amended Scott Schedule record of the number of locations in which remedial work had been done. I accept his evidence on that point. Mr. McGreevey further gave evidence in schedules attached to his second witness statement of remedial work done since the Amended Scott Schedule was prepared. However, that evidence was not relevant to any part of the case pleaded in the Amended Scott Schedule. Mr. Collings, after closing submissions by Mr. Lee had emphasised that the evidence in Mr. McGreevey's second witness statement did not go to any part case pleaded on behalf of Opecprime, sought permission to amend further the Scott Schedule so as to bring it into line with the material contained in the schedules attached to Mr. McGreevey's second witness statement. He accepted that there was a degree of overlap between the records in the latter schedules and the observations of the parties' respective expert witnesses. He suggested that the only way in which I could be confident that I was not double counting if I had regard to the evidence of Mr. McGreevey in the schedules attached to his second witness statement would be if I only took into account the figures in those schedules to the extent that the totals there stated exceeded the aggregate of the numbers of locations agreed by Mr. Scott and Mr. Reeve, the numbers of locations identified in Mr. McGreevey's original schedules which Mr. Scott and Mr. Reeve had been unable to inspect, and the number of locations in which remedial work had been done as set out in the Amended Scott Schedule. In my judgment the further amendment of the Scott Schedule for which

permission was sought would, in the circumstances, have achieved little of value, had I permitted it. In fact after closing submissions it was, it seems to me far, far too late to be making the application which Mr. Collings did. The amendments for which permission was sought were not even properly formulated. I refused the application.

66. For the purposes of his closing submissions Mr. Collings helpfully tabulated the numbers of locations of occurrences of matters set out in the Scott Schedule
- (i) agreed by Mr. Scott and Mr. Reeve;
 - (ii) not inspected by Mr. Scott and Mr. Reeve, but spoken to by Mr. McGreevey;
 - (iii) recorded in the Amended Scott Schedule as having been remedied; and
 - (iv) set out in the schedules attached to Mr. McGreevey's second witness statement as having been remedied since the preparation of the Amended Scott Schedule.

He also set out various unit rates of charge for particular items of remedial work, namely:-

- (a) that pleaded in the Scott Schedule;
 - (b) that contended for on behalf of **Discairn** in its responses to the Scott Schedule;
 - (c) that set out in the report of the joint expert on quantum matters appointed for the purposes of the trial, Mr. Nigel Dight; and
 - (d) that charged, or proposed to be charged, by the company actually engaged by Opecprime to undertake any necessary remedial works to the balconies erected by **Discairn**, Flatline Construction Ltd. ("Flatline"), a company of which Mr. McGreevey is now managing director.
67. The relevance of any defects in the balconies is plainly that there were terms of the contract between Opecprime and **Discairn** concerning the balconies, to be implied as a matter of law, that **Discairn** would fabricate the balconies so that when completed they were of merchantable quality and reasonably fit for their intended purpose and that the balconies would be erected with reasonable care and skill. If and insofar as defects were proved, therefore, **Discairn** was in breach of contract and liable in damages to Opecprime. **Discairn's** claims for payment were formulated on the footing that all the work which **Discairn** had done had been done properly. Consequently, if and insofar as **Discairn** was entitled in principle to be paid a reasonable sum for some work, the presence of any defects in the work needed to be taken into account in assessing the sum which it was reasonable for Opecprime to pay.
68. Mr. Scott gave his evidence in a diffident manner and seemed to me not to be altogether in command of the material relevant to his evidence. In respect of the five instances in which he and Mr. Reeve recorded in their joint witness statement differences over quantities I accept the evidence of Mr. Reeve as to quantity. However, over all of the evidence of Mr. Reeve on technical issues hung the cloud that he had been given to understand that the sole design responsibility for the balconies lay with **Discairn**. That was not the case in relation to the design of the straight sections of balcony, in respect of which it was agreed that **Discairn** would adopt the designs of Hayes.
69. My findings as to the disputed Scott Schedule items so far as the principle of the items is concerned are as follows:-
- 14. Mr. Reeve accepted in cross-examination that there was no evidence on site that the lack of sealing had resulted in water penetration through the floor plate. I find that sealing is not necessary.
 - 16. Mr. Reeve did not really dispute the evidence of Mr. Scott that the slight falls indicated on the relevant Hayes drawings were less than the flatness tolerance in the manufacture of rolled steel. In those circumstances I am not satisfied that the failure to achieve the desired falls in some areas amounted to defective work.
 - 17. **Discairn's** case on this item was not supported by any evidence. Mr. Scott in his expert report accepted that it was a defect and needed to be remedied in the way suggested on behalf of Opecprime. I find this defect proved.
 - 20. For the reasons given in respect of item 16 I am not satisfied that the failure to avoid ponding amounted to defective work.

21. As Opecprime determined the contract with **Discain** wrongfully, in my judgment, it is not open to Opecprime to complain that **Discain** should have completed its work before the determination.
24. Mr. Scott accepted in cross-examination that it would have been better to have supported floor plates with angles to avoid excessive deflection. I find this defect proved.
27. The position in my judgment is the same as in respect of item 21.
29. The position in my judgment is the same as in respect of item 21.
32. The position in my judgment is the same as in respect of item 21.
38. In his first expert report Mr. Reeve said that it was probably unreasonable to expect the gap to which this item related to be filled. If that is right, and I accept Mr. Reeve's evidence on the point, this was not a defect, or at any rate not a defect requiring remedy. This allegation fails.
40. Mr. Reeve accepted in cross-examination that, as one would expect, the provision of a tightening schedule was really a matter for the designer of the particular steelwork. After all, the primary purpose of such a schedule is to inform the erector how much torque should be applied to the relevant bolts. This alleged defect is not proved.
41. The position in my judgment is the same as in respect of item 21.
42. I am not satisfied on the evidence that this alleged defect has been proved. On balance what the evidence suggests is that any missing handrails were removed by other contractors working at the Block for their own purposes, such as to erect chutes or hoists.
44. I am satisfied that the use of countersunk screws to fix handrails was not satisfactory, for the reasons given by Mr. Reeve in cross-examination, namely that the fixing is insufficiently secure. However, there was no evidence as to who had used countersunk screws to secure handrails. It does seem extraordinary that for a small number of probably many thousands of fixings **Discain** should have used screws rather than peel rivets. There was no obvious reason to change the manner of fixing in these cases. In the light of the evidence of handrails being removed by others for their own purposes, it seems more likely that the countersunk screws were the means by which a contractor which had removed a section of handrail sought to secure it once it decided to replace the handrail. This alleged defect is not proved.
45. Mr. Scott accepted in cross-examination that there was evidence of site welding by **Discain** and that that would have caused damage to paintwork. He also accepted that some 300 to 500 mild steel nuts needed to be painted. I am satisfied that damage to paintwork was caused by **Discain**.
49. The position in my judgment is the same as in respect of item 21.
50. I accept the evidence of Mr. Scott that upstands were not shown on the Hayes drawings. I am not satisfied that failure on the part of **Discain** to provide upstands was a defect in those circumstances.
58. No evidence was led at trial to make good any allegation that **Discain** should have known, or enquired about, the depth of finishes to be applied to the Deck. This alleged defect fails.
70. In the result, I find that, in addition to the defects which were accepted on behalf of **Discain** as being defects and as requiring the remedy proposed on behalf of Opecprime, the defects alleged at items 17, 24 and 45 are made out and the remedial work proposed on behalf of Opecprime in relation to those items is appropriate.
71. In relation to the disputed items of alleged defects in the Deck, for the reasons already given I find that both item 1 and item 8 fail. Item 10 succeeds to the extent accepted by Mr. Scott.
72. If and insofar as Opecprime has, in the light of my findings, a claim for damages for breach of contract against **Discain**, the measure of its loss is the cost to it of undertaking the remedial works which I have found to be appropriate. Opecprime has in fact engaged Flatline to carry out remedial works to steelwork and balconies which it desired to have executed. Flatline seems to have charged competitive rates for its work. Certainly its rates of charge are, in many instances, lower than the rates advised by Mr. Nigel Dight, the joint expert on quantum matters. Mr. Lee submitted that in evaluating the worth of any claim for damages in relation to balconies on the part of Opecprime which I found proved I

should take the lower of Flatline's rate or that advised by Mr. Dight for any particular item. I do not think that that submission is well-founded. The issue, as it seems to me, is one of mitigation. Opecprime has chosen to engage Flatline to undertake remedial work. If that was a reasonable decision then the measure of Opecprime's loss is what it has had to pay Flatline for work done to date, plus what it will have to pay Flatline for work to be done in the future. Mr. Dight's evidence of market rates shows that the decision to engage Flatline was, overall, reasonable. That being so, in my judgment, Opecprime is entitled to recover damages calculated at the rates Flatline charges and has charged.

73. In relation to work for which **Discairn** is, in the light of my findings, entitled to be remunerated by payment of a reasonable sum on a restitutionary basis, namely for the fabrication and erection of the Deck, strictly Opecprime can have no claim for damages for breach of contract. However, it is convenient from a practical point of view, to calculate what sum is due to **Discairn** by calculating what would be a reasonable price for the Deck if it were not defective in the respects admitted on behalf of **Discairn**, and then to deduct the reasonable cost of remedying the admitted defects.

Whether Discairn is entitled to payment for incomplete work

74. In the light of what has been admitted on behalf of **Discairn** in respect of defects in the balconies which it fabricated and erected at the Block, and my findings as to defects not admitted, the question arises, because of the plea at paragraph 9 of the Amended Defence and Counterclaim in this action, whether **Discairn** is entitled to any payment at all in respect of the supply and installation of balconies. The question may seem a little unreal, given that it is common ground that payments totalling £282,393.20 have already been made on behalf of Opecprime in relation to the fabrication and erection of balconies at the Block by **Discairn**. What was pleaded at paragraph 9 of the Amended Defence and Counterclaim was this:-

"Paragraph 9 of the Particulars of Claim is denied as there was no sum due to the Defendant [sic] because the Claimant had failed to deliver any fully completed sections of balcony in accordance with the agreement reached between the parties on or about 27th October 1998. In the alternative there was substantial non-performance of the Claimant's duties under the contract and the Claimant is not entitled to any payment under the contract between the parties."

In the light of my findings, no contract was made between Opecprime and **Discairn** on or about 27 October 1998. The contract which I have found was made, incorporating the letter dated 11 January 1999 written by Mr. David White and signed by Mr. Purfield, provided for:-

"Payment in full on the installation of every 4th No. Balconies."

As, under that contract at the time it was made, what **Discairn** was to fabricate and instal was only the steelwork for balconies, that term must, in my judgment, be understood as referring simply to installation of the steelwork for balconies, and not to the complete balcony, including glazing and non-slip flooring. Mr. Collings in his closing submissions contended that because of the existence of defects in the balconies, as was admitted or proved, no balcony was complete, so no sum was payable. That submission was advanced despite the fact that failure to prove the contract pleaded in paragraph 9 of the Amended Defence and Counterclaim would seem to have eliminated the point from consideration. However, even leaving aside the pleading point, it seems to me that there is no merit in the argument. What the contract which I have found provided for was payment on installation of the steelwork for every four balconies. That did not require that the installation had to be complete in every detail before there was any right to payment. Under the doctrine of substantial performance, illustrated by the well-known case of *Hoenig v. Isaacs* [1952] 2 All ER 176, if a party to a contract has substantially performed his obligations under the contract, he is entitled to payment, although exposed to a claim for damages in relation to those respects in which his performance of his obligations is less than complete. In my judgment that doctrine is applicable to the circumstances of the present case. I find that **Discairn** is, in principle, entitled to payment for the fabrication and erection of balconies, although liable in damages to Opecprime in respect of the defects which have been admitted or proved. At paragraph 12 of the Amended Defence and Counterclaim Opecprime sought to set off whatever damages were awarded to it in respect of its counterclaims against its liability to pay anything further to **Discairn** in relation to the fabrication and erection of balconies for the Block. In principle Opecprime must be entitled to such set off.

The value of Discain's claims subject to Opecprime's counterclaims

75. In the Amended Particulars of Claim at paragraph 10A the calculation of the sum claimed by **Discain** in this action of £103,772.17 was set out as comprising a gross total of £370,709.94 for work and materials in respect of the balconies and the Deck, deducting sums paid of £282,393.20, resulting in a sum of £88,316.74, and adding Value Added Tax to the latter figure at the rate of 17.5%. The gross total of £370,709.94 was alleged to be made up as follows:-

*"Straight balconies 531m @ £411/m £218,241.00
Curved balconies 67.5m @ £511/m £34,492.50
Non-slip floor 322.32m @ £25/m £8,058.00
Glazing 377.79 @ £115/m £43,445.85
Garden Deck 31.84743 tonnes @ £1,425/tonne £45,382.59
Perforated gully plates 45no. @ £42 each £1890.00
Painted steel skirting 150m @ £12/m £1800.00
Glazed partitions/dividers 46no. @ £300 each £13,800.00
Steel supports to glass dividers 60no. @ £60each £3600.00"*

76. In the Amended Defence and Counterclaim the quantities of 531 metres of straight sections of balcony, 67.5 metres of curved sections of balcony and 46 dividers were admitted in paragraph 8. It was also there admitted that the appropriate rate of charge for dividers was £300 each. The quantities of glazing supplied and fitted, non-slip flooring supplied and applied, gully plates supplied and fitted and skirting supplied and fitted were proved in the witness statement of Mr. David White and not seriously challenged. Mr. White did not in his witness statement seek to prove either that a particular number of steel supports had been supplied or any rate of charge which it was contended would be reasonable for the supply and fitting of such supports. There was thus no evidence to support that element of claim, which consequently fails.

77. Mr. Collings submitted that, in the absence of agreed rates for the supply and fitting of glazing and non-slip flooring on the balconies fabricated and erected by **Discain**, I should adopt the rates charged by Flatline for such work as reasonable rates. Those rates were established by the evidence of Mr. McGreevy as £74 per square metre for glazing and £12.50 per square metre for flooring. Mr. Dight advised a rate equivalent to £224 per square metre for glazing and a rate equivalent to £19.40 per square metre for flooring. On the evidence I am satisfied that the rates which **Discain** has sought to charge of £115 per square metre for glazing and £25 per square metre for flooring are reasonable. In reaching that conclusion I take into account that Mr. Dight would envisage a much higher rate than **Discain** has sought to charge for glazing, but a rather lower one than **Discain** has sought to charge for flooring. As the two elements were supplied and fixed not separately, but as part of one package, I consider that it is appropriate to look at the overall package price in deciding what reasonable prices would be.

78. No rates of charge which it was contended would be appropriate for gully plates or skirting were put forward on behalf of Opecprime, notwithstanding that Mr. Comer accepted in cross-examination that he had agreed to pay extra for skirting. In his closing submissions Mr. Collings accepted that the appropriate rate of charge for skirting was that for which **Discain** contended, £12 per metre. Mr. Dight in his report dated 20 November 2001 expressed the view that a reasonable rate of charge for a perforated gully cover would be £33 each, while for a cill flashing, that is to say, a skirting, a reasonable rate would be £21 per metre. Mr. Dight considered that a reasonable price for steel supports to glass dividers would be £55.50 each, but as I have said, there was in fact no evidence that any had been supplied. At Mr. Dight's rate for perforated gully plates the value of those supplied and fitted by **Discain** would be £1,485, rather than the £1,890 claimed by **Discain**, while at his rate for skirtings the value of those supplied and fitted by **Discain** would be £3,150, rather than the £1,800 claimed by **Discain**. On the totality of the evidence, and again looking at the overall package price, I find that **Discain**'s claims in respect of perforated gully plates and skirtings are proved in the sums claimed.

79. Subject to the set off of the value of Opecprime's counterclaim, I find that there is due to **Discairn** in respect of the work done and materials supplied in connection with the balconies at the Block the sum of £46,217.62 calculated as follows:-

Straight balconies, as claimed	£218,241.00
Curved balconies, as claimed	£ 34,492.50
Non-slip flooring, as claimed	£ 8,058.00
Glazing, as claimed	£ 43,445.85
Perforated gully plates, as claimed	£ 1,890.00
Painted steel skirting, as claimed	£ 1,800.00
Glazed dividers, as claimed	<u>£ 13,800.00</u>
Sub-total	£321,727.35
Less sums paid	<u>£282,393.20</u>
	£ 39,334.15
Plus Value Added Tax @ 17.5%	<u>£ 6,883.47</u>
	£ 46,217.62

80. I have already indicated my conclusion that the starting point in calculating a reasonable sum to be paid to **Discairn** for the fabrication and erection of the Deck is the originally quoted price of £32,568, plus Value Added Tax at 17.5%. That Value Added Tax amounts to £5,699.40, making a total of £38,267.40. The quantities of items of remedial work required in relation to the Deck were agreed. Rates to be applied to those quantities were pleaded on behalf of Opecprime, but no evidence was led to support the pleaded rates. The only evidence of what would be reasonable rates was contained in the report of Mr. Dight. Mr. Lee submitted that I should evaluate the allowance to be made in respect of defects in the Deck by taking the lower of the rate advised by Mr. Dight for a particular item, or the pleaded rate. I accept that submission, as obviously it is not open to Opecprime to recover a rate in respect of any item which is higher than its pleaded rate, even if such higher rate is supported by evidence. Mr. Lee helpfully undertook the calculation of what the allowance should be if I accepted his submission, and had made the findings which I have made concerning items 1, 8 and 10 in the list of alleged defects relating to the Deck. He arrived at a total of £2,416.40, to which Value Added Tax at 17.5% should be added, producing an overall total of £2,839.27. Deducting that figure from the figure of £38,267.40 produces an amount of £35,428.13, and I find that that is the sum to which **Discairn** is entitled in respect of the fabrication and erection of the Deck.

The value of Opecprime's counterclaims in respect of the balconies

81. As I have already indicated, I am satisfied that the quantities of items needing remedial attention in relation to the balconies fabricated and erected by **Discairn** at the Block are those agreed by Mr. Scott and Mr. Reeve, plus those additional quantities for which Mr. Reeve contended, but with which Mr. Scott did not agree, plus the numbers set out in the original Scott Schedule which Mr. Scott and Mr. Reeve were unable to inspect, plus those identified in the Amended Scott Schedule as having been repaired. I am also satisfied that the appropriate rates at which to evaluate the worth of the counterclaims are those indicated by Flatline, through the evidence of Mr. McGreevey, as those which it has charged to Opecprime or intends to charge to Opecprime. I need to deal separately with Item 45 in the Scott Schedule, but, subject to that, the appropriate calculations are as follows:-

<u>Item</u>	<u>Quantity</u>	<u>Rate(£)</u>	<u>Total(£)</u>
1	71	4.60	326.60
2	122	4.45	542.90
3	20	11.99	239.80
4	18	4.16	74.88
5	4	39.13	156.52
6	3	20.00	60.00
7	19	23.17	440.23
8	320	1.38	441.60
9	10	1.38	13.80
10	155	1.38	213.90

Discain Project Services Ltd v. Opecprime Developments Ltd [2001] Adj.L.R. 12/11

11	36	8.60	309.60
12	54.5	13.85	754.83
13	46.7	8.60	401.62
15	16.6	20.75	344.45
17	13.5	47.80	645.30
22	0 0		
23	8.9	32.10	285.69
24	7 33.	63 2	35.41
25	24	20.00	480.00
26	37.8	204.93	7,746.35
28	27.6	41.50	1,145.40
30	9.9	15.75	155.93
33	32	7.63	244.16
34	3	87.25	261.75
35	62	38.25	2,371.50
36	125	29.25	3,656.25
37	37	23.00	851.00
37A	11	231.30	2,544.30
43	83.	4 7.25	604.65
46	7	1.55	0.85
47	6	1.55	9.30
48	407	1.12	55.84
51	3	76.71	228.30
59	3	52.00	156.00
60	15	23.40*	<u>351.00</u>
Total			26,759.71

* Mr. Dight's rate – Flatline did not give a rate

To the figure of £26, 759.71 Value Added Tax at a rate of 17.5% needs to be added, making a total of £31,442.66.

82. Although I am satisfied that **Discain** caused damage to the paintwork of some of the steel which it supplied to the Block, the only evidence of the extent of that damage was the evidence of Mr. Scott that he felt that between 300 and 500 mild steel nuts needed to be repainted. No evidence was led as to the size of any of the nuts in question. The only evidence of the cost of repainting was expressed in terms of a rate per square metre. I have no idea how many nuts of the type or types fitted to **Discain's** steelwork at the Block there may be to the square metre. In those circumstances I do not feel able to make any assessment of an award of damages for item 45 in the Scott Schedule beyond a nominal £2.
83. There were claims in the Amended Scott Schedule for two items of preliminary costs, namely for £900 for a site office/equipment store for 12 weeks and for £480 for a tower scaffold for 12 weeks. No evidence was led in support of either element of claim. Both of these items of claim fail.

Conclusion

84. I find that Opecprime is entitled to set off against the sum to which **Discain** is otherwise entitled in respect of the fabrication and erection of balconies at the Block, £46,217.62, the sum of £31,444.66, being the total of the sum calculated as set out in paragraph 81 plus £2 nominal damages. The balance in favour of **Discain** is £14,772.96. To that sum needs to be added the sum of £35,428.13 to which I have found that **Discain** is entitled in respect of the fabrication and installation of the Deck. Consequently there will be judgment for **Discain** in the sum of £50,201.09, together with interest, as to which I will hear Counsel.

Jonathan Lee (instructed by Shadbolt & Co. for the Claimant)
 Nicholas Collings (instructed by Bernard Cordell for the Defendant)