JUDGMENT : HIS HONOUR JUDGE TOULMIN CMG QC. TCC. 18th December 2007

1. This is an application by five Danish Defendants against the Claimants, Heifer International Inc (Heifer), (1) to stay proceedings in this court pursuant to Section 9(1) of the Arbitration Act 1996, (2) that the claims against each of the Defendants should be dismissed and (3) that the Court has no jurisdiction to hear the claims against them. Each of the Defendants contends that any dispute between it and the Claimant should be heard in the Danish Building and Construction Arbitration Board in Copenhagen (the Danish Arbitration Board) according to Danish law.

2. The applications are made on two separate grounds. First, the Second to Fifth Defendants contend that they carried out work pursuant to binding contracts which contained an arbitration clause specifying the Danish Arbitration Board as the exclusive venue for the determination of disputes.

3. Secondly, if this Court finds that there was no contract, alternatively no contract which incorporates the arbitration clause, the First and Second named Defendants contend that the Court has no jurisdiction by reason of the Brussels Convention and Judgment Regulations made pursuant to the Brussels Convention namely that the normal rule is that persons domiciled in a member state shall be sued in the court of that member state. It is contended that, under Article 5 of the Convention, the first two Defendants, the architect and his firm, carried out their obligations in Denmark and therefore should be sued in Denmark.

4. The First Defendant claims that he did not enter into any agreements personally and that the claims against him should not proceed in any event. This is not the subject of a formal application before me but if necessary this application will be made if the outcome of the present application warrants it.

5. The Claimant disputes the applications made by the Defendants on the grounds:
   i) That the arbitration provisions relied on by the Defendants were not incorporated into the relevant contract.
   ii) If they were incorporated, they were unfair terms and are not binding on Heifer pursuant to Regulation 8(1) of the Unfair Terms in Consumer Regulations 1999.
   iii) While the Claimant accepts that the Brussels Convention applies, it contends that Article 2 is subject to Article 5 and that "the place for the performance of the obligation in question was, when all relevant matters are considered, England and not Denmark".

6. The dispute relates to the refurbishment of a substantial house known as Tor Point, Tor Lane, St Georges Hill, Weybridge in Surrey (the property). The property is a very substantial one which according to the plans has a very large number of rooms.

7. Mr Alex Temple, also known as Mr Alexsandr Aleksandrovich has given four witness statements and also extensive oral evidence. He is a Russian national who is at present residing full time in England with his wife and children and has been since September 2004. He has a shipping transportation business shipping oil.

8. In December 2005 Heifer purchased the property in the following circumstances set out in paragraph 4 of Mr Temple's first witness statement:
   "When we were looking for a property to buy as our home, my wife was advised as part of her overall wealth management and Inheritance Act planning to establish an off-shore company and to use that company to purchase our home in England. She therefore established Heifer International Inc in the British Virgin Islands … The Claimant is beneficially owned by my wife and children."

9. Mr Temple decided that the quality of Danish workmen was superior to those in the United Kingdom and the Defendants, all of whom are resident in Denmark, were retained in connection with the refurbishment of the property.

10. The First Defendant, Mr Christiansen, is a very experienced Danish architect residing and practising primarily in Denmark although he has carried out work in other countries. The Second Defendant is his firm, which is a Kommanditselskab, a legal entity under Danish law which is owned by Mr Christiansen. It is the entity under which he and his associates carry out their architects practice in Denmark.

11. The Third Defendant, Haslev-Hansen VVS (Haslev-Hansen) is a Danish company, resident in Denmark which provides heating, ventilation and mechanical engineering services.

12. The Fourth Defendant, Stevns El-Service A/S (Stevns) is a Danish company, also resident in Denmark which provides electrical installation services.

13. On 23 May 2007 Stevns brought proceedings against Heifer in the Danish Arbitration Court in connection with this dispute asserting the jurisdiction of the Danish Arbitration Court and claiming DKK 388,391.76 (about £40,000) for unpaid invoices. The pleading is in similar form to particulars of claim in this jurisdiction.

14. The Fifth Defendant, Listed El-Teknik ApS (Listed), is owned by Mr Listed who is also a director. It carries out electrical services and in the middle of November 2006 it took over the electrical works at Tor Point.

THE PARTICULARS OF CLAIM

15. Since I shall in due course have to consider where the principal obligation of the matters in dispute arose and/or the place where the harmful act occurred, it is important to set out how Heifer puts its case in the Particulars of Claim.

16. It claims that the dispute relates to alleged failures in connection with the refurbishment works at the house in St Georges Hill, Weybridge, owned by the Claimant.

17. The Particulars of Claim set out what is described as "the appointment" of the First Defendant alternatively the Second Defendant as the appointed architect namely that it was pursuant to an alleged oral agreement made at the Churchill Hotel in London in December 2005 (paras 7 - 8).

18. The services to be provided by the First and/or Second Defendant and alleged to have been agreed were:
    i) the preparation of all designs, drawings, specifications, bills of quantities and schedules of works (para 10(1));
    ii) preparing tender documents and engaging suitably qualified building contractors to carry out the works (para 10(2));
    iii) acting as Heifer's representative in relation to the works (para 10(3));
    iv) the provision of all professional services necessary for the completion of the works (para 10(4)).

19. By forms of authority dated 31 March 2006 and 10 May 2006 it is alleged that the Claimant authorised and then gave the First Defendant a power of attorney to enter into contracts with craftsmen on behalf of the Claimant and to authorise payments for the craftsmen (paras 14 – 15).

20. In the event that there was no oral agreement in December 2005 and none which governed the relationship of the Claimant and the First and Second Defendants prior to April and May 2006, the Claimant will contend that there was no agreement between the parties (para 20).

21. The draft consultancy agreement signed in May 2006 did not, so it claims, constitute an agreement between the parties, alternatively, if it did, it expired on 25 May 2006 pursuant to Clause 1.5 of its terms. There was therefore no written agreement between the parties and no jurisdictional basis for the court to grant a stay under Section 9(1) of the Arbitration Act 1996.

22. The claim is made against the First and Second Defendants that the Claimant, through Mr Temple, made various payments during the course of the project totalling £1,476,432 (paid in Danish Krone, Euros and Sterling). It is contended that these funds were held on account by Mr Christiansen for the benefit of Heifer (para 34).

23. The work, so the Claimant alleges, remains incomplete and therefore it claims in paragraphs 38 and 39 of the Particulars of Claim:
    i) an account of monies paid to the architect and the contractors;
    ii) an enquiry into the balance of the money in the First Defendant's account;
    iii) an order for payment out of any sums due and repayment of all sums paid to the Fourth Defendant;
    iv) an order of delivery up of all work products prepared by the First and Second Defendant.

24. In relation to the Third Defendant it is claimed that the First Defendant acting on behalf of the Claimant engaged the Third Defendant to provide mechanical, heating and ventilation engineering services at the property. It is alleged (para 24 of the Particulars of Claim) that the Third Defendant was engaged on the basis of a lump sum quotation provided by the Third Defendant in relation to drawings prepared by or on behalf of the First Defendant.

25. The claim against the Third Defendant is for alleged defects in the works and the design of the works as set out in Appendix 2 of the schedule of defects.

26. It is claimed against the Fourth Defendant that it entered into an agreement with Mr Temple. It is claimed that since the material part of the arbitration agreement is not in writing and is inconsistent with the written form, the requirement of the agreement to be in writing is not satisfied.

27. In relation to the Fifth Defendant the Claimant makes the further argument that there is a distinction between the case where the arbitration agreement is incorporated by reference to standard terms and the case where parties refer to another contract involving at least one other different party. It is contended that there was no express reference to the arbitration agreement and in the circumstances it was not incorporated.

28. In relation to the Fourth and Fifth Defendants (as well as the Third Defendant) Heifer's claim is for damages, at present unquantified, for defects in the works and the design of the works as set out in Appendix 2 (schedule of defects).

29. The Defendants contend:
    i) The Claimant and the Second Defendant intended to be bound by the second version of the written contract (together with AB89 containing the Danish Arbitration Clause) made on 10 May 2006.
    ii) This agreement was intended to govern the relationship between the Claimant and the Second Defendant from the commencement of the First and Second Defendant's involvement until 25 January 2006. The First Defendant is involved only as acting on behalf of the Second Defendant.
    iii) After 25 May 2006 the fact that the Claimant and the Second Defendant proceeded with the project without seeking to renegotiate the terms (except for the extension of the completion date) and that Mr Christiansen, as Heifer's agent, submitted invoices to the Second Defendant's bank account designated for fees, constituted an agreement by reference to the terms in the written agreement. It is said that it is plain that the parties intended the arbitration agreement to be incorporated into the terms of the written agreement. If I am against the Second Defendant on this, it argues that the arbitration clause would continue to bind the parties unless I concluded either that the contract based on version 2 had never been made, or the Consumer Regulations applied and resulted in the clause not being binding.

iv) The Third, Fourth and Fifth Defendants claim that they are covered by their arbitration clauses conferring exclusive jurisdiction on the Danish Arbitration Court.

WITNESSES

30. I have read a number of witness statements from Mr Temple and Mr Christiansen and others to which I shall make reference.

31. I have also heard from both Mr Temple and Mr Christiansen who gave oral evidence in English. It is not the first language of either and they coped very well. Mr Temple was the more comfortable in English. It is right to add that it is clear from various emails that neither is absolutely fluent in written and spoken English and I must take that into account, as I do.

32. Mr Temple is a very successful and sophisticated Russian businessman. He was trained in Russia as an economist. He started his professional life as a banker, was then an investment banker and since the year 2000 has been in the shipping business transporting oil. On 16 September 2004 he moved to England and is resident full time in England. I accept that Mr Temple had no previous experience of arranging substantial building and renovation works, particularly in a foreign country.

33. Mr Christiansen has practised as an architect in a firm in Copenhagen for over 30 years and is a member of the Danish Council of Practising Architects. He has undertaken commissions from time to time in Germany, Italy and France but not previously in the United Kingdom. The vast majority of his work is in Denmark.

34. I am satisfied that he had no experience or familiarity with the Building and other Regulations governing the substantial renovation works in England that were being undertaken. He thought that free movement within the European Union under the Treaty of European Union meant just that and he did not expect to encounter any difficulties in working in England.

35. I am satisfied that both were trying to assist me in their evidence.

THE FACTS

36. It is necessary to set out the formation and objects of Heifer in more detail since the Defendants make the allegation that in relation to this project the Claimant does not fall within the definition of a company which was obtaining goods and services other than for the purposes of its business. It cannot therefore obtain the benefit of the Unfair Terms in Consumer Contract Regulations 1999.

37. Heifer is a company that was incorporated in the British Virgin Islands on 3 June 2004. The current director and secretary of the company is Jarman Directors Ltd, a company incorporated on 2 November 2005 and registered in St Lucia which took over the ownership of Heifer in September 2006.

38. In his witness statement dated 19 September 2007 Mr Izelaar says that as director and sole shareholder of Jarman Directors Ltd, which in turn is the sole director of Heifer, he controls Heifer. His direct involvement with Heifer began on 20 September 2006.

39. Mr Izelaar says further in his statement that a company such as Heifer is used as a property holding company off-shore and is established for the purpose of holding and owning valuable residential homes in England (or elsewhere) for their beneficial owners for the purpose of protecting those individuals who are not UK domiciled from English capital taxes.

40. The memorandum of association of Heifer is more widely drawn. Its general objects and powers include, under Clause 4, the carrying on of the business of an investment company [4(1)], the acquisition of stocks and shares [4(1)(2)], carrying on business as capitalists, financiers and merchants [4(1)(6)], carrying on the business of property investment, including developing the resources of real property and property of every description [4(1)(7)].

41. The Defendants contend that the objects are widely drawn and in relation to the refurbishment of an expensive property Heifer may well be trading in the sense that the property is being refurbished with a view to selling it at a substantial profit.

42. Mr Izelaar says that since he became involved on 20 September 2006, and as far as he is aware before that date, the company is not and has not carried on any trade, business or profession or commercial or profit making activity.

43. In his written and oral evidence Mr Temple has confirmed that this is the case. In his oral evidence he said that he did not believe before these proceedings that Heifer was permitted to trade.

44. By a letter dated 14 September 2007 to Dawsons, Asiaciti Trust confirmed to Heifer's solicitors that from the incorporation of the company to 20 September 2006, Heifer has not carried on any trade, business or profession or undertaken any commercial or profit making activity of any kind. I conclude as a matter of fact on the evidence before me that the house was bought for Mr Temple and his family to live in. A secondary purpose, applying to all house purchases, is to make a sound investment and it may well be that the refurbishment would assist this.

45. I now set out the facts in relation to the purchase of the house, the involvement of Mr Christiansen and the other Defendants.

46. The way Mr Temple and Mr Christiansen first met is set out in the witness statement of a mutual friend, Mr Katsnelson. In his witness statement Mr Ilya Katsnelson says that he has known Mr Christiansen since 1991 and regards him as a family friend. He has known Mr Temple since the year 2000 and also regards him as a business associate and a friend. Mr Katsnelson is of Russian origin and lives in Copenhagen.

47. Mr Katsnelson said that about two years ago Mr Temple asked him if he knew an architect who could help with substantial refurbishment of the family home which he was purchasing in England. Mr Katsnelson thought of Mr Christiansen, particularly because he had been involved successfully in the total refurbishment of Mr Katsnelson's apartment in Denmark.

48. Mr Katsnelson introduced Mr Temple to Mr Christiansen and said that thereafter he took a more active role than he would otherwise have done because he speaks fluent English and Russian and good Danish.

49. Mr Temple claims that he reached terms of engagement with Mr Christiansen at a meeting in December 2005 at the Churchill Hotel and that the engagement was made with Mr Christiansen personally and not with his firm. Mr Christiansen does not accept this.

50. It is clear that before the meeting Mr Temple and Mr Christiansen had visited the property and Mr Christiansen had shown Mr Temple details of previous projects that he had undertaken.

51. At the Churchill Hotel meeting (at which Mr Katsnelson was also present) which occurred probably on the same day as Mr Christiansen's visit to the property, Mr Temple said that Mr Christiansen agreed to provide professional services to Heifer in connection with the works. It was agreed according to Mr Temple that Mr Christiansen was to be responsible for everything except funding the project and approving the designs which were to be the responsibility of Heifer.

52. Mr Temple says in his first witness statement that "it was understood that the First Defendant would prepare a budget for the works in due course for agreement". This was no doubt carefully drafted for Mr Temple by his legal advisers. It falls short of saying that it formed part of the agreement. It does not set out the basis of the understanding.

53. On Mr Temple's version of events "it was understood that Mr Christiansen's fees would be agreed in due course". Again no doubt this was carefully drafted. It falls short of saying that there was an actual agreement made to that effect and again does not set out the basis of the understanding.

54. The Claimant's case is that after the meeting Mr Christiansen went ahead and prepared lay-outs of the existing building, arranged for contractors to visit the site, opened a bank account in connection with the project and received funds on behalf of the Claimant for distribution to contractors. This, it is alleged, is all consistent with an agreement having been concluded at the meeting in December 2005.

55. In oral evidence Mr Temple said, and I accept this, that he did not mind whether he was dealing with Mr Christiansen or his firm provided that the work was done.

56. In his witness statement Mr Katsnelson does not say that the parties reached an agreement at the December 2005 meeting at which he was present, but rather that by April 2006:

"as a result of all the discussions and negotiations that had taken place, the agreement was simple: Mr Helge Christiansen was to be responsible for everything in relation to the refurbishment work except for (1) approval of the designs and (any changes), and (2) funding the project both of which were to be the responsibilities of the Claimant."

57. Mr Christiansen's account of the meeting at the Churchill Hotel is that Mr Temple asked him if he was interested in acting as Mr Temple's architect for the refurbishment and renovation of the property. Mr Christiansen said that he was but that if he needed to retain particular experts to assist him in the design work he would call in English expertise. There was, he said, a lengthy discussion about the nature of the work and Mr Christiansen indicated to Mr Temple that his fee would be in the region of 10% of the budget of DKK 15 to 20 million (over £1 million).

58. Mr Christiansen said that he provided Mr Temple with a document entitled Description of Services – Building and Planning provided by the Danish Council of practising architects. An invoice sent by Mr Christiansen in July 2007 referred to charges for work carried out from 22 December 2005.

59. After the December 2005 meeting Mr Temple consulted Dawsons, his English solicitors. Mr Harbourne, a partner of Dawsons, wrote a memorandum to his colleague in the firm Mr White dated 9 January 2006. The advice was passed to Mr Temple and was forwarded by him to Mr Christiansen on 10 January 2006.

60. It is clear from the advice that Dawsons, presumably following Mr Temple's instructions, did not regard any agreement as having been concluded between Mr Temple or Heifer and Mr Christiansen or his firm.

61. Dawsons advised that Mr Temple "will need to appoint either an architect to design and project manage the substantial works that would need to be carried out or a design and build contractor". Mr Harbourne emphasised in his advice that the appointment of the architect ought to be in a reasonable standard English form not in a Danish form:

"although Denmark and this country are both subject to very similar laws, thanks to the European Union, as I see from the Description of Services, there are important differences and hence it is, at least preferable and less risky, to use forms appropriate for this country."

62. Mr Harbourne also advised that if Mr Temple was intent on using a Danish architect he would still need to have his own English legal advice:
"… I do however think we need to tread carefully in the form of appointment of that professional and make sure that the architect/engineer does understand the building contract/procurement system over here or has help from someone who does."

63. Unfortunately this impeccable advice was not followed. Instead, after consulting Mr Katsnelson, Mr Temple consulted Mr Hans Abildstrom a partner in the Danish law firm of DLA Nordic A/S which I was told is a very substantial law firm in Denmark with over 100 lawyers.

64. Mr Abildstrom received an email from Mr Katsnelson on 18 January 2006, copied to Mr Temple and Mr Christiansen, which starts:
"I have just spoken with Alexsandr (Temple) and he has asked me to pass on Hans Abildstrom's email in order to ask him to prepare with Helge an agreement for taking charge of the renovations of Alexsandr's new house."

65. It would appear from this also that the discussions in December 2005 were preparatory discussions.

66. Mr Abildstrom noted that Mr Christiansen was travelling to London on 8 February 2006 with a team of experts to evaluate the extent of the work required for the renovations "before he gets there Mr Temple had asked that a draft agreement is in place to cover the costs of the services". This again supports the view that the earlier discussions were preliminary discussions.

67. I note that it was only shortly before these hearings that the Claimant conceded that Mr Abildstrom was retained by the Claimant.

68. Mr Abildstrom sent an email to Mr Temple and Mr Katsnelson on 7 February 2006 requesting a substantial amount of information and excusing the fact that he had not produced a draft agreement for Mr Temple to consider. Mr Christiansen was not copied in on the email. The email seems to indicate that some previous discussions had taken place between Mr Abildstrom and Mr Temple:
"I agree with you that the contract should be fair and balanced but it is essential that it is clear to Helge (Christiansen) what his responsibilities are and the consequences if the agreed budgets and specifications are not met."

69. There followed some requests for information and suggestions as to the detailed responsibilities of Mr Christiansen which should be set out in the draft agreement. It appears that Mr Abildstrom had been instructed to draft the agreement. There is no suggestion that the governing law should be English law. Mr Abildstrom says that he was then instructed not to go ahead but to await the negotiation of the contracts between Mr Christiansen and the relevant contractors.

70. It appears that Mr Christiansen and his team visited Tor Point on 7 February 2007 and on his return Mr Christiansen produced on 9 February 2006 a priced budget specification of the work which he proposed. The original of the document was in Danish and it was then translated into English. The total cost in the budget was DKK 13,543,585 which, translated into pounds sterling, amounted to over £1 million. Mr Christiansen signed the budget specification.

71. On 21 February 2006 outline drawings were produced for each floor of the building. The architect is described in the header box as Christiansen Arkitekter KS. M.A.A.PAR, the Second Defendant. The Claimant's Danish lawyers would no doubt have understood this. Mr Temple did not recall whether he saw the drawings and said that he had not recognised Mr Christiansen's firm name in the header box. I accept his evidence on this.

72. On 31 March 2006 Mr Temple signed a power of attorney in the following terms:
"To Whom It May Concern
With this letter I, Alexsandr Aleksandrovich on behave (sic) of Heifer International INC authorize Hele Christiansen to sign contracts with craftsmen for the repair and renovation of Tor Point residence on St George's Hill in London."

73. On 2 April 2006 Mr Temple signed an agreement with Stevns, the Fourth Defendant. The agreement appears to have been drafted by Stevns lawyers although amended by Mr Christiansen on his firm's notepaper and using his firm's stamp. The agreement has Mr Temple as "The Employer", Christiansen Arkitekter KS MAA PAR by Helge Christiansen as the representative of the employer and Stevns as the specialist sub-contractor. This makes it clear that Stevns was contracting through the Second Defendants and not the First Defendant.

74. The contract sets out that the work shall be carried out on a cost plus basis at a specified hourly rate. It makes provision for invoicing and payment of the work.

75. Under "Legal Basis" it provides:
"The parties shall in every respect be subject to Danish law. AB 92 (General Conditions for the provision of works and supplies within building and engineering of 1992) … shall apply.
In addition the Danish Construction Association's standard conditions including technical conditions for electrical installation work shall apply.
The work shall be performed in accordance with Danish standards in every respect unless otherwise necessitated by the nature of such work or unless the sub-contractor is expressly instructed in writing by the Employer to arrange for the work to be performed in accordance with other standards …"

76. The last two sections on the first page of the agreement with reference to the scope of the works had been replaced by words which in the English translation are not entirely clear. The last sentence however is clear:
"The detailed extent of the work (sub-contract works) shall be determined on an ongoing basis between the architect (the employer's representative) and the specialist sub-contractor."

77. Paragraph 47 of AB 92 headed "Arbitration" specified that:
"Disputes between the parties shall be decided by the Building and Construction Arbitration Court in Copenhagen whose awards shall settle the matters finally and conclusively."

78. On 3 April 2006 Mr Abildstrom received a faxed letter from Mr Christiansen to a carpenter and plumber together with a draft agreement with them signed by Mr Temple. Mr Christiansen wrote a note to say that he could not agree with the lawyer representing the carpenter and the plumber.

79. Also on 3 April 2006 Mr Abildstrom received a faxed copy of the power of attorney. Mr Abildstrom cannot recall any previous dealings with Mr Christiansen before this date either in relation to this matter or indeed any other.

80. Mr Abildstrom said in his witness statement that he regarded his firm as formally instructed by Heifer on 4 April 2006 and he opened a file on that date in the name of Heifer. Before doing so he asked for and received the appropriate proof of identity and registration of the company from Mr Temple and the secretary of the company. He did not send Mr Temple a formal retainer and explained that that was frequently the way instructions were received and accepted in Denmark.

81. Apparently on 4 April 2006 Mr Abildstrom's trainee lawyer, Mr Fjellvang, sent an email to the lawyer for the contractors including his comments on the draft agreements. Mr Abildstrom's firm was told that the contracting party was Heifer and that Mr Christiansen had advised that he had authority to sign on behalf of Heifer. This would be consistent with the authority given to Mr Christiansen on 31 March 2006.

82. Mr Abildstrom said in his witness statement that on 5 April 2006 he received by fax and ordinary mail revised contracts on behalf of Stevns and a carpenter and plumber. The draft agreement was signed by the contractor. Mr Abildstrom said that the communications between the sub-contractors and the contractor were in Danish as were the draft contracts and that all the instructions were given by Mr Christiansen in accordance with the form of authority that Mr Abildstrom and Mr Fjellvang had seen.

83. On 11 April 2006 Mr Fjellvang approved the draft agreements between Heifer and the Fourth Defendant Stevns. Mr Abildstrom said that his firm did not involve Mr Temple because Mr Christiansen was authorised to sign those agreements.

84. On 24 April 2006 Mr Abildstrom sent a new draft Power of Attorney. He felt that the previous document was too simplistic. The new Power of Attorney was signed by ATP Directors Ltd on behalf of Heifer on 10 May 2006.

85. The agreement was expressed to be between Heifer and Architect Helge Christiansen of Christiansen Arkitekter K/S. The recital declares that whereas Christiansen Arkitekter (the Second Defendant) and Heifer have entered into an agreement regarding the design of Tor Point, Architect Helge Christiansen (ie the First Defendant) is authorised to:
i) enter into contracts on behalf of Heifer in accordance with the design and fixed amounts herein;
ii) authorise for payment of craftsmen in accordance with the agreed payment schedule.

86. I note first that this document was signed on the same date that Mr Temple signed the second version of the consultancy agreement and secondly that Heifer's Danish lawyers acknowledge that an agreement had been entered into regarding the design of Tor Point with Mr Christiansen's firm rather than with Mr Christiansen.

87. On 25 April 2006 there was a meeting in London which Mr Katsnelson attended. Afterwards he sent an email to Mr Abildstrom, Mr Christiansen and Mr Temple.

88. He said that the following had been agreed:
i) Mr Abildstrom to prepare a framework agreement which Mr Christiansen would sign on 28 April.
ii) Mr Christiansen would forward the agreement to London by courier.
iii) Mr Temple would send the contract and the Power of Attorney to Heifer for signing.
iv) Mr Temple would arrange for the payment of DKK 3,000,000 to a separate account specified by Mr Christiansen in the contract (this account was not in fact specified).
v) On 20 April 2006 Mr Christiansen would make payments to the craftsmen from the security account which would be replenished from the new account as soon as money came from Heifer.
vi) During the month all sides would work on getting a final agreement in place.

89. It was pointed out at the hearing before me that under the money laundering laws this new account would need to be opened by Mr Christiansen in his or his firm's name. I agree and make it clear that Mr Christiansen is not to be criticised for doing this.

90. On 26 April 2006 Mr Temple signified his agreement to the recital of what had been agreed by email to Mr Katsnelson copied to Mr Christiansen which said simply "ok".

91. On 28 April 2006 or 1 May 2006 Mr Christiansen forwarded a copy of the draft agreement dated 28 April 2006. The agreement was expressed to be between Heifer as the client and Christiansen Arkitekter K/S (the Second Defendant) as "the consultant".

92. The agreement was in Danish and English. The introduction referred to the agreement as a consultancy agreement. It referred to work to be carried out by the builder and Stevns "the fitting up is performed as sub contracts with … and Stevns El-Service A/S". It also noted that the consultant was empowered to engage other contractors in connection with the renewal of the premises.

93. At paragraph 1.5, in accordance with Mr Katsnelson's email it provided:
"This Agreement is only a preliminary agreement to be replaced on or before 25 May 2006 by a final consultancy agreement."

94. The agreement noted that Mr Temple was the agreed contact with the client. Mr Christiansen was the agreed contact with the consultant and was the Planning Manager.

95. Clause 3, the contractual basis, provided that the following documents were an integral part of the agreement:
i) The consultancy agreement.
ii) The Project Description prepared by the Consultant (schedule 1).
iii) ABR 89 (General Conditions for Consulting Services) (Schedule 2).

96. Clause 4 sets out the services of the consultant, identifying the proposal phase (4.1.1); the planning phase – *"planning and conclusion of contracts with contractors, authority approvals, in co-operation with English consultants if required (4.1.2); and the execution phase (4.1.3).*

97. Clause 4.2 specified that:
"The services under Clause 4.1 must be performed in accordance with good workmanship, current English legislation and other English public regulations and subject to any easements and restrictive covenants registered on the properties."

98. Clause 5 sets out the services of the builder, ie Heifer:
"5.1 The builder shall transfer an amount of DKK 3,000,000 upon signing this Agreement to an account directed by the consultant for the payment of expenses already incurred for workmen and purchase of materials …"

99. Clause 6 in this version is a lengthy provision. It declares that the parties have agreed on an aggregate fee of 10% of the rebuilding costs up to a sum not exceeding DKK 1.6 m exclusive of VAT and that payment would be made when Heifer had approved the handover of the project. Clause 6.4 refers to the entitlement of the consultant to have disbursements refunded according to Article 3.2 of ABR 89. This Clause 6 was changed in the later signed version.

100. Clause 7 requires extra works to be approved by the client in advance. The total budget is said to be DKK 13,543,585, ie the same figure which Mr Christiansen had given in his estimate of 9 February 2006.

101. Clause 9 dealt with time limits. Clause 9.1 provided that "the fitting up of the premises shall be completed on or before 1 January 2007."

102. Clause 10 made provision for insurance. Clause 11 covered the liability of the client in the event of any delay caused by the client. It refers specifically to Article 6.1.2 of ABR 89.

103. Article 6.1.2 of ABR 89 provided that:
"In the event that the client exceeds time limits as stipulated in 5.1 above without a justifiable claim for the extension of time limits (cf 5.5) he shall be bound to make good the losses of the consultant in accordance with the provisions of Danish law concerning damages."

104. Clause 15.1 is headed "disputes" and is relied on by the Defendants:
"15.1 Any dispute in connection with this agreement shall be settled in accordance with Article 9 of ABR 89 before the Danish Building and Construction Board and according to Danish law; always providing that English building rules and regulations, see Clause 4.2, shall apply to the project."

105. Article 9 of ARB 89 provides for the settling of all disputes with final and binding effect before the Danish Arbitration Board but provides that simple fee claims will be decided in the first instance by a permanent committee subject to appeal to the Danish Appeal Board. This is in accordance with rules stipulated by AB 72 to govern the court of arbitration. Section 31 of the rules provides that the rules of the Danish Arbitration Board must be approved by the Danish Ministry of Public Works.

106. On 2 May 2006 Mr Fjellvang who now describes himself as "associate" although a later translation from the Danish refers to him again as "trainee", sent an email to Mr Temple. The email was not copied to Mr Christiansen. He said:
"I have just been contacted by Helge Christiansen. According to him you have agreed to alter the consultancy agreement Clause 6 regarding fees.
I have changed Clause 6 to "the parties are to discuss the size and principles regarding the fee to the consultant to be drafted in a final agreement according to Clause 1.5."

I recommend that a new clause regarding the fee is drafted as soon as possible as the clause is central to the whole agreement.

Please do not hesitate to contact either Hans Abildstrom or me if you want to discuss the matter. The revised consultancy agreement and schedule 2 (an English version of ABR 89) are attached."

107. This letter is consistent with Heifer's Danish lawyer's understanding that the stage had been reached in the relationship that required the written agreement to be finalised between the relevant parties not that, as Mr Temple contends, a piece of paper was required to prove to Heifer's bankers that the request for funds to pay for the refurbishment was a genuine request. Mr Temple's evidence is supported by Mr Katsnelson. It may be that the request from the bankers provided the impetus to get on with the written agreement that had been foreshadowed for some months.

108. Mr Temple said that he did not read ABR 89. He did forward the draft agreement to Mr Christiansen.

109. I do not have a response from Mr Temple to Mr Fjellvang but having received Mr Fjellvang's email on the evening of 2 May 2006 Mr Temple sent an email to Mr Christiansen on the morning of 3 May 2006, it includes as attachments the revised agreement and the English language version of ABR 89.

110. The email reads:

"Dear Helge,

Pleas

1. Sign this verging (version) and send it to me by email.

2. Send to me invoice 100,000 Euro by email (about DKK 500,000) as a part preliminary payment. The form of that invoice should be the same as previous DKK 300. I'll organise payment as soon as possible.

Best regards

Alexsandr"

111. The second version of the draft agreement was identical to the earlier version except for the amendment to Clause 6 as set out in the e-mail of 2 May 2006.

112. On 3 May 2006 Mr Christiansen responded to Mr Temple enclosing the contract for signature and insurance. Later the same day Mr Christiansen sent a single page signed and dated. The contract with the amended Clause 6 was signed by ATP Directors Ltd on behalf of Heifer and dated 10 May 2007.

113. On the first day of the hearing Miss Barwise QC made it clear that Mr Christiansen and/or his firm instructed a law firm (Nordia) in connection with the consultancy agreement. This matter was dealt with therefore by Danish lawyers on each side.

114. In his final submission Mr Mort for the Claimant rightly conceded that on the evidence the Claimant was bound to accept that the parties did sign the same document, ie the revised version, Mr Christiansen on 3 May 2006 and Heifer on 10 May 2006 and that in any event whether or not they actually signed it, the emails from Mr Fjellvang and Mr Temple clearly signify agreement. However since the agreement did not include an agreement as to fees the Claimant says that it is incomplete and unenforceable.

115. In his oral evidence Mr Temple said that it was not intended to be a contractual document at all. It was drawn up in order to satisfy the bank which acted as financial advisers to Heifer and was responsible for administering Heifer as a tax efficient entity. The purpose, so he said, was to demonstrate that the project was a real one and required the release of money to pay for the cost of the renovation of the property.

116. However in cross-examination Mr Temple said that it was a genuine agreement to cover their relationship. He told his bank that he had signed the agreement. He did not tell them that it was only binding until 26 May 2006.

117. It is said by the Claimant that further evidence of its lack of legal effect is that it was prepared in a rush and that there was no detailed discussion of jurisdiction. In his oral evidence Mr Temple said that the document was a genuine document which he described as "a temporary agreement".

118. There is no documentary evidence to support the claim that the signed agreement was intended to have no legal effect. It was negotiated by two Danish law firms and it seems clear that it was intended at least to be a binding agreement until a final agreement dealing with fees had been negotiated by the parties.

119. This is consistent with the earlier intention of both parties that there should be a written agreement and that this agreement was only delayed on the instruction of Mr Temple to his lawyer Mr Abildstrom at the end of January/ early February 2006 pending the completion of negotiations between Mr Christiansen and the relevant contractors.

120. The agreement is not a common form agreement. It has the Danish jurisdiction clause which may be standard but it includes within Clause 15.1 a requirement that "English building rules and regulations shall apply to the project".

121. Clause 4.2 also makes specific reference to "current English legislation and other English public regulations". A completion date of 1 January 2007 is specified as is the precise budget figure.

122. I will have to decide in due course whether the written agreement came to an end for all purposes on 25 May 2006 or whether, in the event that it was not replaced, it was intended to continue to have effect subject to any agreement on fees that was the subject of actual agreement, or could be inferred from the conduct of the parties.

123. The agreement between Heifer and the First/Second Defendant must be seen in the context of continuing discussions with Haslev-Hansen one of the Danish specialist sub-contractors. On 8 May 2006 Haslev-Hansen sent its itemised estimate and offer for the installation of water, heating, stack pipes, roof guttering, etc. The cost was just under DKK 1 million. The estimate contained the explicit reservations as follows:
    i) The Danish Plumbing, Heating and Ventilating Contractors Association's Standard Reservations of March 2001 (which were approved by the Danish Ministry of Housing and Urban Affairs).
    ii) All prices are stated on the basis of Danish Rules and materials bought in Denmark.
    iii) Various exclusions.
    iv) English requirements and approvals.
    v) Transport of materials and staff and meals.

124. The Standard Reservations were attached to the letter dated 8 May 2006 and specify that the offer was subject to the General Conditions of Works and Supplies for Building and Civil Engineering Works "AB 92" of 10 December 1992. The Reservations make two other references to AB 92 although not to the arbitration provisions.

125. Section J of the General Conditions (para 4 of AB 92) provides that "disputes between the parties shall be decided by the Building and Construction Court in Copenhagen whose awards shall settle the matters finally and conclusively." AB 92 sets out the clear procedures to be followed. It is not suggested that Haslev-Hansen sent a copy of AB 92 with the letter.

126. It appears that on 15 May 2006 the estimate was signed by Mr Christiansen as having been approved (acting on behalf of Heifer).

127. The Claimant's case is that the consultancy agreement with the First/Second Defendant came to an end, if it was ever effective, on 26 May 2006. Mr Christiansen said that in his understanding the agreement was not so limited in terms of time. He thought that since Mr Temple had not come back to him with a final agreement he had a clear agreement under which he could work. As he put it, "for me it was going on".

128. The First and Second Defendant's case is that payment of fees would be made on the basis of invoices submitted to Mr Temple. It was an implied term that Mr Christiansen would charge a reasonable fee. It is clear that Mr Christiansen did continue to carry on work either in accordance with some other agreement or on the basis that the agreement was valid and subsisting.

129. On 26 May 2006 Haslev-Hansen sent a letter to Mr Christiansen setting out a costed variation to the approved work. This was signed on behalf of Heifer by Mr Christiansen and dated 29 May 2006.

130. On 30 May 2006 Haslev-Hansen sent a further letter to Mr Christiansen in relation to further extra work which had apparently been discussed between them. The work was to be invoiced in accordance with materials and time consumed. This letter was also signed on behalf of Heifer and dated 6 June 2006. A similar letter was written by Haslev-Hansen on 22 August 2006 and was counter signed by Mr Christiansen on 29 August 2006.

131. It is not disputed that from 26 May 2006 work proceeded on the house at Weybridge. It is agreed that in June 2006 (or perhaps July or August 2006) the date specified for completion of the works of January 2007 (Clause 9) was extended to 1 March 2007.

132. Various payments were made by Heifer which are set out in an agreed schedule. The first payment had been made on 10 April 2006 in the sum of DKK 600,000 which I was told was made to craftsmen.

133. Two payments were made in May 2006 the first on 9 May, and the second on 22 May, both in Euros totalling €300,000.

134. After May 2006 the Claimant paid over £1 million. The sums paid out to craftsmen were sums received in accounts at Spar Nord. I have not included in this figure the sum of DKK 646,000 paid by Mr Temple or Mr Katsnelson to sub-contractors in cash. The last two payments to sub-contractors were made on 19 October 2006 (one payment in euros and one in GB pounds) and 20 November 2006, paid in euros.

135. The Claimant made two payments for architectural services. The First and Second Defendants say that these invoices were tendered and the sums were paid pursuant to Heifer's obligation to pay the First and Second Defendants a reasonable fee for its services. By an invoice on his firm's notepaper to Heifer, Mr Christiansen asked for DKK 425,000 for work carried out for the period from 22 December 2005 to 18 July 2006. He gave the account number at Danske Bank to which the money was to be transmitted. This sum was paid on 2 August 2006 by a foreign bank Aronoma via Deutsche Bank.

136. The second payment to the First and Second Defendants was in the sum of DKK 625,000. The copy of the Swift Transfer shows Mr Christiansen as the beneficial customer. The money was paid on the order of Mr Temple's wife, Galina, via EFG Private Bank to DLA Nordic client account on 13 December 2006 and was transmitted to Mr Christiansen's account on 14 December 2006.

137. It is difficult to understand why Mr Temple authorised the substantial sums which have been paid to the First and Second Defendants if Heifer had had no obligation to do so. Mr Temple rightly agreed in cross-examination that he would not have paid such sums in such circumstances.

138. Work proceeded on the house. It is agreed that Stevns commenced work on site in June 2006 and left site on 3 August 2006. There was a dispute about the quality of their electrical services works. They were replaced in November 2006 by Listed.

139. On 10 November 2006 DLA Nordic A/S (Mr Fjellvang) chased Mr Christiansen for a signed version of the second agreement. Mr Temple said that he did not ask DLA Nordic to do this. They enclosed the earlier draft with the detailed payment provisions. It is now clear that the parties had signed the later draft in May 2006. I am satisfied that this episode had no legal significance since either the agreement (if it was valid) had been extended many months before or it had not. For completeness I should add that the email makes it clear that Heifer was already in dispute with Stevns. Mr Rene Christiansen (no relation) was the firm's owner.

140. Mr Temple describes the quality of the work on the house in his first witness statement as "a complete disaster". He complains that Mr Helge Christiansen carried out the works according to Danish rather than English Regulations. He complains of design faults and says that none of the necessary approvals or planning permissions had been obtained. He also says that he has had to engage replacement contractors to carry out necessary work. Mr Temple says that he has incurred additional expenditure amounting to about £300,000 as a direct result.

141. Stevns left site on 3 August 2006 as a result of complaints about the quality of their work. It appears from Mr Fjellvang's letter to the Fourth Defendants lawyers dated 1 December 2006 that Mr Helge Christiansen did not regard Stevns work as being "a proper job of craftsmanlike electrical work".

142. It is also clear that at the end of 2006/ early 2007 the relations between Mr Temple and Mr Helge Christiansen became antagonistic. This appears from a series of emails which have been disclosed. I suspect that they do not tell the complete history and that there were other emails or conversations which would help to provide a more complete picture.

143. On 5 January 2007 Mr Temple wrote in an email that:
"I have no alternative but to take all issues on my hand and revise all the contractual obligations and payments which have been made on behave (sic) of Heifer International except electrician who now in the site."

144. On 7 January 2007 Mr Christiansen wrote an angry email to Mr Temple in response complaining that he, Mr Temple, had paid the electrician without following Mr Christiansen's instructions. In the course of the email Mr Christiansen said "you know you and I have no written agreement of anything so I don't know what you are talking about". Mr Christiansen said in oral evidence that he was referring to fees.

145. It seems to me, having heard Mr Christiansen give evidence, that the probable explanation of this email is that it was a petulant remark to which I should attach no significance.

146. It is said by Heifer that Mr Temple terminated Mr Christiansen's retainer on 8 January 2007.

147. Apparently on about 23 January 2007 Mr Temple sent an email to Mr Listed whose company is the Fifth Defendant. On the same day Mr Listed sent a reply email to Mr Temple. He said that Mr Christiansen had contacted him a couple of months before to do electrical work on a project in England. The work would be done on an hourly basis. The Fifth Defendant would issue an invoice for payment for the work together with the cost of materials. The work was based on documentation that "Kenny" (Johansen) an authorised representative of the company, had from Mr Christiansen. Mr Listed said that he had no problems in finishing the job in compliance with English regulations.

148. In his response Mr Temple wrote an email saying that Mr Christiansen did not sign a written contract with Listed. He asked Mr Listed to re-send the most recent invoice and said that the amount was amazingly large.

149. In his letter to Dawsons dated 15 February 2007, Mr Listed said that in the middle of October 2006 he was contacted by Mr Christiansen to do work at Tor Point. He received a copy of a contract issued by a company in Denmark. The contract was drafted in Danish but Mr Temple received a copy in English and signed it. On the same day in response Dawsons asked for a copy of the contract. Mr Listed responded by sending a copy of the Stevns contract.

150. The dispute continued between the Fourth Defendant and Heifer. In an email sent by Mr Abildstrom/ Mr Fjellvang on 6 February 2007 to Stevns lawyers it said:
"I can inform you that I neither represent Helge Christiansen (Architect) nor have I done so at any time … It can only be due to an error on the part of the architect Helge Christiansen and your client that Alexsandr Aliksandrovich is stated as a party to the agreement concerning the electrical contract for the property belonging to Heifer International Inc. Since Heifer International Inc is the owner of the property and Helge Christiansen (Architect) alone has been authorised to enter into agreements on the company's behalf the correct Defendant is the company."

151. The letter concludes that it is unable to disclose whether or not Heifer accepts the Court of Arbitration in Copenhagen as the proper legal venue for resolving the dispute.

152. Dawsons wrote a letter dated 9 February 2007 to "Mr Christiansen Arkitekter MAA PAR. Mr Temple said that he did not instruct Mr Rea whether to write to the First Defendant (the individual) or the Second Defendant (the firm).

153. The letter requests extensive documents and information relating to the project and amounts effectively to a request for the disclosure of all the architect's files. I can only comment that the employment of two law firms simultaneously has led not only to a degree of confusion but also, I suspect, to a substantial duplication of cost.

There was a considerable traffic of emails in February 2007. These are summarised in an agreed synopsis helpfully provided in the course of the hearing.

154. Mr Christiansen at that stage was saying that there had only been an agreement until 25 May 2006 and thereafter he worked on an hourly basis and was paid "al conto" ie on account. Mr Christiansen said that this represented a payment on account of a final sum which would include all the hours he spent working on the project. Mr Temple's response was "it is not true. We never discussed this matter. I have documents which counter the claim in this version." In cross-examination Mr Temple said that he was referring to the invoices and that he would not have paid the First and Second Defendants DKK 1.05 m unless there had been an agreement which required him to do so.

155. Mr Christiansen found himself receiving communications from both the Danish and English law firms and quite understandably took exception to this.

156. On 22 February 2007 Mr Abildstrom (DLA Nordic) wrote to Christiansen Arkitekter for the attention of Helge Christiansen. He said that he was writing in his capacity as lawyer to Heifer. He noted that his clients had entered into a temporary consulting agreement. He went on:

"You were granted power of attorney on 10 May 2006 to enter into agreements with specialist contractors and approved payments on behalf of my client. A copy of this power of attorney is appended.

My client agreed verbally with you in England on expiration of the temporary consultancy that you would continue to advise my client about completion of parts of the renovation project. This agreement was rescinded by my client because of your breach of contract.

The power of attorney of 10 May 2006 was withdrawn in January 2007 which you confirm to my client."

157. This email, presumably carefully drafted on instructions, was sent at the same time as acrimonious email correspondence was continuing between Mr Temple and Mr Christiansen. Mr Temple was copying his emails both to his Danish and English lawyers.

158. Dawsons wrote a long chasing letter to Mr Christiansen at Christiansen Arkitekter MAA PAR on 6 March 2006. It included various allegations relating to the work of Haslev-Hansen. The letter threatened:

"Accordingly if you fail to provide a full accounting of all monies received together with a full reimbursement of any balance held to us or our client within seven days of the date of this letter we expect to be instructed to pursue you in respect of all monies received by you from our client for the whole period of the refurbishment project."

159. The letter suggests that since Mr Christiansen was not on the register of architects or enrolled on the list of visiting architects he was using the designation "architect" illegally and that Heifer was entitled to be reimbursed for all monies paid for Mr Christiansen's architectural services. This point has not been pursued before me.

160. The letter ends:

"If you fail to respond within seven days of the date of this letter you will be presumed to admit the accuracy of all of the facts and matters set out in this letter and to accept responsibility to compensate our client in full for all losses suffered in accordance with its rights under English law."

161. Dawsons received the crisp response from Mr Christiansen on 7 March 2007 *"please find attached letter para 15.1 I don't want to here (hear) from you any more*".

162. A letter dated 8 March 2007 from Christiansen Arkitekter to DLA Nordic was delivered by hand on 9 March 2007. It referred to the letter dated 22 February 2007 and a fax received on 5 March 2007. It was written by Mr Christiansen. It started by agreeing that the consultancy agreement was drafted by DLA Nordic and was between Heifer and Christiansen Arkitekter (ie the Second Defendant). It said that the agreement between Heifer and Christiansen Arkitekter expired on 26 May 2006. Since then the firm has been "working according to time spent" as agreed with Mr Temple. The letter sets out the number of hours the firm has expended on the project and says that it is owed DKK 223,200 which have not been billed.

163. The letter notes that Mr Temple has given notice to all the Danish workers on the project and now uses Russian workers to work on the property.

164. On 3 April 2007 Heifer issued proceedings in this court against Mr Christiansen, his firm, Haslev-Hansen, Stevns and Listed. The truth of the Particulars of Claim is attested by Mr Temple on behalf of Heifer. It is not clear when the claim was served on the Defendants. The application notice is dated 21 June 2007.

165. On 23 May 2007 Stevns started its proceedings against Heifer and Mr Temple (using his Russian name) in the Danish Arbitration Court claiming DKK 388,391.76 in respect of unpaid bills for work done on a cost plus basis.

166. As I have already set out, the Particulars of Claim allege that Stevns commenced its contract work in June 2006. It acknowledges that the Respondent through Mr Abildstrom of DLA Nordic A/S has refused to pay its invoices because of alleged defects in Stevns work. Stevns claims that neither Heifer nor Mr Temple have produced any evidence of the alleged defects. Stevns says that the fact that the agreement was made between Heifer and Stevns was due to a mistake on the part of the Claimant. The claim is made on the basis that under the terms of the contract and in particular AB 92, the Copenhagen Tribunal is the proper venue for the resolution of disputes between Stevns and Heifer.

167. In relation to the Third, Fourth and Fifth Defendants it is convenient to identify separately the contractual documents relied on by the parties.

THIRD DEFENDANTS

168. I have already dealt with much of the factual evidence in the narrative. By a letter dated 8 May 2006 Haslev-Hansen made an offer to carry out the installation of water, heating, stack pipes and roof gutters at the property for just under DKK 1 million.

169. The letter included a reservation that the standard conditions of the Danish Plumbing, Heating and Ventilating Contractors Conditions would apply.

170. The letter was signed as accepted on behalf of Heifer on 15 May 2006.

171. Some additional works were ordered – see letters from Haslev-Hansen dated 26 May 2006, 30 May 2006 and 22 August 2006.

172. The standard conditions included the condition that the General Condition for Works and Suppliers for Building and Civil Engineering Works AB 92 should apply, namely that disputes between the parties should be decided by the Building and Construction Arbitration Court in Copenhagen.

173. Clause 1(7) of AB 92 provides that:
"The legal relationship between the parties shall in all respects be treated in accordance with Danish law."

174. Heifer's case is that it does not accept that AB 92 was intended by the parties to govern their contractual relationships. It contends that it is of very general application and that it was clearly intended to be used in projects in Denmark only and a number of provisions which have no application to projects carried out in England. In this regard it notes that Clauses 46 and 42 refer to Danish legislation and Clause 16 refers to "the Keeper of National Antiquities".

175. However as far as Haslev-Hansen is concerned, Heifer accepts that subject to the points raised above the contract did incorporate AB 92 and therefore the referral to the Danish Arbitration Court.

FOURTH DEFENDANT

176. Stevns entered into a "Framework Agreement" dated 2 April 2006 with the First or Second Defendants stated to be acting on behalf of Alexsandr Aleksandrovich. This was two days before Mr Abildstrom of DLA Nordic opened a file on behalf of Heifer. In the Particulars of Claim Heifer alleges in paragraph 9(1) that Mr Aleksandrovich (Mr Temple) had authority to act on behalf of Heifer.

177. On 5 April 2006, Mr Abildstrom by then acting for Heifer, received by fax and ordinary mail a draft agreement between Heifer and Stevns. As Mr Abildstrom puts it in paragraph 11 of his witness statement:
"Based on approval from Helge Christiansen, Nikolaj Fjellvang approved the draft agreement between Heifer International and … (to Stevns el-Service A-S)."

178. In the introduction to the consultancy agreement Heifer acknowledged that the fitting up was being performed by Stevns as sub-contractor.

179. In a letter dated 6 February 2007 from Mr Abildstrom on behalf of Heifer to Mr Rasmussen acting on behalf of Stevns, Mr Abildstrom wrote in these terms in relation to the threatened proceedings in Copenhagen:
"It can only be due to an error on the part of the architect Helge Christiansen and your client that Aleksander Aleksandrovich is stated as a party to the agreement concerning the electrical contract for the property belonging to Heifer International Inc since Heifer International Inc is the owner of the property and Helge Christiansen (Architect) alone has been authorised to enter into agreements on the company's behalf, the correct Defendant is the company."

180. Heifer's case is that Mr Christiansen purported to enter into a contract not with Heifer but with Mr Temple and in so doing was acting outside his authority.

181. As a fallback position, Heifer contends that even if its name is substituted for that of Mr Temple, it will have no legal effect in relation to Section 9 of the Arbitration Act 1996. It contends that Section 9 of the Arbitration Act, under which a claim for a stay is made, does not apply by reason of Section 5(1) of the Act. This refers to the provision that the Act only applies when the arbitration agreement is in writing (Section 5(1)).

182. Section 5(2) defines an agreement in writing as:
"(a) an agreement made in writing; or
(b) an agreement made by exchange of communications in writing; or
(c) an agreement evidenced in writing."

183. The Claimant says that if the material part of the agreement is not in writing, it is inconsistent with the written form and therefore the provisions of the Section are not satisfied.

184. The Defendants say that if the terms are set out in writing and the agreement is in fact between Heifer and Stevns on the same terms as those set out between Mr Temple and Stevns, it is an agreement between Heifer and Stevns evidenced in writing.

THE FIFTH DEFENDANT

185. Mr Listed said in his witness statement that his company took over the electrical work in connection with the refurbishment work at Tor Point.

186. Mr Listed said that a former employee, Mr Kenny Johansen was aware that Mr Christiansen was looking for an electrician to replace Stevns. In about November 2006 he gave Mr Listed a copy of the framework agreement dated 2 April 2006 to see if his firm was interested in the work.

187. Mr Listed said that after he had read the contract he and Mr Christiansen met at Mr Christiansen's house in the middle of November 2006. Mr Listed said that he had read the contract and was aware that the terms of AB 92 applied. Mr Listed said that he tried to negotiate an hourly rate of DKK 400 per hour rather than the stipulated DKK 375 but he was told by Mr Christiansen that he must accept the terms that had applied to Stevns. He said that he agreed to do so.

188. The Fifth Defendant contends that the parties' agreement is evidenced in writing and/or is an agreement agreed otherwise in writing by reference to terms which are in writing. The disputes provisions apply and the case must be heard before the Arbitration Court in Copenhagen.

189. The Claimant contends that there is a dispute as to precisely what was agreed between Mr Christiansen and Listed.

190. The Claimant relies first on an email dated 23 January 2007 from Mr Temple to Mr Listed and in particular the following passage:

"I don't know which contract you are refer because your authorise representative said on [our] meeting that they have no contract and no obligation, because Helge didn't sign written contract with your company and you confirm this position in our meeting. That is why I am slightly concerned to go forward without clarification who is oblige to do what and how much it will cost. In this circumstance not providing me any written proposal put me at very uncomfortable possession."

191. At paragraph 36 of his first witness statement, Mr Temple said that Mr Listed and his site representative repeatedly told him that there was no contract with Listed. He also said that when Listed was attempting to leave the site Mr Temple attempted to argue that under the agreement with Heifer, Listed could not leave the site. He contends that his understanding is confirmed by the exchange of emails with Peter Listed dated 23 January 2007.

192. I turn to Mr Listed's email of 23 January 2007. He said that the work should be done:

"on hour basis. We should issue an issue for all the working hours and the material of course. We have never issued an offer for this project and have never been asked to do so …

All the work we have done is based by the documentation that Kenny had from Helge when we started at the building. We have never been invited to a meeting about this project as the documentation was completed already."

193. Ms McMahon refers to Mr Listed's evidence at paragraph 19 of her witness statement. Her witness statement is argument and of no evidential value but Mr Christiansen refers to it in paragraph 16 of his witness statement and says:

"I can confirm that the two contracts referred to by Ms McMahon are the contracts which I entered into on behalf of the Claimant with the Third and Fifth Defendants."

194. This refers to the contracts "on precisely the same terms as the Framework Agreement dated 2 April 2006 and by express reference to the Framework Agreement".

195. Mr Christiansen was not asked about this by Mr Mort. Mr Listed's evidence is clear, namely that he was required by Mr Christiansen to enter into an agreement with Heifer on precisely the same terms and conditions as Stevns. Mr Listed had read the agreement with Stevns dated 2 April 2006 and agreed to be bound by it.

CONCLUSIONS ON THE FACTS

196. I reach the following conclusions on the facts:

i) Mr Temple and Mr Christiansen did not reach a binding oral agreement at the Churchill Hotel in December 2005. There was a general understanding that they would continue to have discussions which might well result in an agreement. This was Mr Katsnelson's impression at the time and is borne out by the fact that subsequently Mr Temple consulted his English solicitors who advised that the appointment of the architect ought to be a "reasonable standard English form" which I take to mean an English written form.

ii) In January 2006 Mr Temple instructed his Danish lawyer, Mr Abildstrom in connection with appointing an architect for the renovation work at Mr Temple's new house.

iii) Mr Abildstrom, as a Danish lawyer, can be taken to know the difference between Mr Christiansen and his architect's firm.

iv) In his email to Mr Temple and Mr Katsnelson dated 7 February 2006, Mr Abildstrom requested a considerable amount of information to enable him to draw up a written contract.

v) Mr Abildstrom was subsequently instructed to await the negotiations with the sub-contractors before drawing up the contract between the architect and Heifer.

vi) On 7 February 2006 Mr Christiansen produced a priced specification for the renovation work with a price of DKK 13,543,585.

vii) On 21 February 2006 Mr Christiansen's firm produced outline drawings as appears from the description of the architect in the header box.

viii) On 31 March 2006 Mr Temple produced a power of attorney authorising Mr Christiansen to enter into agreements on behalf of Heifer to carry out the renovation works.

ix) On 2 April 2006, pursuant to his authority, Mr Christiansen, on behalf of his firm entered into a written agreement with Stevns. The agreement was made at that stage with Mr Temple.

x) On 4 April 2006 Mr Abildstrom's firm DLA Nordic A/S was formally instructed to work on behalf of Heifer in connection with the refurbishment of the property including the recruitment of specialist sub-contractors.

xi) On 4 April 2006, a trainee lawyer working under Mr Abildstrom, approved on behalf of Heifer the draft agreement between Heifer and Stevns.

xii) The contract between Heifer and Stevns specified:

a) that Danish law was to apply;

b) that the provisions of AB 92 (General Conditions for the Provisions of Works and Supplies within Building and Engineering) should apply;

c) subject to the challenge to validity on the grounds of unfairness, such terms were incorporated into the agreement. This included paragraph 47 of AB 92 which set out the arbitration clause.

xiii) On 24 April 2006 Mr Abildstrom on behalf of Heifer drafted a more comprehensive power of attorney. This was signed by Heifer on the same date as the second version of the consultancy agreement, namely 10 May 2006.

xiv) On 25 April 2006 Mr Abildstrom prepared a Framework Agreement between Heifer and Mr Christiansen's firm. It is to be inferred that the agreement was intended to reflect the basis on which Mr Christiansen and his firm had been working on the renovation of the property both on the architects' own account and pursuant to the power of attorney. It was intended that the agreement would be a binding agreement but would only last for a limited time while the final agreement was put in place. It would, however, provide the framework for the relations between the parties. This included the agreement in Clause 15.1 relating to disputes. It was contemplated that a final agreement would be reached by 26 May 2006. The negotiations with the sub-contractors had not at that stage been completed. This was the reason given at an earlier stage for not concluding a formal final agreement.

xv) There were two drafts of the agreement between Heifer and Mr Christiansen's firm. It was the second version of the agreement which was signed by the parties. I reject Mr Temple's evidence that it was not intended to be a contractual document. There is no contemporary evidence to suggest that the parties did not intend to be bound by it or that it was only produced to satisfy Heifer's bankers that money needed to be made available for the renovation although the need for Heifer's bankers to have such a document might well have provided the impetus for the long awaited written agreement.

xvi) The clause did include the revised Clause 6: "the parties are to discuss the size and principles regarding the fee to the consultant to be drafted in a final agreement according to Clause 1.5".

xvii) The draft contract which was drafted by Heifer's Danish lawyers on behalf of Heifer provided that Schedules 1 and 2 were integral parts of the agreement. Schedule 2 contained ABR 89 Clause 9 of which conferred exclusive jurisdiction for the settling of disputes on the Danish Arbitration Board. I am satisfied that this clause was incorporated in the written agreement signed by the parties.

xviii) On 2 May 2006 Mr Temple was sent English translations of the documents. He sent an email to Mr Christiansen on 3 May 2006 telling him to sign the revised agreement.

xix) On 8 May 2006 Haslev-Hansen sent out an itemised estimate and offer for the installation of auto heating, stack pipes, roof gutters, etc. The general reservations specify that the offer is subject to AB 92.

xx) Mr Christiansen signed the Haslev-Hansen agreement on behalf of Heifer, as he was authorised to do, by the power conferred on him. He can be taken to have known and understood the relevance of AB 92 even though Haslev-Hansen did not send a copy of AB 92 with the letter. The same finding is made in respect of later letters varying the contract.

xxi) In June 2006 (or maybe July 2006) on a date after the written agreement between the Claimants and Second Defendants is expressed to have come to an end, the parties agreed that the date of 1 January 2007 specified in Clause 9 of the written agreement for completion of the works, was extended to 1 March 2007.

xxii) The Claimant made payments both before and after 25 May 2006 to the First Defendant on behalf of the Second Defendant and other contractors. The question which I address separately is whether they were made and accepted as payments for work done or whether they were payments on account to be the subject of a final accounting when the parties finally reached agreement on the proper basis on which the fees were to be paid.

xxiii) I accept Mr Listed's account of the formation of his contract with Heifer. This is supported by Mr Christiansen. Mr Listed was given a copy of the contract with Stevns. He read it and was aware that it included the terms of AB 92. Both he and Mr Christiansen were aware of the significance of AB 92. Mr Listed tried to negotiate an enhanced hourly rate for the work but was told that he must agree to identical terms to those of Stevns. He agreed to do so.

THE LAW

197. The parties have agreed that for the purposes of this application only, Danish law is to be treated as the same as English law. This does not mean that if it becomes relevant I should treat the English legal system as the same as the Danish legal system.

198. This application is dealing with important questions. The Claimant is resident in British Virgin Islands but Mr Temple, who speaks on behalf of Heifer, is ordinarily resident in England and speaks English but not Danish. The

Defendants are ordinarily resident in Denmark. Danish is their first language. If the hearing takes place in the Danish Arbitration Court I was told originally that the court would consider holding the proceedings in English but it is clear from a ruling of the Arbitration Tribunal on 23 November 2007 properly drawn to my attention after the hearing had been concluded that this hearing is likely to be in Danish and that Heifer will need to provide a translation of all documents and an interpreter at the hearing.

199. Over many years rules have been evolved in the United Kingdom to resolve issues of forum. The primary rule is that when the parties have agreed in writing that disputes relating to a contract which they have made should be resolved in another court or tribunal this court will stay proceedings in order that effect can be given to that agreement. This legislation is now contained in the Arbitration Act 1996.

200. In this case there are difficult questions of law which I must address. The first is in relation to whether as between the Claimant and the Defendants there was a written contract and whether the arbitration clause was incorporated within it and therefore whether the Arbitration Act applies.

201. Secondly, the Claimant contends that if there is a written contract incorporating an arbitration clause before the Danish Arbitration Court such a term should not be given effect because the Claimant is a consumer and the term is unfair under the terms of the Unfair Terms in Consumer Contract Regulations SI 1999 No.2083 ("the Regulations").

202. Finally the First and Second Defendants contend that if they fail on their primary submissions that on the proper application of the Brussels Convention as translated into English law by the Brussels Convention and Judgment Regulations, these Defendants are entitled to be sued in the court of the member state where they are domiciled, namely Denmark.

1. The Arbitration Act 1996 ("The Act")

203. The Defendants' primary submission is that the proceedings should be stayed under Section 9 of the Arbitration Act 1996.

204. Section 9 provides:

"9(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter. …

(3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the procedural claim.

(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed. …"

205. It is clear from Section 5 of the Arbitration Act that the Act only applies where the clause is in writing.

206. Section 5 provides:

"(1) The provisions of this Part apply only where the arbitration agreement is in writing, and any other agreement between the parties as to any matter is effective for this Part only if in writing.

The expressions "agreement", "agree" and "agreed" shall be construed accordingly."

207. Section 5(2) defines an agreement in writing for the purposes of the Act as follows:

"(2) There is an agreement in writing —

(a) if the agreement is made in writing (whether or not it is signed by the parties),

(b) if the agreement is made by exchange of communications in writing, or

(c) if the agreement is evidenced in writing.

(3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.

(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement."

208. Section 7 of the Arbitration Act deals with the separability of the arbitration agreement. Section 7 provides:

"7. Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement."

209. The first issue raised by the parties relates to the incorporation of standard terms, including arbitration clauses in a written agreement.

210. The previous authorities were set out in a careful judgment by Langley J in ***Sea Trade Maritime v Hellenic Mutual War Rules Association (Bermuda) Ltd ("The Athena") No.2*** [2007] 1 Lloyds Rep 280.

211. At paragraph 62 he defined the differences in approach as follows:

"… Mr Brenton submits that absent special circumstances or express reference to an arbitration clause in what I shall call the primary contractual documents, an arbitration clause cannot be incorporated into the contract by reference to what I will call a secondary document in which the clause is contained. The submission is founded on authorities in

which the secondary document is a contract to which at least one party is different from the parties to the contract in question ("a two contract case") …

Mr Moriarty submits that (whatever the position in a two-contract case) the law permits the use of general words to incorporate by reference standard terms to be found in another document including incorporation of arbitration clauses in that document in what I will call "a single contract case"."

212. The general approach set out in the ***Federal Bulker*** [1989] 1 Lloyds Rep 103 is expressed by Langley J as follows, at paragraph 65 of his judgment:

"In my judgment this dictum expresses both the principle and (with some reluctance) the justification for an exception to it. English law accepts incorporation of standard terms by the use of general words and, I would add, particularly so when the terms are readily available and the question arises in the context of established dealers in a well known market. The principle, as the dictum makes clear, does not distinguish between a term in an arbitration clause and one which addresses other issues. In contrast and for the very reason that it concerns other parties a "stricter rule" is applied in charter party/ bills of lading cases. The reason given is that the other party may have no knowledge nor ready means of knowledge of the relevant terms. Further as the authorities illustrate, the terms of an arbitration clause may require adjustment if they are to be made to apply to the parties to a different contract."

213. Langley J's conclusion is clear and fully supported by authority which he cites extensively:

"81. … General words of incorporation may serve to incorporate an arbitration clause save in the exceptional two contract cases to which I have referred in which some express reference to arbitration or perhaps provision of the relevant clause is also required."

214. It is said by the Claimant that in relation to the Fifth Defendant the courts have drawn a distinction between the case where an arbitration agreement is made by reference to standard terms and the case where the parties refer to another contract involving at least one other party.

215. The Fifth Defendant says that this submission is far too widely drawn. The "stricter rule" applies to bills of lading and charter parties and should not be extended.

216. In ***Roche Products v Freeman Process*** [1997] 80 BLR 102, cited with approval by Langley J in *The Athena,* HH Judge Hicks QC rejected the submission that the "stricter rule" should be applied to construction cases. He said at page 115:

"I conclude that it would not be right for me to accept the proposition advanced by the plaintiffs (that the stricter rule should apply to construction cases) unless I am required by authority to do so."

217. He concluded that he was not so required.

218. In ***Aughton Limited v MF Kent Services*** [1991] 31 Con LR 60, relied on by the Claimant, I am invited to adopt the reasoning of Sir John Megaw. I note that this is a two contract case, ie between one of the parties to the contract and a third party, whereas I am concerned with a one contract case. In any event I conclude (as Judge Hicks QC did in *Roche*) that since this was a two Judge court where the two Judges expressed irreconcilable views on the law the decision is not binding or even persuasive.

219. I adopt the approach set out by Longmore LJ in ***Fiona Trust Corporation v Privalo***v [2007] EWCA Civ 20. In that case Longmore LJ reviewed the authorities and set out the correct approach as follows:

"18. As it seems to us any jurisdiction or arbitration clause in an international commercial contract should be liberally construed …

19. One of the reasons given in the cases for a liberal construction of an arbitration clause is the presumption in favour of one-stop arbitration … This is indeed a powerful reason for a liberal construction."

220. On separability Longmore LJ said that:

*"22. Ever since **Heyman's case**, the English common law has been evolving towards a recognition that an arbitration clause is a separate contract which survives the destruction (or other termination) of the main contract …"*

221. The learned Lord Justice then set out Section 7 of the Act and went on:

"23. This statutory principle codifies the principle that an allegation of invalidity of a contract does not prevent the invalidity question being determined by an arbitration tribunal pursuant to the (separate) arbitration agreement. It is only if the arbitration agreement is itself directly impeached for some specific reason that the tribunal will be prevented from deciding disputes that relate to the main contract. …"

222. The Defendants contend that even if the parties did not intend there to be a binding agreement after 25 May 2006 the arbitration agreement would be severable and continue to bind the parties unless:

i) the contract had not been made at all;

ii) the clause was not binding because it was rendered ineffective by reason of the Unfair Terms in Consumer Regulations.

223. The Claimant contends that there was no concluded agreement to arbitrate but that even if there was it stands or falls with the main agreement.

2. Unfair Terms in Consumer Contracts Regulations (The Consumer Regulations) SI 1999 No.2083)

224. It must be noted at the outset that Section 90 of the Arbitration Act 1996 provides that the Consumer Regulations may apply to legal persons.

225. Section 90 provides:

"90. The Regulations apply where the consumer is a legal person as they apply where the consumer is a natural person."

226. It is clear from Section 89 of the Act that the purpose of Sections 89 to 91 is to extend the application of the Regulations to arbitration agreements and by Section 90 to arbitration agreements between a commercial supplier and a consumer who is a company or partnership. A company which obtains goods and services for purposes outside its trade, business or profession is therefore within the terms of these Regulations.

227. Section 91 of the Act confers upon ministers the power to make orders by Statutory Instrument to remove agreements from the ambit of the Regulations. This power has so far been exercised in relation to arbitration agreements for sums of £5,000 or less and therefore has no application to these proceedings. The First and Second Defendants contend that there is some tension between the Act and the Consumer Regulations but I do not find any such difficulty.

228. For the Claimant to bring itself within the Consumer Regulations it must prove:

i) The Claimant is a company or partnership dealing as a consumer.

ii) The arbitration clause was not individually negotiated and the consumer has not been able to influence the substance of the term.

iii) The clause was unfair.

iv) The arbitration clause caused a significant imbalance in the parties' rights and obligations which is (a) to the Claimant's detriment; and (b) contrary to good faith.

229. The Consumer Regulations provide as follows: Regulation 3(1) defines consumer as "any natural person [or company] who in contracts covered by these Regulations is acting for purposes which are outside his trade, business or profession."

230. Regulation 5 defines what can amount to an unfair term:

"5(1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to a requirement of good faith, it causes a significant imbalance in the party's rights and obligations arising under the contract to the detriment of the consumer.

(2) A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.

(3) Notwithstanding that a specific term or certain aspects of it has been individually negotiated, these Regulations shall apply to the rest of a contract if an overall assessment of it indicates that it is a pre-formulated standard contract.

(4) It shall be for any seller or supplier who claims that a term was individually negotiated to show that it was.

(5) Schedule 2 to these Regulations contains an indicative and non-exhaustive list of the terms which may be regarded as unfair."

231. Schedule 2 paragraph 1(q) stipulates:

"(q) Excluding or hindering a consumer's right to take legal action or exercise any other legal remedy particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal proceedings."

232. I note that in ***Bryen & Langley v Boston*** [2005] BLR 508 Rimer J concluded in the Court of Appeal that Regulation 5(1) is directed at the situation where the supplier has imposed a standard form contract (or relevant terms) on a consumer.

233. The basis of any assessment of unfair terms is guided by Regulation 6 which provides as follows:

"6(1) Without prejudice to Regulation 12 (not applicable) the unfairness of a contractual term shall be assessed taking into account the nature of the goods or services for which the contract was concluded and by referring at the time of the conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent …"

234. Regulation 8 provides that the effect of an unfair term is as follows:

"8(1) An unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer.

(2) The contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term."

235. The leading case interpreting the Regulations is ***Director General of Fair Trading v First National Bank Plc*** [2002] 1 AC 481 at 494 where Lord Bingham discusses the test laid down by Regulation 4(1) derived from Article 3(1) of the Directive, namely that "*These Regulations apply in relation to unfair terms in contracts concluded between a seller or a supplier and a consumer.*"

236. At paragraph 17 of his speech Lord Bingham said:

"… The language used in expressing the test so far as applicable in this case, is in my opinion clear and not reasonably capable of differing interpretations. A term falling within the scope of the Regulations is unfair if it causes a significant imbalance in the party's rights and obligations under the contract to the detriment of the consumer in a manner or to an extent which is contrary to the requirement of good faith. The requirement of significant imbalance is

met if a term is so weighted in favour of the supplier as to tilt the party's rights and obligations under the contract significantly in his favour.

…

The illustrative terms set out in Schedule 3 to the Regulations provide very good examples of terms which may be regarded as unfair … This involves looking at the contract as a whole. But the imbalance must be to the detriment of the consumer; a significant imbalance to the detriment of the supplier, assumed to be the stronger party, is not a mischief which the Regulations seek to address. The requirement of good faith in this context is one of fair and open dealing. Openness requires that the term should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 to the Regulations. Good faith in this context is not an artificial or technical concept; nor since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice. Regulation 4(1) lays down a composite test, covering both the making and substance of the contract and must be applied bearing clearly in mind the objective which the Regulations are designed to promote."

237. At paragraph 54 Lord Millett set out further considerations as follows:

"It is obviously useful to assess the impact of an impugned term on the party's rights and obligations by comparing the effect of the contract with the term and the effect it would have without it. But the enquiry cannot stop there. It may also be necessary to consider the effect of the inclusion of the term on the substance or core of the transaction; whether if it were drawn to his attention the consumer would be likely to be surprised by it; whether the term is a standard term, not merely in similar non-negotiable consumer contracts, but in commercial contracts freely negotiated between parties acting on level terms and at arms' length; and whether in such cases the party adversely affected by the inclusion of the term or his lawyer might reasonably be expected to object to its inclusion and press for its deletion. …"

238. In ***Picardi v Cuniberti*** [2003] BLR 487 I had occasion to consider the application of the Regulations. I concluded that the test under Regulation 3(1) was:

"Does the term cause a significant imbalance in the party's rights and obligations arising out of the contract to the detriment of the consumer? An instance of this is the limiting of the consumer's right to exercise a legal remedy."

239. The Claimants contend that a requirement to take a dispute to arbitration abroad is an example of a significant imbalance.

240. In ***Bryen & Langley v Boston*** [2005] BLR 508 Rimer J, giving the lead judgment in the Court of Appeal, set out the approach to be followed:

*"45. It follows, in my view, that in assessing whether a term that has not been individually negotiated is "unfair" for the purposes of Regulation 5(1) it is necessary to consider not merely the commercial effects of the term on the relative rights of the parties but, in particular, whether the term has been imposed on the consumer in circumstances which justify the conclusion that the supplier has fallen short of the requirements of fair dealing. The situation at which Regulation 5(1) is directed is one in which the supplier, who will normally be presumed to be in the stronger bargaining position, has imposed a standard-form contract on the consumer containing terms which are, or might be said to be, loaded unfairly in favour of the supplier. The **Picardi case** was one in which the terms had been imposed by the claimant architect (in that case the supplier). …"*

241. However at paragraph 46 of his judgment Rimer J held in ***Bryen & Langley v Boston*** that where the standard terms had been introduced by the defendant's professional adviser at tender stage, the term was not unfair. Rimer J said:

"46. In my judgment Mr Boston faces exactly the same difficulties in relation to his Regulation 5(1) argument … His problem is that the relevant provisions were not imposed upon him by B&L the supplier. It was Mr Boston (the consumer) acting through his agent, Mr Welling, who imposed them on the supplier, since they were specified in Mr Welling's original invitation to tender. I am prepared to assume that, in practice, Mr Boston played no part in the preparation of that invitation and that he did not receive any advice from Mr Welling on the provisions now in question; and it is clear that there was no individual negotiation over them with B&L. In principle, however, Mr Boston had the opportunity to influence the terms on which the contractors were being invited to tender, even though he may not have taken it up; and there is therefore at least an argument available to B&L under Regulation 5(2) to the effect that the terms of which he now complains are not terms which fall within the first nine words of Regulation 5(1) at all. …In light of the fact that it was Mr Boston, by his agent who imposed these terms on B&L I regard the suggestion that there was any lack of good faith or fair dealing by B&L with regard to the ultimate incorporation of these terms into the contract as repugnant to common sense. If they were to tender at all, B&L were being asked by Mr Boston to tender on, inter alia, the very terms of which Mr Boston now complains."

242. The parties contest each stage. First the Defendants dispute that Heifer is a consumer for the purposes of the Regulations.

243. The Claimant's case is that it is an off-shore company holding the assets of Mrs Temple for tax purposes which does not carry on any trade, business or profession. Although I have referred to the evidence already I will now set it out in definitive form.

244. In support of the Claimant's case Mr Temple says at paragraph 3 of his second witness statement:
"I confirm that the Claimant is not a trading business and carries on no commercial or profit making activity. It does not have "any trade, business or profession". As I indicated in my first statement it is simply an off-shore holding company established by my wife following advice that she was given as to how she might best structure her affairs from the point of view of sensible tax planning."

245. The Defendants argue that it is the factual situation rather than the alleged motive which is relevant to the test under the Regulations. The Memorandum and Articles of Heifer are widely drawn and give the company power under Article 7:
"to carry on the business of a property investment and holding company and for that purpose to purchase … undertake or direct the management of all work … of lands, buildings … and other real property."

246. It is clear, so the Defendants say, that Heifer carries on the business of an off-shore holding company and that the purchase and refurbishment of the property which is the subject of this litigation is within the scope of the business. A major object of the company, they claim, would be to hold the proceeds of any sale of the property so that the money would not be brought into the United Kingdom and risk being subject to UK tax. This profit (or loss) would include sums attributable to the refurbishment being undertaken on the property at a cost of over £1 million.

247. The Defendants make the further point that it is for Heifer to bring itself within the protection of the consumer legislation and that the evidence does not include any accounts which would support the notion that Heifer was not carrying on a business.

248. Although I shall leave other questions until later, it is convenient to answer the threshold question now.

249. The test which I must adopt in relation to Regulation 3 is "*was Heifer acting for purposes outside its trade, business or profession"*. This is essentially a question of fact. It is the word "purpose" which is at the core of the dispute between the parties. In my view purpose connotes intention. If a party acts in a way which furthers its intention, ie to further its trade, business or profession, its actions are excluded from the Regulations. If an action is for a different purpose but which has an incidental result which furthers its trade, business or profession it does not result in the contract being excluded from the protection of the Regulations.

250. In this case I am satisfied on the evidence and find as a fact that the purpose of buying and renovating the house was to provide a place for Mr and Mrs Temple to live with their family. It was not to provide an investment opportunity for Heifer to benefit from any increase in the value of the house although incidentally such an increase may have resulted. It would be otherwise if the house had been purchased by Heifer as part of an investment portfolio. In these circumstances I find that the Unfair Consumer Regulations apply. I shall consider later whether if there is an agreement to which the Arbitration Act 1996 applies, any of its provisions should be regarded as unfair.

3. The Brussels Convention

251. In relation to jurisdiction, the Claimant and the First and Second Defendants rely on Council Regulation EC No.44/2001 as determining the appropriate place of jurisdiction for disputes between Heifer and the Defendants. This issue only arises if I find that the arbitration clause is not incorporated in the contract. In those circumstances the first and second Defendants say that under the Convention the forum for resolution of these disputes is Denmark, whereas the Claimants say that it is in this jurisdiction.

252. The Regulations follow the terms of the Brussels Convention of 1968 which gave effect to what was Article 220 EC which provided that the parties to the Treaty of Rome would enter into discussions to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts and tribunals.

253. In fact the mainspring of the Council Regulation came from Article 65 of the Treaty of European Union which gave the EU a competence in the field of judicial co-operation in civil matters and in particular in maintaining and developing an area of freedom, security and justice in which the free movement of persons is ensured.

254. The First and Second Defendants refer to paragraphs 11 and 12 of the preamble to the Regulations. I do not propose to cite them since the Regulations have been the subject of substantial judicial discussion and the preamble itself does not form part of the Regulations.

255. Article 2 provides that:
"Subject to this Regulation, persons domiciled in a member state shall, whatever their nationality be sued in the court of that member state.
(2) Persons who are not nationals of the member state in which they are domiciled shall be governed by the rules applicable to nationals of that state."

256. Article 3 provides that:
"Persons domiciled in a member state may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this chapter."

257. One of the issues in this case is the relationship between Article 2, set out above and Article 5 to which I shall now refer.

258. Article 5 provides that:

"A person domiciled in a Member State may, in another Member State be sued

(i) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

(ii) for the purpose of this provision and unless otherwise agreed the place of performance of the obligation in question shall be:

… in the case of provision of services the place in a Member State where, under the contract, the services were provided or should have been provided …

(iii) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur."

This follows the text of the Convention.

259. The First and Second Defendants argue that the claims for delivery up of the architect's designs and/or account are not matters relating to a contract but arise from fiduciary duties and/or agency. The Claimants contend that these, along with the delivery up of books and records, are within the definition of matters relating to a contract.

260. The European Court of Justice (ECJ) has had to decide the ambit of Article 5(1) in a series of decisions. In ***Peters*** [1983] ECR 987 the ECJ decided that a claim for compensation by members of trade association against one of its members was a matter relating to a contract since the claim related to the contractual relationship between the members.

261. In ***Kalfetis v Schroder Case*** 189/87, judgment 27 September 1989, the ECJ held at paragraph 19:

"The special jurisdictions in Articles 5 and 6 of the Convention constitute derogations from the principle that jurisdiction is vested in the Courts of the State where the defendant is domiciled and must be interpreted restrictively."

262. In ***Arcado*** [1988] ECR 1539 an agent claimed against a French principal compensation for repudiation of a commercial agency agreement and for the balance due. The principal argued that this was a case in quasi-delict and not in contract. The ECJ held that the claim for wrongful repudiation and for entitlement to compensation was based on the failure to respect a contractual obligation and therefore came within Article 5(1) not 5(3).

263. In the ***TCMS case*** [1992] ECR1 – 3967 the ECJ ruled that a dispute between a subsequent purchaser and the manufacturer who was not the seller of an object in connection with defects in that obligation or his unsuitability for the purpose for which it was intended was not within the ambit of Article 5(1).

264. In ***Tacconi*** [2002] ECR 1-7537 the ECJ emphasised, as it had in previous cases, the need for mutuality of obligations and for those obligations to be freely entered into.

265. At paragraph 19 of the judgment the court emphasised that:

"The expression "matters relating to contract" and "matters relating to tort" … in Articles 5(1) and 5(3) of the Brussels Convention are to be interpreted independently having regard to the general scheme of the Convention. …"

266. At paragraphs 22 and 23 the court said:

"While Article 5(1) … does not require a contract to have been concluded, it is nevertheless essential for the provision to apply to identify an obligation since the jurisdiction of the National Court is determined in matters relating to a contract by the place of performance of the obligation in question …

Furthermore it should be noted that according to the court's case law, the expression "matters relating to a contract" within the meaning of Article 5(1) … is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another."

267. The court has also considered how the relevant obligation is to be defined.

268. In ***de Bloos*** [1976] ECR 1497 at 1508 the court held that the obligation in Article 5(1) refers to "*the contractual obligation forming the basis of the legal proceedings*".

269. In ***Shenavai v Kreisher*** [1987] ECR 239, cited by Lord Goff in the House of *Lords in* ***Union Transport Plc v Continental Lines*** [1992] 1 WLR 15 at 20 – 21, the ECJ set out the principles to be applied under Article 5(1) of the Convention. In particular at paragraph 19 the court said that where various obligations are at issue it will be the principal obligation which will determine the question of jurisdiction.

270. In ***Custom Made Commercial Ltd v Stawa Metallbase GmbH*** [1994] ECR 2913 the ECJ gave further guidance emphasising at paragraph 22 the necessity "to identify the obligation referred to in Article 5(1) of the Convention and determine its place of performance".

271. In ***Leathertex*** (case C-420/97) the ECJ concluded at paragraph 31:

"For the purpose of determining the place of performance within the meaning of Article 5(1) the obligation to be taken into account was that which corresponded to the contractual right on which the plaintiff's action was based."

272. In ***Kleinwort Benson v Glasgow City Council*** [1997] 1 AC 153 at 163 Lord Goff considered the applicable principles and concluded as follows:

"1. The basic principle is to be found in Article 2.

2. This principle is expressed to be subject to the provisions of Article 5.

3. The provisions of Article 5 exist "because of the existence in certain clearly defined situations of a particularly close connecting factor between a dispute and the court which may be called upon to hear it with a view to the efficacious conduct of the proceedings". For example in the case of Article 5(1) the court for the place of performance of the obligation in question (at page 164).

4. Within the scope of these principles the Court of Justice gives full effect to Article 5(1).

5. Attempts to broaden the scope of Article 5(1) have normally failed."

273. These issues were again considered by the House of Lords in ***Agnew v Länsförsäkrings Bolagens AB*** [2001] 1 AC 223. The House of Lords reached its conclusion by 3 to 2. Lord Woolf MR in the majority referred to two passages in ***Kleinwort Benson*** to which I should refer particularly.

274. In the first passage Lord Goff says that a claim can only fall within Article 5(1) *"if it can properly be said to be based upon a particular contractual obligation, the place of performance of which is within the jurisdiction of the court".*

275. Secondly in his speech in ***Kleinwort Benson*** Lord Clyde said at page 181:

"There must be an obligation to be performed and the obligation must be in dispute … the "question" concerns a contractual obligation. The existence of a contract thus becomes an essential element. And while the question may appear in a variety of forms, essentially at the heart of the dispute will be a consideration relating to its performance."

276. In his dissenting judgment in ***Agnew*** at page 250 Lord Hope of Craighead refers to the two requirements (a) what are "*matters relating to a contract*" and the holding in ***Kleinwort Benson*** that a claim for unjust enrichment is not such a claim; and (b) where is the place of performance? He concluded at page 252 that the phrase *"matters relating to a contract"* should be interpreted to include all matters in which a remedy sought can be identified as a contractual remedy.

277. A practical illustration of these principles is contained in the judgment of the Court of Appeal in ***Barry v Bradshaw & Ors*** (judgment 29 November 1999). That case concerned a chartered accountant domiciled in Ireland and carrying on his practice in Ireland. He was instructed by Mr and Mrs Barry at a time when they were resident in Ireland. As Pill LJ put it:

"The main purpose of the retainer was to secure settlement of a United Kingdom tax assessment for the year of assessment 1989/1990."

278. Pill LJ put the issue succinctly:

"On the defendant's behalf, it is submitted that he was instructed to perform professional services in Ireland and he is sued for an alleged breach of his obligation to perform those services. On behalf of the plaintiff, stress is placed on the defendant's obligation to deal with an English public authority, the Inland Revenue, and the allegation that the defendant failed to ensure representation and/or attendance at a hearing of the General Commissioners of Inland Revenue in England on 15 February 1995."

279. Pill LJ referred to various decisions of the ECJ and in particular ***de Bloos*** and ***Custom Made Commercial Ltd***.

280. At page 12 Pill LJ said:

"I cannot accept as a general principle that when a professional man is instructed to perform services in one jurisdiction he becomes liable to another Brussels Convention jurisdiction if the services involved dealing with a public authority in that other jurisdiction … most of the allegations of breach of contract in the particulars of claim concerned conduct in Ireland …"

281. However Pill LJ, along with the other Judges of the Court of Appeal, concluded that the fact that most of the allegations of breach of contract concerned conduct in Ireland was not decisive. The essence of the obligation was held to be *"to represent, conduct and settle the tax affairs of the First and Second Plaintiffs"*. Those were obligations that had to be performed in England as that was the place where the Inland Revenue was situated. The alleged breach of contract was that:

"*He failed to ensure attendance and/or representation at a hearing before the General Commissioners of Inland Revenue on 15 February 1995 causing determination of the said assessment without regard to any relief, allowances or exemptions in the sum of £32,973."*

282. In these circumstances Pill LJ (along with the other Lords Justices) held at page 8:

"The principle obligation was to represent, consult and settle the tax affairs of Mr and Mrs Barry and the breach was the failure to attend or to ensure the appellants were represented at the hearing. In my view that was an obligation which had to be performed in England."

283. If it fails in establishing a claim under Article 5(1) Heifer seeks (if it has to) to rely on 5(3), namely that in matters relating to tort, delict or quasi-delict the forum should be the courts where the harmful event occurred or may occur, namely it contends the English Court.

284. ***Tacconi*** was a case before the ECJ concerned with pre-contractual rights. The ECJ summarised at paragraphs 21-23 the relationship between Articles 5(1) and 5(3) of the Convention as follows:

"1. The concept of "matters relating to tort, delict or quasi-delict" within the meaning of Article 5(3) of the Convention covers all actions which seek to establish the liability of a defendant and which are not related to "a contract" within the meaning of Article 5(1) of the Convention.

2. *Article 5(1) does not require a contract to have been concluded but it is essential for Article 5(1) to apply to identify the relevant obligation since the jurisdiction of the National Court is determined in matters relating to a contract by the place of performance.*
3. *Under Article 5(1) the expression "matters relating to contract" is not to be understood as covering a situation in which there is no obligation freely assumed by one party to another.*
4. *In the absence of obligations freely assumed by one party towards another, an action founded on the pre-contractual liability of the defendant is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3)."*

CONCLUSIONS

285. I return now to the original questions and set out my conclusions.

286. The first issue is whether, if there was any agreement between these parties, it is made between Heifer and the First Defendant or between Heifer and the Second Defendant. I conclude that any agreement was made between Heifer and the Second Defendant and not with Mr Christiansen personally. The terms of the drafts make it clear that the agreement was with Mr Christiansen's firm and not Mr Christiansen personally and Heifer's Danish lawyers would have known the distinction between the individual and the firm.

287. There was a detailed framework agreement between Heifer and the Second Defendant which was the second written version of the draft agreement signed by Heifer on 10 May 2006. This was intended to be replaced by 26 May 2006 by a final agreement. This did not happen.

288. It was nevertheless a framework agreement which was intended to govern the relationship between the parties after 26 May 2006. Within it there was an agreement that the future relationship between the parties would be governed by Clause 15, namely that any dispute would be resolved before the Danish Arbitration Board in Copenhagen.

289. Even if the other provisions came to an end on 26 May 2006 I find that the arbitration provisions continued in effect to regulate how any dispute between the parties would be resolved. There was therefore an agreement in writing within the terms of Section 5 of the Arbitration Act 1996.

290. I am inclined to the view that all the terms continued in effect unless they were varied or superseded. There is substantial legal authority for the proposition that one should give effect to a commercial contract if at all possible particularly when it has been substantially performed. The parties conducted themselves on the basis that they continued to be bound by the contractual terms set out in the draft agreement.

291. In ***Sykes v Fine Fare*** [1967] 1 Lloyds Rep 53 Lord Denning MR said that in a commercial agreement the further the parties have gone on with their contract, the more ready the Courts are to imply any reasonable term so as to give effect to their intentions "when much has been done, the Courts will do their best not to destroy the bargain" See also ***Sudbrook Trading Estate v Eggleton*** [1993] 1 AC 444 at 460 and ***Mamidoil v Okta*** [2001] Lloyds Rep 76 at 89 per Rose LJ (paras 66 and 69).

292. Mr Christiansen, on behalf of his firm, continued to engage contractors and supervise the project on the basis that he would be paid a reasonable price for the number of hours which he worked. He invoiced Heifer and was paid on that basis even though the invoices claimed to be "*on account*". If I am wrong about that I would conclude that in the absence of any concluded agreement the Second Defendant should be paid a reasonable sum for the work which he carried out. Either way it was on the basis that all the other terms of the Framework Agreement applied including the arbitration provisions (unless they could be said to be unfair).

293. In the case of the Third, Fourth and Fifth Defendant, Heifer retained DLA Nordic A/S as its independent lawyers and instructed the First Defendant on behalf of the Second Defendant to negotiate the agreements with them on its behalf. The Second Defendant acted within the terms of its authority.

294. In the case of the Third Defendant its offer of 8 May 2006 to carry out work on the property included the reservation that AB 92 would apply. This clause conferred jurisdiction on the Danish Arbitration Court. I find that this was intended to govern the contractual relationship between these parties.

295. With regard to the Fourth Defendant the agreement was drawn up on 2 April 2006 with the Second Defendant acting on behalf of Mr Temple. After DLA Nordic had been instructed, Mr Fjellvang approved the draft agreement between Stevns and Heifer on behalf of Heifer. This was confirmed by Mr Abildstrom on 6 February 2007. There was therefore a written contract between the Claimant and the Fourth Defendant or at least a contract evidenced in writing.

296. With regard to the Fifth Defendant Mr Listed read the terms of the Stevns contract and agreed to be bound by it. That contract included the arbitration clause. Under s5(3) of the Arbitration Act 1996 where, as in this case, the parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.

297. I am therefore satisfied in relation to each of the Third, Fourth and Fifth Defendants that in each case there was an agreement in writing within the definition of Section 5 of the Arbitration Act 1996. Subject to the two further points relating to unfair contract terms and the Brussels Convention to which I must turn, the arbitration clauses were effective in stipulating that any disputes arising out of the contract must be heard by the Arbitration Court in Copenhagen.

298. I now turn to the Unfair Contract Terms in Consumer Contracts Regulations. I observe that Heifer may well, in relation to its agreement with the Second Defendant, be in the position that it is in because it failed to take the clear advice of its English solicitors, given at an early stage, but instead chose to rely on the legal advice of its Danish lawyers.

299. The purpose of the Unfair Contracts Terms in Consumer Contracts Regulations is to protect consumers from unfair terms put forward by others which they must accept or be denied the opportunity to enter into the agreement. It was not intended to protect clients from their own legal advisers.

300. I cannot accept Heifer's case that it was prevented from using its English lawyers by Mr Christiansen and thus prevented from being properly and effectively advised.

301. Heifer's Danish lawyers DLA Nordic A/S were and are a large and prestigious law firm in Copenhagen of about 100 lawyers. They were not Mr Christiansen's own lawyers and they were retained and paid for by Heifer or Mr Temple on Heifer's behalf. Mr Temple was in independent communication with them and it was their professional obligation to obtain proper instructions from Heifer and give independent advice.

302. The Claimant contends that the arbitration agreement is unfair because it requires the Claimant to bring proceedings in Denmark and in an arbitration tribunal rather than in court proceedings. It is said that a designer or contractor is not obliged to offer its services outside its own jurisdiction and gets considerable commercial benefit from so doing. Heifer also claims that the clause is unfair because the Defendants will insist on communicating in Danish.

303. The Defendants say that much of the work of the First and Second Defendants is carried out in Denmark and further that if a Claimant employs Danish skilled labour on a project in England, it is not unfair that any dispute should be resolved in Denmark.

304. I must apply the test under the Regulations. I find that, applying the test of Regulation 5(2), the arbitration clause was not individually negotiated. However I do not accept that Heifer, through its Danish lawyers, satisfied the other part of the test namely that it was unable to influence the substance of the term or that the insertion of the condition was contrary to good faith or inherently unfair. Mr Temple wanted to retain a Danish Architect and his firm and Danish workmen. With respect to the agreement with the Second Defendant it was Heifer's Danish lawyers who prepared the agreement.

305. With regard to the other agreements Heifer granted Mr Christiansen a Power of Attorney to enter into agreements with Skilled Danish Workmen for them to work on the Project. There is no claim that DLA Nordic A/S failed to carry out any of Mr Temple's or Heifer's instructions or that Mr Christiansen acted beyond his instructions. I do not find that there was any lack of good faith.

306. I do not find that the clause was unfair either in respect of the Second Defendant or the Third, Fourth or Fifth Defendants. Mr Temple chose to have his house renovated by Danish workmen and a Danish architect. It is not inherently unfair that if something went wrong the dispute should be determined in the domicile of the Danish entities. Applying Lord Millett's cross check test in *Director General of Fair Trading v First National Bank* it is probable that if the clause had been drawn to Mr Temple's specific attention he would have objected to it but it is by no means entirely clear. Mr Temple wanted Danish workmen and it may be that as a consequence he would have been prepared to resolve any disputes between him and them or between the Claimant and them by arbitration in Denmark in order to be able to have a Danish firm of architects and Danish workmen to renovate the property. This of course is a matter of speculation. I merely raise the point to indicate that it does not seem to me that the answer to Lord Millett's question (to be used as no more than a cross check) is entirely clear.

307. In relation to the recent evidence that leads to the conclusion that the Danish Arbitration Board is likely to conduct any proceedings in Danish, I note that the latest ruling contemplates the possibility of using interpreters. There is no evidence that Heifer would be unable to pay for these or that the Arbitration Board would not give Heifer a fair hearing.

308. I conclude that although the arbitration provisions in each of the contracts were potentially unfair, taking into account, as I do, all the matters set out in Regulation 6(1) I cannot conclude in the circumstances of these cases that the term in the contracts stipulating that disputes between the Claimant and the Second to Fifth Defendants would be resolved in the Danish Arbitration Court is unfair.

309. In these circumstances I can deal shortly with the Brussels Convention points in relation to the Second Defendants. I am satisfied:

i) That the basic principle is to be found in Article 2.

ii) Article 5(1) applies to matters relating to a contract and applies because of a particularly close connection between the place of performance of the obligation in question and the contract. This establishes an alternative jurisdiction provided that the claims are related to contract.

iii) In my view all the claims including the claims for an account were related to the contract which formed the basis of the relationship between the Claimant and the Second Defendant. It was as a result of this contract that the power of attorney was given by the Claimant to Mr Christiansen to recruit skilled workmen in Denmark for the renovation of the house in England.

iv) In deciding on the place of performance I must focus on the place of performance of the principle obligation.

v) For reasons similar to those in ***Barry v Bradshaw*** I conclude that the place of the principle obligation is England. While, in the case of the architect, the drawing up of plans may have been carried out in Copenhagen, the obligation under Clause 4 related to (a) the proposal phase; (b) the planning phase including conclusion of contracts with contractors, authority and approval in co-operation with English consultancy if required; and (c) the execution phase. These all related to the renovation of the property in England. In short the obligation was to manage the renovation of the house near London. The work product related to the project in England. In these circumstances the place of primary obligation is London and not Copenhagen. Although the account claimed referred to an account in Copenhagen the primary obligation related to payment for work done in England. The sub-contractors were under an obligation to carry out work on the house in England. I have no doubt that, if it had been relevant, the place of primary obligation would have been England.

vi) It is clear that Articles 5(1) and 5(3) of the Convention are alternatives. I am satisfied that Article 5(3) does not apply. If it had done, the proceedings should take place in the courts of the place where the harmful event occurred or may occur. This is a difficult question. The claim for an account relates to monies in an account in Denmark. The harmful event could be said to have occurred in Denmark since the sub-contractors were paid in Denmark. However for the reasons I have given, in my view this is an Article 5(1) not an Article 5(3) case.

310. Despite my findings in relation to the Brussels Convention in relation to the Second Defendant I conclude that in the event of any dispute between Heifer and the Second Defendant to Fifth Defendants, that dispute is within the exclusive jurisdiction of the Arbitration Court in Copenhagen.

311. I therefore grant the Second to Fifth Defendants the relief which they seek.

Mr Justin Mort (instructed by Dawsons LLP) for the Claimant
Miss Stephanie Barwise QC (instructed by Matthew Arnold & Baldwin) for the 1st and 2nd Defendants
Mr Simon Henderson (instructed by Grundberg, Mocatta and Rakison) for the 3rd and 5th Defendants and by Orr Litchfield for the 4th Defendant