JUDGMENT : JOHN UFF QC : TCC : 6th March 2003.

PART I

1. The Claimant, Harvey Shopfitters Limited, claims sums due under a contract for refurbishment of 22 Cornwall Gardens, SW5. This comprises residential flats and is owned by the Defendant, ADI Ltd, a Jersey registered company of which the beneficial owners are Mr and Mrs William Fenley.

2. The Claimant claims sums alleged to be due under a contract which provided either for payment on a conventional basis under or by analogy with the IFC Conditions or on a quantum meruit. The works were carried out between July 1998 and January 1999 and left the parties in dispute over claims and counterclaims made on the conventional basis. At the end of 2000 the Claimant launched adjudication proceedings under the Housing Grants Construction and Regeneration Act and obtained a decision which awarded the whole sum claimed of approximately £173,000. Enforcement proceedings ensued which grew into the present action, in which the Claimant, by Amendment, added the alternative claim for quantum meruit.

3. At the beginning of the present hearing I suggested informally that time would be saved by taking the "Contract issue" at the outset, and Counsel have adopted this course. Both parties have therefore made written and oral submissions and have called and cross-examined witnesses on this issue, Mr. Nolan the Claimants' Contract Director and Mr. Evans, the Defendants' Architect. I agreed to give this ruling at the conclusion of the issue, which therefore comprises Part I of the Judgment.

4. The "Contract issue" is variously framed but in essence the issue is "what was the effect of the Architect's letter of 7 July 1998", which was expressly accepted by the Claimant by signing the letter on 28 July 1998. The letter is as follows:

   "Dear Vince,

   22 Cornwall Gardens, London. SW7

   A.D.I. Limited

   Further to your letter dated 23 June 1998 and fax dated 24 June 1998, I write to confirm that it is the intention of our client, A.D.I. Limited, to enter into a contract with you on the basis of the tender sum of £339,895.34 exclusive of VAT, for the above project.

   The main contract documents are currently being prepared for signature. I confirm that the conditions of contract will be those of the JCT Intermediate Form of Building Contract 1994 Edition amended as stated in the tender documents and this contract is to be executed under hand.

   The date for commencement is to be 6 June 1998 and the contract period is to be 12 weeks with completion on the 25 September 1998.

   I have been instructed by our client to request that you accept this letter as authority to proceed. If, for any unforeseen reason, the contract should fail to proceed and be formalised, then any reasonable expenditure incurred by you in connection with the above will be reimbursed on a quantum meruit basis. Any such payment would strictly form the limit of our client's commitment and our client would not be subject any further payment of compensation for damages for breach of contract.

   If you are agreeable to the foregoing please:

   (i) Sign the enclosed copy of this letter and return it to me at the above address."

   Both parties contend that a contract came into existence on 7 July or on 28 July 1998. Mr. Burr for the Claimant, in final oral submissions, cast doubt on the mode of acceptance but in my judgment there can be no doubt as to the status of the letter in the light of its acceptance on page 2 by the Claimant.

5. The issues in more detail are:

   (a) The Claimant says there was a "simple" contract which was not subject to the IFC Conditions, by which the Claimant was entitled to be reimbursed on a quantum meruit basis.

   (b) The Defendant says there was a contract for the specified work at an agreed Lump Sum, with or without the IFC Conditions.

   (c) The Defendant says, if there was a "simple" contract, it must be subject to the third sentence of the fourth paragraph of the letter of 7 July 1998, the effect of which is to absolve the Defendant from liability for breach of contract.

(d) The Defendant further contends the Claimant is estopped from claiming now on a quantum meruit basis, having acted on the basis that there was a Lump Sum Contract up to the date of the Amended Statement of Claim.

6. I deal first with the contract itself, as to which only evidence of surrounding circumstances up to 7 July or 28 July may be taken into account. The evidence of Mr. Nolan and Mr. Evans, with the admitted documents, shows that:
   (i) The works were tendered on a conventional basis with the Claimant being asked to provide a Lump Sum price (including, unsurprisingly, a number of provisional sums) on tender documents which referred expressly (Clause 1.2.1, Prelims & General) to the IFC with amendments 1-11. It is of little relevance whether, in the tendering process, the conditions were discussed, neither side suggesting any alteration to them.
   (ii) The Claimant submitted an unqualified tender, on the form provided, dated 27 June 1998. Mr. Evans on 18 June asked for the return of the priced Specification from which it appeared that the Claimant had omitted Section 11 and also the contingency and daywork sums. The revised tender value after adding back these omissions was £339,895.34.
   (iii) Mr. Evans on behalf of the Defendant wrote the letter of 7 July 1998 which the Claimant took as an instruction to proceed, having in fact commenced work on the start date identified in the tender documents of 6 July 1998.
   (iv) Neither side sought to question whether there was a binding contract and by 28 July the Architect had taken steps, without protest, which were referable to the existence of a Contract on the IFC terms i.e. issuing Instructions and valuing the work on an interim basis by assessing a percentage of the items in the Specification. These steps might be equally referable to other forms of contract but it was the IFC that was referred to, both in the Specification and in the letter of 7 July 1998.
   (v) No further contract documents were brought into being and the works are now complete, albeit there is a continuing dispute as to payments due and other issues.

7. For the Claimant, Mr. Burr accepts that the scope of works were set out in the tender documents and says “there was nothing left further to discuss or formalise”, and that “the parties did not necessarily intend the letter of 7 July to be displaced at a later stage by a formal contract”. He relies on the express terms of the second sentence of the fourth paragraph of the letter of 7 July. Mr. Burr contends that the failure to “formalise” the contract means that the second half of the sentence must apply. This requires that the words “fail to proceed and be formalised” be read disjunctively (since the Contract has admittedly proceeded), in effect reading and as or. Mr. Coulson QC submits that the words cannot be so read.

8. As regards the effect of the words under consideration Mr. Burr cites a considerable body of authority, dealing with the effect of a letter of intent (**Hall & Tawse v Ivory Gate** and **British Steel v Cleveland Bridge**), the need to agree terms which render the Contract workable (**Pagnan v Feed Products**), and the consequence of non-agreement of essential terms (**Hescorp v Morrison**, **Murphy v ABB**, **Serck Controls v Drake & Scull** and **Sykes (Wessex) v Fine Fare**).

9. Given that it is common ground that there was a contract between the parties and that the right to quantum meruit arose under an express term, I find these authorities of only limited relevance. Mr. Burr also relies on **Galliard Homes v Jarvis**, the facts of which he contended were similar to the present case. There, however, as contended by Mr. Coulson, the Court of Appeal held there was no contract, as execution under seal was an essential pre-requisite. No such impediment is relied on here.

10. In further oral submissions Mr. Burr drew particular attention to the decisions in **Laserbore v Morrison** and **Serck Controls v Drake & Scull**, in each of which letters of intent had been considered.

11. Mr. Coulson relied particularly on the Court of Appeal decision in **Stent v Carillion** where (agreeing with Dyson J) the Court of Appeal held that a letter of intent in terms similar to the present did not prevent a contract coming into existence, even though the letter contemplated a formal document which was never executed. In **Stent** the letter of intent emanated from a party higher up the contract chain and the existence of a contract between the intended parties was directly in issue. Mr. Burr submitted that the case was of little relevance and could be distinguished, but in my judgment the case is a fortiori.

12. In addition, the judgment of Brooke LJ is apposite, in that the Lord Justice noted the difficulties which could in theory arise from incorporation of a standard form involving choices which had not been resolved. In that case, given that the contract had been performed it was, as counsel conceded, *"water under the bridge which of these provisions were chosen"*.

13. In the present case an issue is raised as to whether the IFC Sectional Completion Supplement was imported into the agreement. Whether or not it was accepted does not, in my judgment, affect the nature of this agreement nor does it determine whether or not the IFC Conditions were part of the Contract. Both parties relied on many more authorities indicating the approach of the Courts to such issues. Without discourtesy to Counsel and the detailed written submissions provided, the appropriate approach to the issues can be summarised in this way:
    (a) the Courts now adopt a practical approach to whether and what agreement should be upheld;
    (b) niceties which might on a more traditional approach have been regarded as precluding agreement will not now be so regarded unless essential to the basis of the agreement;
    (c) this is the more so where the contract has been fully performed.

14. In any event, in the present case there is no issue as to the existence of a contract and the alternative quantum meruit claim arises, not by operation of law, but by the terms of the contract as set out in the letter of 7 July 1998.

15. I therefore turn to the letter and the issues which arise from it. Again, with respect to the detailed arguments addressed, the issues appear to me to be of limited compass. They are:

    (1) Does the second sentence of the fourth paragraph apply?

    In my judgment the words "fail to proceed and be formalised" are not to be read disjunctively. As a matter of ordinary construction and means and not or. Furthermore, having regard to the consequences spelled out, it would be most surprising if the parties intended the mere failure to formalise the Contract document to lead to the result that the careful process of tendering and pricing should be thrown over in favour of the uncertainty of quantum meruit. The second sentence of the fourth paragraph has ample scope when limited to failure to proceed with the works, which necessarily means that the Contract will not be formalised. I therefore reject the Claimant's primary contention. It follows that the agreement between the parties was on a Lump Sum basis.

    (2) Was the contract subject to the IFC Conditions?

    The Defendant in a written submission summarised the difficulties which arise without such conditions, including lack of mechanisms for dealing with variations, payment and administration (including extensions of time and completion). Mr. Burr submitted that, on the facts, the Contract did not fit within the IFC Conditions and drew attention to the absence of interim certificates at critical times. In my judgment this affords no reason why the IFC Conditions should not have been imported by agreement. The argument against importing the IFC Conditions depends crucially on confining the agreement to the letter of 7 July. That letter, however, expressly contemplates the preparation of full contract documents. Furthermore, the Claimant concedes that the scope of works is that set out in the tender documents. Such a concession was unavoidable, given the reference to the tender in the letter of 7 July 1998. Once the tender and the documents on which it is based are taken into account it becomes clear, in my judgment, that the parties intended to contract on the IFC Conditions, which accordingly formed part of the agreement made on 7 July or 28 July 1998. In the light of these decisions, it is unnecessary to consider further contractual issues at this stage.

PART II

16. Part I of this Judgment was delivered orally, following which the trial continued on all outstanding issues, which are now dealt with in this Part II Judgment.

17. The Claimant started work at 22 Cornwall Gardens on 6th July 1998 in anticipation of the contract which, it is common ground, was concluded on either 7th or 28th July 1998. No issue now turns on the precise date: if it was the later date, both parties have assumed retrospective effect back to the commencement. The works proceeded with a resident workforce up to foreman level with periodic visits from the Claimants' Contracts Manager (Gary Plenty) and Contracts Director (Vincent Nolan) as

well as the Architect, Stephen Evans and from the "client" who was effectively Mr William Fenley. The original Contract documents refer to the appointment of a Quantity Surveyor, Messrs. Webb and Tapley. In the event, their only connection with the Project was in relation to Party Wall matters, and all questions of valuation and certification were dealt with by Mr. Evans, who issued a number of Interim Certificates.

18. The Contract Period, which ran from 6th July, was 12 weeks leading to an agreed contractual Completion Date of 25th September 1998. Practical Completion was in fact certified in respect of the final elements of the work on 12th January 1999 amounting to a delay of 15 weeks 4 days. The Claimant contends that the work was completed by 8th January 1999 but the primary matters in dispute concern the reasons for delay and the financial consequences. The Claimant contends that the work was delayed and disrupted from the outset and throughout its course by variations and late instructions, and that full extensions of time are merited together with compensation in the form of loss and expense. It is common ground that a substantial part of the works was completed earlier, Flats 3 (first floor) and 5 (third floor) on 1st November 1998 and Flats 4 (second floor) and 6 (fourth floor) on 6th November 1998. The Defendant contends that Flat 2 (ground floor) was completed on 10th January and Flat 1 (basement) on 12 January 1999; while the Claimant contends both the ground and basement flats were complete on 8th January 1999.

19. It is common ground that there were no notices of delay nor notices claiming loss and expense from the Contractor nor, indeed, any substantial volume of written or recorded complaint from either party. The Defendant contends that no extension of time is merited and no loss and expense due; and in any event both are barred by lack of notice. The Architect in fact granted a formal extension of 3 days, representing the weekend between Friday, 25th September and Monday, 28th September 1998. More significantly, the Architect informally conceded that an extension of 23 days should be allowed and this period (despite the Claimant's contention that this was a late concession) was formally accepted in the Defendant's pleadings from the Adjudication in November 2000 onwards. This brings the effective completion date up to 28th October 1998.

20. Before embarking further on examination of the contractual issues, it is appropriate to deal with a number of matters raised in the Final Written Submissions served by the parties. First, the Claimant seeks to maintain that the contractual relationship between the parties was governed solely by the letter of 7th July 1998. In the findings comprising Part I of this Judgment, it is concluded that the parties plainly intended to contract on the IFC Conditions. For the avoidance of doubt, this issue has been decided in favour of the Defendant, in my view, and is not to be re-opened. The letter of 7 July 1998 was effectively superseded by the IFC Conditions and the incorporated contract documents.

21. Secondly, both parties reiterate earlier submissions, on which no decision has been given, regarding estoppel. The Defendant, relying on **Mitsui Babcock v John Brown Engineering** CILL 1196 contends that it would not be just and equitable for the Claimant to resile from the parties' common assumption that IFC 84 Conditions of Contract govern the parties' relationship. The Claimant, conversely, relying on **Amalgamated Investment v Texas Commerce International Bank** [1982] 1 QB 84 contends that there was no agreed statement of facts, the truth of which had been assumed by the convention of the parties, nor had the parties acted upon an agreed assumption accepted between them as true as regards the Contract. The Claimant contends that the evidence established that the parties failed to turn their minds to the issue once the tender price had been accepted and in fact assumed that the Contract was governed by the terms of the Letter of Authority of 7th July 1998. While I accept that the parties, after 7 July 1998, did not further discuss the question of which Conditions of Contract, if any, were to apply, this is in no way unusual in any class of construction contracting.

22. What the parties in fact did, in my judgment, was to behave as though their relationship was governed by the IFC Conditions, particularly in relation to pricing and certification of the work and the certification of completion and extensions of time. Furthermore, at the end of the Project the Claimant and the Architect sat down to seek to agree a Final Account using procedures which were referable to the IFC conditions. Specifically, both parties recognised and accepted that Provisional Sums, of which a significant number existed in the Contract Documents, needed to be formally omitted and replaced with

Adjudication Law Reports. Typeset by NADR. Crown Copyright reserved.

Architect's Instructions, all of which was referable specifically to the IFC conditions. While the parties rarely, if ever, made actual reference to the terms of a Standard Form, I am in no doubt that, had they been asked which Standard Form applied, their answer without further consideration would have been IFC 84. I therefore find that there was indeed an agreed convention on the basis of which the parties performed the Contract, for this purpose the Defendant being represented by the Architect as its agent. This convention was acted on without demur or exception by both parties and I find that it would not be just or equitable for the Claimant now to be permitted to resile from this common assumption. Accordingly, in addition to the findings set out in Part I of his Judgment, I find that the Claimant would be estopped from denying that the IFC 84 Conditions of Contract applied to the works which are the subject matter of the Contract.

23. A further contention raised by the Claimant is that, even if IFC84 is found to govern the contractual relationship between the parties, there was still an entitlement to be paid on a fair and reasonable basis on either of two grounds. First, the Claimant asserts that the Defendant interfered with the Architect's making of proper extensions of time, or in the alternative the Architect, as Agent for the Employer failed properly to carry out his duties under the IFC Contract. The particular assertions do not appear in the existing pleadings and the Claimant, accordingly, requests permission to amend in terms of a Draft Re-Re-Amended Particulars of Claim attached to its final submission. This is strenuously opposed by the Defendant who points to the fact that frequent and substantial changes have previously been made to the Claimant's case, that no prior notice of the application was given and that the particular matters were not supported by evidence, nor were they put to the Architect. Secondly, the Claimant asserts that, by failing to appoint a Quantity Surveyor as required by Article 4 of IFC 84, the Defendant was in repudiatory breach of contract. In either case it is contended that the Claimant has a right to be paid for all work carried out on the basis of quantum meruit as put forward by its Expert, Mr. Blincow.

24. As regards the application for permission to amend, I consider that this must be refused, in relation to the new assertions summarised in para 23 above. I cannot conceive of any proper reason why such an application was not made during the hearing and before Mr. Evans gave oral evidence so that the matters could at least have been tested openly. In any event, in my judgment, the contention that the facts asserted should lead to the conclusion that the Claimant has an entitlement to be paid a fair and reasonable amount, disregarding the terms of the Contract, has no serious basis in law. As regards the second assertion of repudiatory breach, this contention also fails for a number of reasons. The contention, as pointed out by the Defendant, is not pleaded, even in the proposed Re-Re-Amended Particulars of Claim. The point has not been properly raised as an issue nor has it been addressed in the evidence. Furthermore, no serious case was advanced as to why the lack of a Quantity Surveyor should be regarded as fundamental. In fact, the intended functions of the Quantity Surveyor were performed by the Architect and, while the Claimant complains of the Architect's failure to accede to its arguments, there is no reason to suppose that the position would have been materially different had Messrs. Webb and Tapley been part of the Professional Team. If it was a breach not to appoint a Quantity Surveyor, it was a breach which had no material consequence. For these reasons, I reject both the alternative contentions which would lead to payment on a basis other than that dictated by the terms of the contract as already found.

25. This Judgment therefore proceeds on the basis that the parties entered into a Contract incorporating the IFC 84 Conditions to carry out work as described and priced in the Tender Documents for the Lump Sum Price of £339,895.34 subject to a single Completion Date which has been extended both formally and by the Defendant's concession to 28th October 1998. The issues which remain to be decided are the following:
    (i) What is the proper valuation of the measured work under the contract?
    (ii) Who was responsible for delay and what extensions of time (if any) are due?
    (iii) Is the Contractor, on account of delay and/or variations, entitled to additional sums in respect of prolongation and/or disruption?
    (iv) To the extent the Claimant was in culpable delay, what sums are due to the Defendant on the counterclaim? (the Defendant's further counterclaims for defects and restitution are settled in the sum of £3,000).

Valuation of the measured contract work

26. It is unavoidable that, at some stage in this Judgment, I must summarise the somewhat confusing history of the pleadings in this case. The original claim launched in January 2001, was for enforcement of the decision of an Adjudicator given on 8th December 2000, whereby he directed the Defendant to pay the principal sum of £173,959.30 amounting to 100% of the Claimant's claim, then put simply on the basis of a Contract made in July 1998. The Defendant raised a jurisdictional argument, which was not decided; but the Defendant by agreement paid into Court the sum of £207,412.18, representing the principal sum above together with VAT and interest, and the case has proceeded by way of re-hearing of the original dispute. Pursuant to the orders of the Court, the Claimant served Amended Particulars of Claim on 23rd May 2001 followed by Re-Amended Particulars on 28th May 2002. In each case the Claimant sought to pursue alternative claims for reasonable expenditure or quantum meruit, while the original basis of claim remained as the Claimant's fall back. Each of these pleadings was followed by corresponding pleadings from the Defendant and replies from the Claimant. The final attempt further to re-re-amend the Particulars of Claim is referred to above. Accordingly, the valuation of the Contract Works and the relevant disputes are those set out in the Claimant's Final Account which is conveniently summarised in the Defendant's Schedule C (to the Defence and Counterclaim) and the Claimant's response to that Schedule. The Final Account as originally relied on by the Claimant is set out in the document jointly drawn up between Mr. Evans and Mr. Nolan, bearing manuscript annotations where the typed figures were challenged by the Defendant.

27. Both Mr. Nolan and Mr. Evans gave evidence about the drawing up of the Final Account as did Mr. Fenley, who became involved through being asked to approve or otherwise comment on the proposed final account by Mr. Evans. The differences which emerged between the parties as regards valuation of the original contract work and variations (excluding other claims) was of modest compass. The recorded total difference between the measured works in the Claimant's Final Account and in the Architect's Financial Statement amounts to £27,693.56 (the Claimant's measured account totalling £352,456.94 against the Defendant's figure of £324,763.38). The difference arose as a result of queries raised by Mr. Fenley, which led Mr. Evans to revise the figures earlier agreed with Mr. Nolan. The Claimant argued that there was a binding agreement and I accept Mr. Nolan's evidence as to the way in which this came about. Mr. Nolan had attended at Mr. Evans' office at his (Mr Evans') request on a number of days in January 1999 and worked through the account in what I accept was a reasonable and uncontentious manner, with Mr. Nolan producing such supporting documents as Mr. Evans thought were reasonably required. It must be remembered that Mr. Evans, unlike most of those now involved in this case, had a close familiarity with the works and it is unsurprising that he did not require full details in order to make the necessary adjustments to the account.

28. In ordinary parlance there is no doubt, in my judgment, that Mr. Nolan and Mr. Evans "agreed" the Final Account. However, that is not the end of the matter because the parties were operating under the IFC Conditions of Contract, where the Architect (either on his own behalf or in the guise of the Quantity Surveyor) has specific tasks in relation to valuation. Those tasks do not include reaching a binding agreement with the Contractor. Mr. Evans' function under the Contract, strictly, was to certify what he found to be due and both the Contractor and the Employer then had the right to challenge the certificate, if necessary by Arbitration or litigation. What happened instead was that Mr. Evans, having, as I find, ascertained the value of the account in such manner as would normally have been certified, invited Mr. Fenley's comment. As can be seen on the original document, and as was freely accepted by both Mr. Evans and Mr. Fenley, a number of queries were raised which resulted in the account being reduced by the sum which now represents the difference between the parties. In those circumstances, and given that Mr. Evans did not certify the full sum in question, there is no ground upon which I can find that Mr. Evans or Mr. Fenley or the Defendant was bound by the discussions that had taken place. Nevertheless, I find that those discussions did result in the agreement of Mr. Evans (although not binding) to the sums included in the final account. Those sums had been arrived at on the basis of give and take and it is unattractive, to say the least, that the amounts which Mr. Nolan would have been prepared to accept should then be used as the starting point for further negotiation with the client. In the result, I find that, while the Defendant was not strictly bound by what had been discussed and agreed, a

heavy onus falls on the Defendant to show why the figures apparently agreed should not now bind them. It is on that basis that the figures now said to be in issue fall to be assessed.

29. It is to be noted that Mr. Blincow provided alternative figures for the amounts said to be in issue. These were not related to any pleading, nor was there an application to amend. Accordingly, Mr. Blincow's figures are of no account, save that he has identified and accepted an item of double counting by which the amount in dispute is reduced to the net sum of £24,589.15. Further, in the Claimant's Response to Schedule C, it is now conceded that a further sum of £828.92 should be deducted.

30. In respect of the further items disputed by the Defendant my findings are as follows:
    (i) Shower Screens: I accept that the Defendant has established that the wrong type of screen had been priced in the Final Account. The correct screens cost £180 each in lieu of £440.34, leading to a total deduction of £1,822.38.
    (ii) Charge for Hot Air Driers: The Defendant now claims that no Architect's instruction was given for the provisions of dryers. It was originally accepted by Mr. Evans himself that an instruction was given. It is no longer open to the Defendant to contend that the Architect did not or should not have instructed the work. No deduction is appropriate.
    (iii) Sash Windows: The Claimant contends that this work amounted to adding additional weights as a consequence of re-glazing, which was initially accepted by the Architect. The Defendant now contends work amounted to snagging only. I accept the Claimant's evidence as to the work carried out. It follows that the work was extra and no deduction is appropriate.
    (iv) Wardrobe Shelves: This was a quantum dispute in respect of which the Claimant was unable to provide any substantiation. In the circumstances, I accept that the sum claimed has not been substantiated. I do not accept the full deduction claimed by the Defendant and allow a reduction of £1,000 only.
    (v) The Defendant seeks to apply a general reduction to all other items in the Account. In the light of my finding as to the manner of drawing up the Account I reject this further reduction.
    (vi) Client Review 20.4.99: This represents a series of items in respect of which the client has checked through the Final Account and estimated a series of further reductions. The Claimant has agreed to two items totalling £1,159.28, one item covering outstanding defects. In my judgement, given that the Final Account was initially agreed with the Architect and included elements of give and take on both sides, it is not open to the Defendant to take over the question of valuation in the manner suggested. I find that no further reduction is appropriate, beyond those agreed by the Claimant.
    (vii) The Defendant then seeks to apply the above reduction to all remaining items. This approach is unacceptable for the same reasons as the earlier pro rata reduction. I find that no further reductions are merited.

31. Taking in account the above findings, the Claimant's measured account falls to be reduced by a total of £7914.98 giving a net allowable figure of £344,541.96. Compared to the original lump sum tender price of £339,895.34, this represents an increase of just over 1%.

Responsibility for Delay Beyond 25 September 1998

32. The claim is put forward first on the basis that the Claimant was not bound by the IFC Conditions of Contract and was accordingly bound to complete only within a reasonable time. This alternative must be rejected for reasons already given. Alternatively, on the basis of the IFC Conditions of Contract, the Claimant claims extensions of time relying on the following matters:
    (i) Absence of Party Wall Award which brought the works to the basement flat effectively to a halt shortly after the start. Effective progress began only when the Claimant was informed on 17th or 21st September 1998 that the Award had been obtained. Only then could structural steelwork be ordered and this was installed by 28th September.
    (ii) Following structural works in the basement it was found that complete electrical re-wiring was required. Rewiring led to the necessity to replaster the entire basement flat as additional works.
    (iii) Between early November and mid-December the Claimant was unable to proceed with the original works, the basement kitchen being fitted (by Direct Contractors) in the week prior to Christmas. Previous delays led to the work being prolonged during the Christmas shutdown.

(iv) However, on 25th November 1998 the Architect instructed the Claimant to order Amtico flooring for the basement kitchen which had a delivery period of 4 weeks. This delayed laying of the floor until 5th January and completion until 8th January, the date on which the Claimant asserts completion of the remaining parts of the works.

33. The Defendant drew attention at various points to a number of notable, if not dramatic changes that had occurred to the Claimant's case and it is worth summarising briefly the way in which the Claimant's present case came to be before the Court. The Amended Particulars of Claim, served in May 2001 included, within the detailed calculations of the Final Account, an Appendix setting out grounds of delay which asserted some 12 grounds, mostly comprising variations and late instructions which were claimed to give rise to a total delay of 30 weeks, but that the actual delay of 14 weeks only indicated some degree of concurrence. The Claimant's case altered dramatically in the Re-Amended Points of Claim which were finally permitted on terms and re-served on 28th May 2002. The new pleading relies substantially on the matters set out above which are said to have become apparent as a result of documents disclosed by the Defendant. The Claimant's case on delay was supported, initially by the first Report of Mr. Blincow dated 8th March 2002 and subsequently by his Supplementary Report dated 29th May 2002. Mr. Blincow's analysis of delays led him to conclude, in his Supplementary Report, that delays to the basement flat were the major delaying factor for the whole Project. Mr. Blincow's interpretation of events was that delays to the basement arising from the structural work, the Party Wall Awards, replastering and rewiring all affected the critical path of the basement flat and the contract period itself. Mr. Blincow considered there were many changes and delays in transmitting information. The Claimant places reliance on Mr. Blincow's Reports which justify an extension of time, in respect of the basement up to the actual completion date. Alternatively, concurrent delays occurred to flats on the upper floors which are relied on to the extent necessary. The Defendant, on the other hand has severely criticised the manner in which the Claimant's final extension of time claim was put forward and the stark changes in the claims put forward at different times. The Defendant contends that Mr. Blincow's Reports gave no justification for the 21½ weeks period of delay claimed and that the periods of delay asserted by Mr. Blincow did not correspond, either in their length or starting point, with the pleaded delays, nor did Mr. Blincow set out time periods said to be associated with the delays asserted by him.

34. As regards the individual delays relied upon by the Claimant, the Defendant pointed out that there was a major inconsistency between the pleaded case of there being an alleged freezing order in respect of steelwork throughout the building and the Claimant's own factual evidence, where Mr. Plenty accepted that the steelwork related only to the basement. Mr. Evans denied that any freezing order had been given and was not challenged about this, nor was there any record of such an instruction. As regards steelwork to the new roof in the kitchen, Mr. Evans gave evidence that the relevant drawing was provided to the Claimant on 4th August and considered there was no reason why the roof could not have been completed by the end of August as opposed to early October when it was completed. Mr. Evans was not cross-examined about this evidence. As regards Beam LG3, Mr. Evans accepted that the Claimant had been told that the beam should not be installed until approval by the Party Wall Surveyor for No 23. Mr. Nolan accepted that approval had been notified by 18th September. The channels were delivered on 28th September and the beam installed immediately thereafter. The Defendant contended that Beam LG3 had no effect on the ground floor flat and indeed no significant effect on work in the basement. As regards the Party Wall Awards themselves, Mr. Plenty had accepted that he had never seen them and that they were irrelevant.

35. As regards rewiring, although this is accepted as extra work, the Defendant contends that it should have been identified much earlier and Harvey were in fact aware of the need for this work. Harvey's programme showed that this work could not have occupied more than four days, including other electrical work. As regards the alleged replastering, the Contract work included a large amount of plasterwork and it was disputed that "replastering" was ever required as such. In any event, Harvey's Programme showed replastering as concurrent with rewiring and therefore not involving any further delay. The Defendant strongly disputed any claim based on ordering Amtico floor tiling: not only was the amount of work small, but Mr. Evans had intentionally taken into account the existing delay to the

work in assessing that no additional delay would be caused by the four week delivery period. No delay was in fact caused.

36. In addition to these points, the Defendant relies on the complete absence of any Notices of Delay, contrary to Clause 2.3 of IFC 84. Furthermore, Clause 2.4.7, which concerns alleged late instructions, requires that the Contractor must specifically have applied at a reasonable time for such instructions. The Defendant also placed reliance on two sets of Minutes of meetings on the site on 7th September and 28th September 1998. On 7th September Mr. Nolan had advised that completion of all but the basement flat was anticipated for 25th September i.e. the Contract Completion Date but that the basement flat was two weeks in delay and should be completed on 9th October. On 28th September Mr. Nolan had given a Completion Date for the basement flat as 16th October with other flats being completed in the period of 2nd to 30th October, thus involving delays of between one week and three weeks in total. The Minutes, which had been taken by Mr. Evans, were remarkable for their absence of any complaint from the Claimant about being held up or incurring additional cost. The Minutes, coupled with the absence of any Notices of Delay amply confirmed, in the Defendant's submission, that the delays now alleged by the Claimant were nothing more than a late invention. It had taken the Claimant well over 3 years to work out what their case on delay was and the final product was shot through with holes, being full of inconsistencies and unsupported by appropriate evidence. Furthermore, the Claimant had failed effectively to answer the positive case put forward on behalf of the Defendant. Notwithstanding this, the Defendant stood by the Architect's unofficial assessment of 23 days which could now be seen to be over generous. The Defendant counter-claimed liquidated damages beyond the extension of time conceded, to which the Claimant had no answer.

37. The Claimant's case, as finally presented on paper and as placed before the Court, was deeply unimpressive and the Defendant's criticism of it is no mere hyperbole. Nevertheless, the function of the Court at this stage is not to criticise but to seek the truth. This would not be the first case in which the combined efforts of experts and Counsel had managed to obscure rather than reveal the Claimant's true case. In my view, there are a number of significant factors which make it difficult to accept the case, as put forward on behalf of the Defendant, that there was in fact no delay of any note to the works. When cross-examined about the state of the works on 7th and 28th September 1998, both Mr. Plenty and Mr. Nolan were firmly of the view that delaying factors existed which were not recorded in the Minutes. Mr. Nolan stated that the Claimant company had had a non-confrontational relationship with Mr. Evans, the Architect. While Mr. Nolan accepted that it would normally be appropriate to record events and to give notices to the Architect, he said that this was not the way in which this Contract had been performed. The Claimant had an existing relationship with the Architect involving other Projects and Mr. Nolan was confident that the Architect in fact knew what was happening on the Project. In Mr. Nolan's opinion the supply of information from the Architect was often late and Mr. Evans was aware of this.

38. As regards the contribution of the Architect, Mr. Evans, it is relevant to note that, while reliance was placed on the accuracy of his minutes of meetings, it was Mr Evans who sent the letter of 7th July 1998 and then took no further step to issue formal Contract Documents to be signed by the parties. One explanation might be that Mr. Evans' attitude to the contract was sloppy verging on being negligent. But having seen Mr. Evans in the witness box, I reject such an explanation. Mr. Evans was a precise and careful Architect when this was necessary and in my view the failure to draw up a formal Contract is consistent with the degree of informality to which Mr Nolan testified. While I have no doubt that all parties believed there was a binding Contract in existence, no one showed any sign of wishing to stand by the letter of it nor to enforce the small print in the way now proposed. No formal waiver was alleged in this regard but it is worth noting that the Defendant alleged and has now succeeded in demonstrating waiver as its alternative case in relation to the existence of a binding Contract. That point further emphasises the degree of informality that I am satisfied existed, not only in the drawing up of the contract but, more important for present purposes, in its performance.

39. In relation to extensions of time, since the Defendant does indeed rely on requirements as to notice, it is appropriate to record that, in my judgment, Clause 2.3 does not seek to render the Contractor's Notice a condition precedent to the granting of extensions of time. If any doubt is created by the first paragraph,

Adjudication Law Reports. Typeset by NADR. Crown Copyright reserved.

that doubt is removed by the third paragraph which expressly provides for the Architect to review extensions of time *"whether or not the Contractor has given notice as referred to in the first paragraph hereof"*. It is also relevant to note that the ways in which Mr. Evans came to form his opinions about extensions of time was unconventional and did not demonstrate any careful or systematic review of the circumstances such as to suggest that the final extension of 23 days, as accepted by the Defendant, should be regarded as definitive. It should be added that the way in which Mr. Evans dealt with the Final Account, on which I have already made findings, was also consistent with this approach. I found it surprising that Mr. Evans, as a professional Architect, should have reached apparent agreements with the Contractor and then unilaterally consulted the Defendant through Mr. Fenley and apparently accepted Mr. Fenley's views without further question. But I do not criticise Mr. Evans for this, because I see it as further confirmation of the informality with which not only the performance of the works but the subsequent process of accounting was approached. For present purposes it is sufficient to conclude that the view of Mr. Evans as regards extensions of time were of little more significance than those of Mr. Fenley. Mr. Evans' estimate of extensions must be taken as the minimum entitlement and, in my judgment, the Claimant is entitled to be granted such extension of time as is merited by the facts, so far as they can be ascertained from the confused state of the Claimant's pleadings and expert evidence, taken with the factual evidence primarily of Messrs. Plenty and Nolan and Mr. Evans.

40. Having considered the extensive material placed before the Court, I have come to the following conclusions on extensions of time:

(i) The absence of Party Wall Awards must have been a significant factor in being able to complete work to the basement flat. Why this was not referred to in the Architect's Minutes is a matter into which I do not need to enquire, but in my judgment the Claimant was indeed prevented from completing the structural steelwork in the basement flat until late September, work which on any view ought to have been available to the Contractor at a much earlier date. To allow work to start without full Party Wall Awards in place involves a risk and it is unfair that that risk should rebound on the Contractor. Doing the best that I can, I find the Contractor entitled to an extension of time of 7 weeks.

(ii) The need to review the electrical wiring was a matter that should have been ascertained by the Architect and should have been the subject of a proper instruction. Consequent delay is not to be measured purely in terms of the length of time taken to do the works since this involved replanning in addition. I accept also that some additional plastering would have been necessary, although not to the extent contended for. I allow 2 weeks extension on account of these matters.

(iii) The allowance for the further delay over the Christmas break depends on whether the Contractor should reasonably have completed before the break: if not, there is no such entitlement.

(iv) As regards the Amtico floor, Counsel have referred to the authorities on questions of concurrent delay and the general question whether the Employer is entitled to take advantage of existing delay to order extras with impunity. I do not think that facts in this case are sufficiently well established to merit a review of these authorities. It is sufficient to say that in my judgment the Architect, when ordering an extra which, taken alone, would involve delay, takes the risk that some delay may in fact result notwithstanding other events. In the light of the evidence of Mr. Plenty, I am satisfied that some residual delay was caused which I assess at 1 week.

41. For the avoidance of doubt, the above individually assessed extensions are in place of those assessed by the architect. Furthermore, it is now established beyond argument that extensions are to be added to the original completion date, and there is no question of extensions being effectively granted up to the date on which the last item of delayed work could be completed (the "last coat of paint" theory). In addition, it is necessary to consider concurrency. The foregoing delays were, by the nature of the work, concurrent to an extent. Again, doing the best I can, I estimate the net extension which the Contractor has established amounts to 8 weeks, in place of the shorter period assessed by the architect. The result is that the contractual Completion Date is to be extended from 25th September to 20th November 1998. It follows that the Claimant is not entitled to a further 2 week extension on account of the Christmas break. The consequences of these extensions will be considered in relation to the claim and counter-claim.

Loss and Expense arising from Delay and/or Disruption

42. The Claimant's claims for sums additional to the cost of the work itself follow a similarly chequered history to the claims for extension of time but nothing would be gained from a further recital. One issue of substance is whether, given the complete absence of notification, the Claimant has any right to pursue such claims, which was strongly disputed by the Defendant. Reliance was placed on IFC 84 Clause 4.11 which, in relation to direct loss and/or expense arising from late instructions, variations and provisional sums, is prefaced by the words: "If, upon written application being made to him by the Contractor within a reasonable time of it becoming apparent …." This makes it clear that written notice is ordinarily a condition precedent, and the contrary was not argued. Furthermore, although I have found that the Contract was administered informally, no plea of estoppel is raised. It is to be noted, however, that up to the delivery of Part I of this Judgment, on the second day of the trial, the Claimant had maintained alternative claims for reasonable remuneration and for quantum meruit on the basis that IFC 84 did not apply. Had these contentions succeeded, it would have been immaterial whether any notice had been given. I also bear in mind that there was no break in the hearing, either before or after giving the Part I judgment. The lack of notice was put to Mr. Nolan in his cross-examination, as bearing on the credibility of his evidence. His response was to refer to the closing paragraph of Clause 4.11 which relevantly states: *"The provisions of this Clause 4.11 are without prejudice to any other rights or remedies which the Contractor may possess".*

    This is usually understood to refer to alternative claims based on breach of contract, and it is of some relevance that the Claimant sought, even after the Part I Judgment, to maintain alternative claims for payment on a fair and reasonable basis which, however untennable, have only finally been dismissed in the earlier part of this judgment.

43. For whatever reason, there was no application during the hearing to amend to add an allegation that the relevant events relied upon constituted, in the alternative, breaches of contract. An application to amend emerged only in the Claimant's Final Written Submissions, with no prior notice, in the Draft Re-re-amended Particulars of Claim. I have already dealt with some aspects of this draft pleading but now turn to the amended paragraph 39A which seeks to support the claim as "verified" by Mr. Blincow in the following terms: *"Such a valuation is an appropriate measure, either under IFC 84 (which the Claimant continues to deny was incorporated), or as damages for breach of contract".*

    The pleading sets out alleged breaches of contract involving the administration of the Contract, for which I have already refused leave to amend. However, the valuation referred to is that allegedly based on the matters set out in para 18A to 18F of the original Re-amended pleading, corresponding substantially to the grounds of delay which have already been considered above. Such matters and events would normally be regarded as amounting, in the alternative, to breaches of express or implied obligations under the contract. Given that the facts relied on have not changed, I do not consider that the Defendant suffers any prejudice by permitting the alternative claim. Accordingly, and subject to any subsequent argument as to costs, I allow the amendment and permit the Claimant to rely on the same events as previously pleaded as breaches of contract in the alternative, giving a right to damages, if established. Such damages are unlikely to differ materially from the alternative remuneration due under the Contract. In the light of this decision, it follows that the Claimant's claim for additional payment is not barred by lack of notice. The absence of any form of notification is, however, material to the weight to be placed on the evidence supporting the claim.

44. With regard to the sums claimed, the Claimant's Closing Submissions reiterate the figures set out in the Re-amended Particulars of Claim as follows:

    (i) Delay related loss and expense and/or damages comprising;

    a) Preliminaries: 12.4 weeks (net) at £3400 per week £42,160

    b) Head Office Costs based on Emden formula in respect of 14.4 weeks at 6%. £24,472.46

    (ii) Disturbance related loss and expense and/or damages:

    Cost of alleged overtime working by operatives, including foreman, based on time sheets, and leading to a total of over 6000 hours "overtime" which is costed at the claimed amount of £74,466.10.

45. The pleaded claims were amended in various ways and summarised in the "Claimant's Case on Money" appended to its Closing Submission. This document amended the foregoing figures as follows:
    (i) Delay-related loss/damage:
        (a) Extended preliminaries now amount to £39,833.22, following a correction to the supplementary report of Mr. Blincow submitted at the hearing, based on a reduced weekly rate of £2,588.33 and Mr. Blincow's assessed delay of 15.59 weeks.
        (b) For head office costs, the Claimant's latest figure is £33,133.23, based on Mr. Blincow's reassessment of the appropriate percentage figure at 7.84% and his assessment of relevant delay.
    (ii) Disturbance-related loss/damage:

    Mr. Blincow in his first report analysed the labour content of the original contract work and the actual labour used on the job and arrived at figures of 9,850 and 26,358 hours respectively, giving a difference of over 16,000 hours as compared to the originally claimed excess hours of just over 6000. Mr. Blincow did not originally seek to place a monetary value on the disruption claim and, in his supplementary report of May 2002 opted for a round figure of (say) £50,000. During re-examination Mr. Blincow distributed a further paper in which a new calculation is presented showing that the excess labour used amounted to 5646 man hours at £11.50, giving a total of £64,929. This calculation starts with the actual excess man hours previously calculated and deducts allowances for items, including other claims for disruption (dealt with below).

46. In addition to disruption as originally claimed and pleaded, the claim presented to the Court includes the following additional elements:
    (i) Additional preliminaries on works after Practical Completion: £3,981.30, alternatively £7,845.06;
    (ii) Use of lorry to store materials: £5,320.76;
    (iii) Claim from electrical sub-contractor: £4,836.00;
    (iv) Claim for double handling of materials and loss of productivity due to lack of space: £5,000, revised to £5,382.00;
    (v) Additional supervision: £10,000, revised to £11,628.60;
    (vi) Additional cleaning and clearance of rubbish: £3,000, revised to £2,155.10;
    (vii) Additional claims resulting from acceleration of the works by 5.93 weeks:
        (a) Additional preliminaries: £16,159.25 revised to £15,170.90;
        (b) Additional contribution to head office costs: £28,600.20, revised to £13,185.24.

47. The Defendant, while not objecting to Mr. Blincow's reductions, took issue with any unpleaded increase in the claim. The Defendant also placed reliance on Mr. Blincow's non-support of the pleaded claims and contended that no claims at all had been established. In particular, there had been no proof of any loss or expense being incurred.

48. Having summarised the claims finally advanced by the Claimant it is appropriate to weed out those that do not merit further consideration. First, all the additional claims summarised in para. 46 above are unpleaded. They arise from successive amendments to Mr. Blincow's report which the Claimant has adopted as part of its claim for reasonable costs. No attempt has been made to plead a contractual basis for these additional claims. The Court has, prior to the present hearing, shown the Claimant every possible latitude but the Defendant remains entitled to a trial on the claim as pleaded and in my view all the claims fall to be rejected as not properly before the Court.

49. Further and additionally, no factual evidence was proffered to support these additional claims which appeared only in Mr. Blincow's reports. To the extent that the evidence offered any support for these claims, none were adequately established and I reject all such claims as unsupported. Specifically, I reject the Claimant's contention that the works were accelerated as alleged or at all.

50. The remaining claims which merit serious consideration are those referred to in paras 44 and 45 above. I have found that the facts on which these claims are based led to prolongation of the works and I accept that they also led to a degree of disruption in terms of excess labour usage. I further accept that the facts amounted, in the alternative, to breaches of express or implied terms of the contract as to non-interference with the due progress of the works having regard in particular to the short contract period for performance.

51. Taking into account both the lack of any prior notice of any such alleged losses and also my findings as to the informal manner in which the works were carried out, my findings as to the above claims are as follows:

    (i) I accept that a claim for extended preliminaries should be allowed in the reduced sum of £2558.33 per week for the assessed period of 8 weeks giving a claim of: £20,467;

    (ii) I accept that a claim for head office costs is available and may be assessed using the Emden formula as follows: £339,895.34 ÷ 12 x 8 x 6% = £13,596;

    (iii) I accept the substance of Mr. Blincow's analysis showing that the Claimant incurred labour costs substantially in excess of those allowed for. The different calculations put forward by the Claimant and by Mr. Blincow all assume that the Claimant was blameless and that all established additional costs should be recoverable. Having considered the evidence I am not persuaded that the whole or even the majority of the Claimant's additional labour costs can be attributed to the matters alleged. On the contrary, there was evidence of the unproductive and wasteful use of labour. Doing the best I can on the material presented, I assess that one quarter of the minimum figure put forward on behalf of the Claimant by Mr. Blincow (£50,000) is properly attributable to additional labour costs and I allow the Claimant the sum of: £12,500.

52. The total of claims allowed is therefore: £46,563

Add value of measured work:	344,541.96
Total of final account:	391,104.96
Sum paid:	324,577.50
Balance due:	£66,527.46

Defendant's Counterclaim

53. This arises from the Claimant's culpable delay in completion. I accept the evidence of Mr. Evans as to the actual dates for completion. The contract contained no provision for sectional completion and it follows that the extension of time I have assessed applies to all the flats. The extended completion date was 20 November 1998. It follows that Flats 3 to 6 were completed early in relation to the extended completion date. Flats 1 and 2 (basement and ground floor) were complete on 12 and 10 January 1999, 7 weeks 4 days and 7 weeks 2 days late respectively.

54. The Defendant, in respect of such delay, claims either liquidated damages or general damages. Clause 2.7 of IFC84 provides for the recovery of liquidated damages at the rate stated in the Appendix. There is no provision for sectional completion. The Contract Preliminaries and General Conditions provided for liquidated damages at the rate of £600 per day with no division between the flats. The Defendant's evidence, which is not disputed by the Claimant, is that different rental values attach to each flat. By the Counterclaim, the Defendant claims liquidated damages in respect of the period up to 1 November 1999 and loss of rental income thereafter. It follows from the extensions of time assessed in this Judgment that no liquidated damages in respect of the whole building would be recoverable in any event. I therefore accept that the counterclaim for general damages for delay succeeds in respect of the agreed loss of rental income.

55. The allowable claim is as follows:

Flat 1: 53 days @ £600 per week	£4,543
Flat 2: 51 days @ £625 per week	£4,554
TOTAL	£9,097

56. The counterclaim is therefore allowed in this sum together with the agreed settlement figure for other counterclaims, giving a total of £12,097.