Gurney Consulting Engineers v Pearson Pension Property Fund Ltd [2004] APP.L.R. 09/02

JUDGMENT : His Honour Judge Richard Seymour Q. C. : TCC. 2nd September 2004.

Introduction

1. The principal issue in this action was whether a contract was concluded between the Claimants, a firm of consulting engineers practising under the style *"Gurney Consulting Engineers"* and to which I shall refer in this judgment as *"Gurney"*, and the Defendants, companies called, respectively, Pearson Pension Property Fund Ltd. and Pearson Nominees Ltd., which are in fact, as I understand it, together the trustees of the Pearson Properties Pension Fund, and to which it is convenient to refer collectively as *"the Trustees"*.

2. The significance of the question whether a contract was concluded between Gurney and the Trustees was that the position of the Trustees was that such a contract was made and it incorporated the standard form of contract produced by the Association of Consulting Engineers (*"ACE"*) and known as *"A.C.E. Conditions of Engagement 1981 Agreement 3 For Structural Engineering Work where an Architect is appointed by the client"* with amendments made up to August 1990. In this judgment I shall refer to that standard form of contract as *"the Standard Form"*.

3. By clause 4 of the Standard Form it is provided that:- "*Any dispute or difference arising out of this Agreement shall be referred to the arbitration of a person to be agreed upon between the Client and the Consulting Engineer or, failing agreement, nominated by the President for the time being of the Chartered Institute of Arbitrators.*"

4. By a letter dated 22 March 2001 written on their behalf by the solicitors at that time acting for them, Messrs. Vizards Staples & Bannisters (*"VSB"*), to the solicitors acting on behalf of Gurney, Messrs. Reynolds Porter Chamberlain (*"RPC"*), the Trustees purported to give notice of reference to arbitration pursuant to clause 4 of the Standard Form in relation to a dispute between the Trustees and Gurney concerning consulting engineering services provided by Gurney to the Trustees in respect of a project (*"the Project"*) for the undertaking of refurbishment works at a property (*"the Property"*) known as and situate at 2 – 5, 8 and 10 Beauchamp Place, London SW3. During the course of the Project, on 26 October 1998, part of the front wall of the Property, in fact that part at 3 – 5 Beauchamp Place, collapsed. The dispute between the Trustees and Gurney is as to whether Gurney has any, and if so what, liability to the Trustees in respect of that collapse.

5. It is not in dispute between Gurney and the Trustees that Gurney did in fact undertake the provision of consulting engineering services in connection with the Project. It is accepted, therefore, that if the Trustees consider that they have a claim against Gurney, Gurney will have to respond substantively to that claim in some forum. However, the position of Gurney was that, although it undertook work in connection with the Project, that was not done pursuant to a contract between it and the Trustees, because no contract was ever concluded. Rather, so it was contended on behalf of Gurney, it undertook work which it was requested to do in anticipation of the making of a contract which never was concluded. If no contract were concluded, it would follow that Gurney never agreed to submit to arbitration any disputes concerning the work which it undertook in connection with the Project. Thus, any claim which the Trustees desired to pursue against Gurney would have to be pursued in litigation in court.

6. The practical significance of whether the Trustees pursued any claim against Gurney in arbitration proceedings, as they wish, or in litigation in court, which is what it was contended on behalf of Gurney was the proper course, seems to lie simply in the fact that, if sued in an action, it will be open to Gurney, if it wishes, to make claims under the provisions of Part 20 of the Civil Procedure Rules against others alleged to be liable in respect of the collapse of the front wall of the Property, whereas that option would not be available in arbitration proceedings.

The Law

7. It was, I think, common ground between Mr. Paul Sutherland, who appeared on behalf of Gurney, and Mr. Manus McMullan, who appeared on behalf of the Trustees, that a convenient formulation of the principles to be applied in a case such as the present to the issue whether the parties had reached a concluded agreement was to be found in the judgment of Lloyd LJ, as he then was, in ***Pagnan SpA v. Feed Products Ltd.*** [1987] 2 Lloyds Rep 601 at page 619. That formulation was:- *"As to the law, the principles to be derived from the authorities, some of which I have already mentioned, can be summarised as follows:*

   (1) In order to determine whether a contract has been concluded in the course of correspondence, one must first look to the correspondence as a whole (see Hussey v. Horne-Payne*).*

(2) Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. That is the ordinary "subject to contract" case.

(3) Alternatively, they may intend that the contract shall not become binding until some further term or terms have been agreed; see Love and Stewart v. Instone, *where the parties failed to agree the intended strike clause, and* Hussey v. Horne-Payne, *where Lord Selborne said at p.323: "…The observation has often been made, that a contract established by letters may sometimes bind parties who, when they wrote those letters, did not imagine that they were finally settling terms of the agreement by which they were to be bound; and it appears to me that no such contract ought to be held established, even by letters which would otherwise be sufficient for the purpose, if it is clear, upon the facts, that there were other conditions of the intended contract, beyond and besides those expressed in the letters, which were still in a state of negotiation only,* and without the settlement of which the parties had no idea of concluding any agreement *[My* [Lloyd LJ's] *emphasis]*

(4) Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled (see Love and Stewart v. Instone *per Lord Loreburn at p. 476).*

(5) If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty.

(6) It is sometimes said that the parties must agree on the essential terms and that it is only matters of detail which can be left over. This may be misleading, since the word "essential" in that context is ambiguous. If by "essential" one means a term without which the contract cannot be enforced then the statement is true: the law cannot enforce an incomplete contract. If by "essential" one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by an "essential" one means only a term which the Court regards as important as opposed to a term which the Court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound and, if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the Judge "the masters of their contractual fate". Of course the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens everyday when parties enter into so-called "heads of agreement"."

8. Mr. McMullan also reminded me of the well-known passage in the judgment of Steyn LJ, as he then was, in *G. Percy Trentham Ltd. v. Archital Luxfer Ltd.* [1993] 1 Lloyds Rep 25 at page 27:- ""*Before I turn to the facts it is important to consider briefly the approach to be adopted to the issue of contract formation in this case. It seems to me that four matters are of importance. The first is the fact that English law generally adopts an objective theory of contract formation. That means that in practice our law generally ignores the subjective expectations and the unexpressed reservations of the parties. Instead the governing criterion is the reasonable expectations of honest men. And in the present case that means that the yardstick is the reasonable expectations of sensible businessmen. Secondly, it is true that the coincidence of offer and acceptance will in the vast majority of cases represent the mechanism of contract formation. It is so in the case of a contract alleged to have been made by an exchange of correspondence. But it is not necessarily so in the case of a contract alleged to have come into existence during and as a result of performance. See* **Brogden v. Metropolitan Railway** *(1877) 2 AC 666;* **New Zealand Shipping Co. Ltd. v. A. M. Satterthwaite & Co. Ltd**. *[1974] 1 Lloyd's Rep. 534 at p.539 col.1 [1975] AC 154 at p. 167 D-E;* **Gibson v. Manchester City Council** *[1979] 1 WLR 294. The third matter is the impact of the fact that the transaction is executed rather than executory. It is a consideration of the first importance on a number of levels. See* **British Bank for Foreign Trade Ltd. v. Novinex** *[1949] 1 KB 628 at p. 630. The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential. In this case fully executed transactions are under consideration. Clearly, similar considerations may sometimes be relevant in partly executed transactions. Fourthly, if a contract only comes into existence during and as a result of performance of the transaction it will frequently be possible to hold that*

the contract impliedly and retrospectively covers pre-contractual performance. See **Trollope & Colls Ltd. v. Atomic Power Constructions Ltd.** *[1963] 1 WLR 333.* "

9. In addition, Mr. Sutherland drew to my attention the recent decision of the Court of Appeal in ***Sun Life Assurance Co. of Canada Ltd. v. CAN Reinsurance Co. Ltd.*** [2003] EWCA Civ 283.

10. Where Mr. Sutherland and Mr. McMullan differed was as to how the principles as to which they were basically in agreement should be applied to the circumstances of the present case. To those circumstances I now turn.

The negotiations

11. To a large extent communications during the course of negotiations concerning a contract in relation to the provision by Gurney of services in connection with the Project were in writing. Those communications were between Gurney, acting for the most part by Mr. Peter Rose, who was at the material time the senior partner in Gurney, and Mr. Andrew McSmythurs, who was at the relevant time an associate director of Gleeds Management Services (*"Gleeds"*) and was project manager of the Project. Insofar as the communications were in writing there was no issue as to what the communications were or as to the terms of them, but there was a difference between the parties as to the legal effect of what had passed between Gurney and Gleeds. That difference was based to some extent upon disputes of fact as to what had been said during a telephone conversation or telephone conversations between Mr. McSmythurs on the one hand, and Mr. Rose's partner, Mr. Geoffrey Marsh, on the other. I heard oral evidence from Mr. McSmythurs, Mr. Rose and Mr. Marsh about the disputed telephone conversations and I indicate later in this judgment my findings about the contested assertions of the parties in relation to those conversations.

12. A feature of the negotiations between Gleeds and Gurney was that there seems to have been a degree of uncertainty, at least initially, as to on whose behalf Gleeds was acting. That whoever was Gleeds's client was likely to be the freehold owner of the Property was tolerably plain. The uncertainty was as to the identity of that owner.

13. The negotiations commenced in March 1998. Mr. Rose first visited the Property on 20 March 1998 at the request of Gleeds. By that date a number of drawings relevant to the Project had been produced by Messrs. George J. McKinnia Associates (*"McKinnia"*). In drawings numbered 1509/01/A, 1509/02/A, 1509/03, 1509/04, 1509/05/E and 1509/06/F, each of which was dated as originally drawn 26 November 1997, with the latest revision (where the drawing had been revised) dated not later than March 1998, the *"Client"* was named on the drawing as *"Lazard Brothers & Co. Limited"* (*"Lazard"*). Lazard was also named as the *"Client"* on the drawing numbered 1509/08 dated 19 March 1998. However, on revision A of the drawing numbered 1509/03, made on 1 April 1998, the drawing title was changed to show as the *"Client" "Millbank Property Fund Ltd. & Pearson Nominees Ltd."*. Millbank Property Fund Ltd. is a former name of Pearson Pension Property Fund Ltd.

14. Mr. Rose attended a meeting on 24 March 1998 at the Property with others who were potentially to be involved with the Project. At that meeting Mrs. Joy Good of Lazard was introduced as a representative of the *"Client"*, and Mr. Rose's evidence was that at that stage he understood that Gurney was to be providing services in connection with the Project potentially to Lazard. Mr. Rose made notes of the discussions at the meeting. Those notes included:-

"*1. Pearson Group are looked after by the Millbank Property Fund. ….*
10. Appointment letter to be prepared with Lazards but letter to Andrew McSmithers [sic]. *…*
12. Main Contractor ideas."

In cross-examination Mr. Rose was not able to explain the significance of the first note, but hazarded a guess that he might at the time have understood those identified to be interested as funders of the Project.

15. The name of Lazard appeared as the name of the *"Client"* on the cover of a draft Pre-Tender Health and Safety Plan prepared by Gleeds Health and Safety Ltd. dated 22 April 1998 and a copy of which was sent to Gurney under cover of a letter dated 23 April 1998. Within the body of the document the name of the *"Client/Employer"* was left blank.

16. Lazard's name also appeared on the cover of what was called a *"Project Execution Plan"* (*"the PEP"*) a draft of which was sent to Gurney under cover of a letter dated 24 April 1998 written by Mr. McSmythurs.

Clause 2.1 of the PEP was introduced with the words:- *"This Project Execution Plan has been prepared by Gleeds Management Services and is designed for use by The Project Team participating in the design, procurement and construction of a refurbishment project at 8 – 10* [sic] *Beauchamp Place, London, SW3, on behalf of : LAZARD BROTHERS & CO. LTD*"

17. The correct identity of the *"Client"* was not firmly established until Technical Review Meeting No.1 held on 29 April 1998, which was attended by, amongst others, Mr. McSmythurs, Mr. Marsh (for part of the time) and Mr. Ian Rafter of Gurney. Minute 2.1 of the minutes of that meeting recorded that:- "*Client confirmed as "Millbank Property Fund and Pearsons Nominees Limited"*."

Mr. Rose accepted that a copy of the minutes of the meeting was provided to him. However, it seems that at the time he did not really register the terms of minute 2.1.

18. Following the meeting on 24 March 1998 Mr. Rose wrote a letter dated 25 March 1998 to Mr. McSmythurs. That letter was, so far as is presently material, in these terms:- *"I was very pleased to meet you, the client and other professional members of the team yesterday and as agreed am pursuing our first investigations on site early next week. Although I will be on holiday my office will adequately cover the investigations in my absence.*

With regard to possible Main Contractors to tender for the work I am always slightly reticent as whereby I might have had a good experience others may be able to reiterate a reverse situation.

However the following Contractor is carrying out a £2.5 million refurbishment at Kensington High Street for VISA International having only just completed very successfully a contract for the same client, VISA, at the building [details of the contractor were then set out]

No doubt you will carry out your own references of suitability on this company. If you require other suggestions please do not hesitate to contact me as I have carried out numerous refurbishment contracts of this type in London."

19. A project meeting attended by, amongst others, Mr. Rose, Mr. McSmythurs and Mrs. Good was held on 7 April 1998. One of the matters discussed was the need to establish the basis upon which Gurney and other professional practices which it was anticipated would be involved in the Project would charge for services to be provided. Minutes were taken by Mr. McSmythurs of the discussions at the meeting. Minute 1.3 was in these terms:- "*Design Team fee submissions not received, to be issued to AMcS* [Mr. McSmythurs] *within 1 week.*
Appointments will be based upon:
- *appropriate professional body "standard"*
- *BPF* [British Property Federation] *warranty (copy handed out)*
- *GMS* [Gleeds] *master programme*"

20. The matter of the fees proposed to be charged by Gurney was mentioned in a letter dated 17 April 1998 which Mr. McSmythurs wrote to Mr. Rose. The letter was in these terms:- *"You will recall during the recent project meeting my request for you to supply your draft fee submissions within the following week.*
Todate [sic] *I have not received these and would ask that you ensure the submission is available to me no later than next Wednesday 22 April 1998.*
As you will appreciate with the fast track nature of this project it is important we resolve appointments at the earliest opportunity to ensure full co-ordination of the team."

21. Mr. Rose replied to Mr. McSmythurs's letter dated 17 April 1998 in a letter dated 20 April 1998 as follows:- "*Thank you for your letter dated 17th April reminding me to action my brief and proposals for fee arrangements.*

I apologise for the delay in responding, but have concentrated our efforts since the last project meeting to ensuring we meet the very tight timescale for supply of information for inclusion in the first stage tender to Paul Mills. I am sure you concur with that decision.

It is my understanding from the project meetings that the scheme will be built out in three continuous phases i.e. Phase I – No. 2, 3, 4 and 5, Phase II No. 8 and Phase III No. 10. Therefore until our mutual client obtains vacant possession which is also virtually the contract start date sometime in June 1998, we will know very little about the structural condition of the buildings and therefore our work to then will be largely intelligent guesswork!

Thereafter, we will be virtually designing the alterations, strengthening works etc. after further opening up by the Contractor and just prior to him actually requiring to carry out the structural works etc.

You will understand that this method of working although a client requirement and to relocate Janet Regar by November does involve us in additional work to that normally anticipated in a refurbishment scheme.

I believe my role in providing structural engineering advise [sic] *us* [sic] *a* [sic] *follows:-*

1. Based on preliminary assessments provide sufficient information to Quantity Surveyor for first stage tender.
2. Following access to buildings open up existing structure and prepare structural proposals for alterations to suit proposals on Architects drawings.
3. Attend all project and site meetings as requested and covering the period of our involvement.
4. Prepare sufficient information to obtain Building Regulation approval.

We will carry out our role generally in accordance with the ACE Conditions and are prepared to sign subject to detailed agreement Collateral Warranties based on the BPF standard forms.

Exclusions

a. Provision of Party Wall drawings, details, etc.
b. Site visits in excess of 15 No. from possession of site in June 1998.
c. Disbursements.

Based on a construction cost in the order of £1,000,000, I propose a fee for our involvement of 3% + VAT. This reflects a discount of 20% against scale fees.

I propose fee accounts will be due as follows:-

First Stage Tender =25%
Contract start on site say 1/7/98 =60%
Completion of Phase II structure No. 1,2,3,4 and 5 =85%
Completion of Phase II structure No. 8 =95%
Completion of Phase III structure No. 10 =100%

I also take this opportunity to enclose a copy of our current brochure illustrating our expertise and scope of work undertaken."

22. In his witness statement dated 1 June 2004 Mr. McSmythurs commented upon Mr. Rose's letter dated 20 April 1998 and what happened immediately thereafter. He said:-

"*14. I was happy with the proposed scope covered in points 1 – 4 of the letter and that the terms for the appointment would be subject to the ACE Conditions of Engagement. The ACE Conditions of Engagement are an industry standard with which I am familiar and which funds, such as Millbank and those advising them, are prepared to accept. They are well known conditions and I note that Peter Rose does not suggest that he was not familiar with them.*

15. I noted the exclusions and the percentage fee on the second page of the letter … , neither of which I was happy to accept. Turning firstly to the exclusions, the provision of party wall drawings was, in my view, essential. Equally, a limit of fifteen site visits did not represent the reality of what was involved, namely that Gurney was to advise and issue design information as the various buildings became available and were opened up for inspection. As regards the disbursements item my view was that a reliable estimate of these costs could be provided at this stage. Turning secondly to the proposed fee, this was based on a percentage of the likely value of the works. As there was some way to go in determining this value, I preferred the certainty of a lump sum.

16. I note Peter Rose's suggestion, in paragraph 11 of his statement, that he envisaged that the appointment would be formed by way of an exchange of letters. For schemes of this size I have never operated on this basis. The ACE form of appointment incorporating the ACE Conditions of Engagement were required by the Fund and its advisors. Further, the Fund required all other members of the design team to enter into formal appointments which in time they did, without exception. …..

20. My recollection was that, following receipt of Peter Rose's letter of 20th April 1998 he went away on holiday. In his absence I had a number of telephone conversations with Jeff Marsh, one of Peter Rose's partners, to resolve the matter of their appointment. My understanding of the position agreed with Jeff Marsh is set out in my letter of 13th May 1998 … Peter Rose says, at paragraph 13 of his statement, that my letter purported to be a counter proposal the terms of which were not acceptable to him. This is not correct. The proposals set out what I believed Jeff Marsh and I had agreed. The reference at the end of the letter to preparation of a first draft of the appointment for

signature arose out of my discussions with Jeff Marsh. He accepted that the terms of appointment should be formalised. Further, as the ACE form of agreement was readily accessible, Jeff Marsh was happy to provide a first draft for signature.

21. I received Peter Rose's letter of 18th May … seeking to clarify two items in response to my letter of 13th May 1998. Firstly, as part of his scope, Peter Rose could not provide reports on damp and infestation. I understood this but had agreed with Jeff Marsh, in Peter Rose's absence, that Gurney would organise these investigations to be undertaken by others. Secondly, whilst the level of fee was agreed (£30,000), Peter Rose wanted more of the fee at an earlier stage. Again, I was agreeable to the change. The final reference to a formal draft was a matter Jeff Marsh and I had agreed and was clear from my letter of 13th May 1998. By this stage, I was of the view that an agreement had been concluded on all outstanding issues and that all the terms of Gurney's appointment were settled."

23. In his witness statement dated 15 June 2004 Mr. Geoffrey Marsh accepted that he had spoken on the telephone to Mr. McSmythurs during the absence on holiday of Mr. Rose. However, his account was completely different from that of Mr. McSmythurs. Mr. Marsh's evidence was:-

"*8. I believe that Mr. Rose is correct when he says that he was only away for 4 days, 5th to 8th May 1998.*

9. Mr. McSmythurs says that he had a number of conversations with me during that period. However I do not believe that I had more than one conversation with him. This conversation was by telephone. I remember it, and I believe that it is accurately recorded in my note to Peter of that date … I wrote this note at the time I took the phone call, i.e. as soon as I put the phone down.

10. Mr. McSmythurs said that he wanted to negotiate fees. I believe I tried to encourage him to wait until Peter's return so that he could speak to Peter directly, but Mr. McSmythurs was not prepared to wait. I believe that this was because he was due to speak to Lazards that day (as recorded in the penultimate paragraph of the note), and wanted to report on progress.

11. I believe that my note sets out the full extent of what was discussed. Had there been anything else of significance, I would have noted it.

12. In relation to the amount of fees, I had thought that we agreed on a lump sum fee of £27,500, but I note from his subsequent letter of 13 May 1998 …. that Mr. McSmythurs had a different understanding. I cannot remember whether I agreed the stage payments set out in my note, but I doubt that I would have done.

13. I note that in paragraph 20 Mr. McSmythurs suggests that his letter of 13 May 1998 "sets out the position agreed with [me]". *I disagree. What we discussed is as set out in my note. This is all that we discussed. We did not discuss any overall agreement. We did not formally agree anything. It was understood that everything was subject to client approval, and that the matter would be picked up again (and hopefully concluded) by Mr. Rose when he returned.*

14. Looking at Mr. McSmythurs' letter of 13 May, I can certainly confirm in particular that I did not agree to provide (or even to organise) damp reports. Had I been asked to provide or even to organise such reports (and I do not believe I was) I would have said no. This would have been additional work, which was outside our expertise and for which we were not insured. I would also have recorded the point on my note of 7th May 1998, which I did not.

15. I also disagree with Mr. McSmythurs that the figure we reached for fees was £30,000. It was £27,500. On receipt of his letter of 13 May 1998 Mr. Rose and I went along with his figure of £30,000, however, for reasons which are no doubt obvious.

16. In and about paragraph 21 Mr. McSmythurs says he was agreeable to certain subsequent changes contained in Mr. Rose's letter of 18 May 1998. I confirm that he did not communicate any such "agreement" to me, and I was not aware that any such agreement was ever reached.

17. In paragraph 23 Mr. McSmythurs suggests that he and I discussed the preparation of a draft Memorandum. I am quite sure that there was no such discussion. Had there been any such discussion, I would have made a note of it, and would probably recall it. I would also have said that Mr. McSmythurs should discuss such details with Mr. Rose on his return.

18. I think that when Mr. Rose did return from holiday on 11 May 1998 I had a brief conversation with him in which I pointed out that I had spoken to Mr. McSmythurs, and another discussion with him when he received Mr. McSmythurs' letter of 13 May 1998, as described by Mr. Rose in his second statement. I believe I recall Mr. Rose

saying to me, in relation to the last sentence of Mr. McSmythurs' letter: "what does he mean by that?", to which I confirmed I did not know."

24. The note to which Mr. Marsh referred in his witness statement in the passage quoted in the preceding paragraph was in manuscript and was dated 7 May 1998. It was in these terms:- "*Peter*
Whilst you were away I had to negociate [sic] *fees with Andrew McSmythurs.*
He was unhappy with the exclusions
I agreed to omit them on the proviso that any matters relating to Party Walls was dealt with by virtue of our calculations having to be undertaken for contract purposes. Also that a strict regime of opening up would be drawn up to control our visits to site.
He had a figure of £25k in mind however based on your "Pink" assessment of fees I pushed this up to a lump sum fee of £27500 + Vat.
Also the payment stages have been modified.
1) 1st Stage - 25%
2) Completion of Structural Works 1 – 5 - 75%
3) " " " Unit 8 - 85%
4) " " " " 10 - 100%
He was meeting Lazards today and was happy to recommend the above.
He was pumping me as to our resources etc & the extent of our involvement at the outset of the project."

25. Mr. McSmythurs's letter dated 13 May 1998 was addressed not to Mr. Marsh, but to Mr. Rose. Mr. McSmythurs wrote:- "*Thank you for your letter dated 20 April 1998 reference 4314F/BDR/pc setting out your fee proposals for the above scheme.*

Following my discussions with Jeff Marsh I am pleased to advise you of the clients [sic] *acceptance of your proposals, subject to the comments below.*

- *Scope of works to be generally as Items 1 – 4 of your letter, undertaken in accordance with the ACE Conditions.*
- *Exclusions a) – c) inclusive are withdrawn and absorbed within the fee.*
- *Fixed lump sum fee of £30,000 exclusive of VAT but inclusive of all disbursements and all other charges.*
- *Scope of service to include full structural survey and inspection report for each building individually, including reporting on issues of damp, infestation etc.*
- *Scope of service to include direction of the contractor through the Contract Administrator to identify all areas associated with the refurbishment and investigatory works.*
- *The fee payment schedule will be as follows:*
- *Stage 1 tender 25%*
- *Completion of Phase 2 structure to Number 1, 2, 3, 4 and 5 75%*
- *Completion of Phase 2 structure Number 8 85%*
- *Completion of Phase 3 structure Number 10 100%*

Please note that the Contract Administrator will be George McKinnia and that all project direction and control will be in line with the Project Execution Plan as issued by Gleeds Management Services. GMS will provide overall Project Management and direction and will act as the sole point of contact to the Client.

Please confirm your receipt and acceptance of the above, following which I would appreciate receiving your first draft of the appointment for signature."

26. There are in fact five standard forms of agreement produced by ACE. One is the Standard Form. The others are:-
Agreement 1 – Conditions of Engagement for Report and Advisory Work
Agreement 2 – Conditions of Engagement for Civil, Mechanical and Electrical Work and for Structural Engineering Work where an Architect is not appointed by the Client.
Agreement 4A – Conditions of Engagement for Engineering Services in relation to Sub-contract Works
Agreement 4B – Conditions of Engagement for Engineering Services in relation to Direct Contract Works.

As it was known in the present case that the work required was structural engineering work and that an architect, McKinnia, had been engaged, it was, as it seems to me, fairly obvious that the appropriate form of ACE agreement for use to govern the engagement of Gurney, if it was desired to use one of the standard

forms of agreement, was the Standard Form. However, the Standard Form does contain, in the Memorandum of Agreement (*"the ACE Memorandum"*), a number of blanks which are obviously intended to be completed appropriately to fit the circumstances of each individual case in which the Standard Form is used.

27. Mr. Rose responded to Mr. McSmythurs's letter dated 13 May 1998 in a letter dated 18 May 1998:- "*Thank you for your letter dated 13th May regarding our appointment and fees and discussion with Geoff Marsh regarding my letter dated 20th April, in my absence on holiday.*

I accept all the comments and agreements made apart from the following:-

1. We cannot provide an expert report on damp, infestation etc. These are specialist items specifically excluded from the protection of all Structural Engineers P.I. policies. The best we can do is advise you of any defect etc. apparent when we open up the structure to determine the existing structural floors, any strengthening etc.

My own advice to you is that you should, in a building of this age and carrying out works to lengthen its life significantly, seek independent timber specialist advice from a company such as Rickards.

2. The gap between the fee payment schedule for the Stage 1 tender and completion of Phase 2 structure is I feel unreasonable – on site possession for No. 2 – 5 incl. we will carry out shortly a significant part of our involvement and therefore I suggest 50% of our fee should be due in September and inserted as an additional payment date i.e. completion of Phase 2 structural investigation and design 50%.

I do not understand the meaning of the last paragraph of your letter and perhaps you could clarify."

28. The PEP, which, as I have already mentioned, was sent to Gurney in draft under cover of a letter dated 24 April 1998 written by Mr. McSmythurs, included a section numbered 7.4 entitled *"Structural Engineer"*. That section began in this way:-

"*1. The Structural Engineer will make himself fully familiar with the Brief and shall use all reasonable endeavours to implement its terms and shall advise the Project Manager where the Consultant believes that any of the objectives of the Brief cannot be achieved and/or there is any conflict between other documents and the Brief.*

2. In carrying out its duties in relation to the Project the Structural Engineer shall communicate with the Client the Project Manager and the Several Consultants in accordance with the system prescribed by the Project Manager."

There then followed immediately, without any further introduction or explanation, a long listing, over some three pages of text, of what looked like a detailed catalogue of what it was desired that the *"Structural Engineer"* should do. Those matters were set out under a number of headings, specifically *"Inception and Feasibility"*, *"Outline Proposals"*, *"Scheme Design"*, *"Detail Design"*, *"Production Information and Bills of Quantities"*, *"Tender Action"*, *"Project Planning"* and *"Operations on Site and Completion"*. The letter under cover of which the draft of the PEP was sent indicated that the purpose of sending it was so that Gurney could "*… review the contents and provide comments for discussion at the Progress Meeting on 29th April 1998.*"

What exactly was the *"Brief"* referred to in paragraph 1 of section 7.4 of the draft of the PEP never clearly emerged. No copy of any document with that title was put in evidence. Section 4.2 of the draft of the PEP referred both to *"The Clients Brief"* and *"The Project Brief"*. No copy of any document with either of these titles was put in evidence.

29. Under cover of a letter dated 27 May 1998 Mr. Rose sent to Mr. McSmythurs a fee note in respect of 25% of what was described as *"Agreed lump sum fee - £30,000"* plus Value Added Tax thereon. The fee note was addressed to Lazard. The covering letter began:- "*As agreed in your letter dated 13th May, I enclose our fee advice note for our first interim payment.*"

30. A further fee note, also addressed to Lazard, in respect of builders' attendance costs in relation to digging trial holes was sent by Mr. Rose to Mr. McSmythurs under cover of a letter dated 1 June 1998.

31. The matter of the engagement of Gurney does not seem to have been raised by anyone again until Progress Review Meeting No. 1, which took place on 18 June 1998. Once more Mr. McSmythurs took minutes of the meeting. A copy of those minutes was put in evidence. Minute 7.1 was in these terms:- "*GMS reminded all design team to submit details of commissions using appropriate professional bodies standard appointment with BPF standard warranty.*"

32. In his first witness statement dated 10 May 2004 Mr. Rose said this in relation to the meeting on 18 June 1998 and a letter dated 23 June 1998 which he wrote following it:-

"*15. I note from my letter of 23 June 1998 that there was a "Client Meeting" around 16 June 1998. I cannot remember this meeting at this stage, but note from my letter that at this stage I appear to have been asked to provide a draft appointment in the form of an ACE Memorandum of Agreement. Although this was not what I had envisaged, I agreed to provide such a Memorandum and did so in manuscript (with the precise client details left blank for completion by Gleeds), under cover of my letter of 23 June 1998. … I would point out that in the draft version of the ACE Memorandum of Agreement I sent with that letter I had left the client's details blank. It would appear that subsequently these have been completed by somebody else on the copy in the Defendants' possession. I did not provide (and there never was provided by the Claimant or Gleeds) any particular Conditions of Engagement. Clearly, there was still no formal appointment of the Claimant at this stage, merely my proposed memorandum with blank client details and date, and on which I had (in my letter of 23 June 1998) invited Gleeds' comments. I did not have the draft memorandum typed up because it was not intended to be (and I am sure could not have been taken by Gleeds to be) a final appointment: it was a draft for discussion.*"

33. Mr. McSmythurs's position concerning the memorandum of agreement sent under cover of Mr. Rose's letter dated 23 June 1998 was completely different from that of Mr. Rose. At paragraph 23 of his witness statement Mr. McSmythurs said:- "*At paragraph 15 of his statement, Peter Rose says that a handwritten draft of the ACE Memorandum of Agreement was sent under cover of his letter of 16th* [sic] *June1998. The Memorandum was the draft which Jeff Marsh and I had discussed in Peter Rose's absence and to which I had referred to* [sic] *in my letter of 13th May 1998. I confirm that I received this letter and the enclosures. I was happy with the Memorandum and the Warranty, and it only remained for the client details to be inserted.*"

34. Mr. Rose's letter dated 23 June 1998 was in these terms:- "*Further to the Client Meeting last week, I write with regard to the matter of our Appointment and fees. It would appear there has been some misunderstanding over the position. Although I was handed at the first Project Meeting on 24th March Standard Collateral Warranties, these were Specimen Documents for Purchaser/Tenant and Funder to be provided by a Contractor and I believe from discussions with other Consultants that they received similar documents. I am, of course, very happy to provide a BPF Warranty to any of the bodies previously mentioned as and when required.*

The attached marked up copies confirm the basis on which we are prepared to enter these agreements. With regard to our Appointment I responded to your letter dated 13th May on several issues in my letter dated 18th May and in the last sentence referred to not understanding the last paragraph of your letter as there had never been any previous indication that an appointment would be other than a simple letter from the Client. As I have not had a reply to my letter dated 18th May, I presume you never received it and therefore I enclose a further copy for your reference.

However, as requested at the meeting last week, I enclose herewith a handwritten marked up copy of an ACE Memorandum of Agreement which on receipt of your comments and completion of client details I can have typed out for signature.

Finally, with regard to the recent client meeting, I feel I must clarify the matter of the two week survey period at the start of the project. I have checked with my office and at no time has the matter of an opening up period been discussed – it is possible it may have been discussed at a meeting we did not attend or at the meeting on the 29th April after my staff had left – However, I would have expected it to be in the Minutes. I understand from George McKinnia that it is referred to in the Tender documents but as we have not been provided with a copy, we are not aware of that statement. As requested at the last client meeting we would appreciate a priced copy of the document including all those parts/preliminaries etc relevant to the structural work before the survey work commences."

35. Not only the ACE Memorandum but also the British Property Federation standard form of collateral warranty ("*the BPF Warranty*") contains blank spaces for completion as considered appropriate in any particular case in which it is to be used. Apart from the details of the parties, the ACE Memorandum requires completion in each individual case of the precise nature of the services to be provided under it, the fee to be charged, an hourly rate of charge, the intervals at which fees are to be paid, any additional services to be provided, the amount of professional indemnity insurance cover to be provided by the consulting engineer and the period for which that cover is to be maintained, and a statement of the amount of the limit of the liability of the consulting engineer. The BPF Warranty requires, again in addition to identification of the parties, the identification of other intended warrantors, a statement of the amount of

professional indemnity insurance cover to be provided by the warrantor and the period for which that cover is to be maintained, a statement of the number of assignments of the benefit of the warranty which are permitted, and a statement of the period after which no proceedings for alleged breach of the warranty may be commenced. The marked up drafts sent by Mr. Rose under cover of his letter dated 23 June 1998 dealt with all of these matters. Questions of hourly rates of charge, the amount of professional indemnity insurance cover to be provided and for how long, limitations on the liability of Gurney, the identification of other warrantors, the number of assignments of a warranty permitted and the period after which no proceedings for alleged breach of warranty could be commenced had not been addressed before in the course of negotiations between the parties. In completing the marked up draft of the ACE Memorandum Mr. Rose altered the description of the services which it was anticipated that Gurney was to provide and also the intervals at which fees were to be payable. The description of the services written into the draft was:- "*structural engineering services for the alterations including:-*
a) Investigating the existing structures as necessary
b) Preparing all necessary calculations drawings & details for construction and Building Regulations
c) Attending all project and site meetings as requested and covering the period of the works."

Additional services to be provided were suggested as *"those as directed & instructed by the Client or their representative"*. The material part of clause 4 of the ACE Memorandum with the blanks completed by Mr. Rose read:- "*The intervals for the payment of instalments under Clause 19.1(a) of the said Conditions of Engagement shall be at regular intervals reckoned from the commencement of the Consulting Engineer's appointment, and the cumulative proportions referred to in the said sub-clauses shall be as follows: …*

On Completion of Scheme Design Stage	*25% of the fee*
On Completion of Detail Design and Tender Documentation Stage	*50% of the fee*
On Completion of Production Information Stage	*75% of the fee*
On Completion of the Works	*100% of the fee*

Payments will be due to suit the phasing of progress of the project."

36. The fee notes submitted under cover of Mr. Rose's letters to Mr. McSmythurs dated, respectively, 27 May 1998 and 1 June 1998, were not paid promptly. Gurney chased payment by reminders sent to Lazard dated 7 July 1998 and 21 July 1998. In a facsimile transmission dated 10 August 1998 to Mr. Rose Gleeds asked that the fee notes be re-addressed to Millbank Property Fund & Pearsons Nominees Limited. That was done by Gurney on the same day.

37. In a letter to Mr. McSmythurs dated 4 August 1998 Mr. Rose drew to his attention that Gurney's fee notes had not been paid and also that:- " *…I have heard nothing further from you since my letter of the 23 June regarding our Formal Appointment and Draft Warranties.*"

38. Mr. McSmythurs replied to the letter dated 4 August 1998 written by Mr. Rose in a letter dated 12 August 1998. Although in the latter letter Mr. McSmythurs dealt with the other points made in the letter dated 4 August 1998, he did not comment on the matter of a formal appointment or draft warranties. About the fee notes Mr. McSmythurs wrote:- " *…the invoices you refer to had not been received and are now being processed on the basis of copies.*"

39. Mr. Rose again chased the matter of a formal appointment at the end of a letter dated 17 September 1998 to Mr. McSmythurs. Once more Mr. McSmythurs replied to the letter without commenting on the matter of a formal appointment. Mr. McSmythurs's response to the letter dated 17 September 1998 was in a letter dated 28 September 1998.

40. In his witness statement dated 10 May 2004 Mr. Rose observed at the end of paragraph 20 that the matter of Gurney's appointment was not resolved prior to the collapse of part of the front wall of the Property on 26 October 1998. He went on:-

"*21. Very shortly after the wall collapsed, Mr. McSmythurs contacted me in relation to the proposed memorandum to discuss its terms. We discussed my draft and made a number of corrections, which can be seen on the first page of the further (again updated) version of the manuscript memorandum contained in my file … Those revisions to the memorandum were made between 26 October 1998 and 5 November 1998, when I sent a proposed typed version of the memorandum to Mr. Paul Till at Millbank Property Fund, at Gleeds' request . … This identified the proposed*

client as "Millbank Property Fund & Pensions Nominees", not the Defendants. No particular ACE Conditions were attached and this further version was, once again, ignored. I heard nothing in response, and indeed nothing of any significance further in relation to the project, because at this stage our involvement in the Works had ceased. Gleeds began using different engineers.

22. By a letter dated 1 December 1998 Mr. McSmythurs wrote to me on behalf of Millbank Pension Fund, described as the "client", purporting to terminate the Claimant's appointment."

41. A copy of the marked up draft of an ACE Memorandum which Mr. Rose said that he altered during his conversation with Mr. McSmythurs between 26 October 1998 and 5 November 1998 was put in evidence. In origin the document seemed to be a copy of the ACE Memorandum as marked up and sent to Mr. McSmythurs under cover of Mr. Rose's letter dated 23 June 1998. The alterations made to the version sent to Mr. McSmythurs in June 1998 comprised inserting the name of *"Millbank Property Fund & Pensions Nominees Ltd"* as that of the client, deleting the words *"of the works"* at paragraph c) of the description of the services to be provided and substituting the words *"of our involvement"*(to which alteration I shall refer in this judgment as *"the paragraph c) amendment"*), and adding, after paragraph c) of the description of the services as a general qualification to the description of the services the words:- "*All as per the brief issued to the Consulting Engineer at the commencement of the Project by the Clients Project Manager*"

In their respective oral evidence neither Mr. Rose nor Mr. McSmythurs seemed to know to what exactly this referred. Mr. Rose told me that he thought that the form of words which I have set out was suggested to him by Mr. McSmythurs during their conversation, that Mr. McSmythurs did not indicate what he meant by *"the brief"*, and that he, Mr. Rose thought that it referred to the draft PEP, as that was the only document resembling any sort of brief which Gurney had ever received. Mr. McSmythurs told me that it appeared that the insertion of the words at the end of the description of the services in the draft ACE Memorandum had come about following discussion, but that he did not recall. He said, first, that he thought that *"the brief"* referred to was that mentioned in the draft PEP, but then he said that he thought that it included the draft PEP.

42. At one point in his cross-examination Mr. Rose said that he thought that all of the alterations to the marked up draft ACE Memorandum which he sent to Mr. McSmythurs in June 1998 which were made between 26 October 1998 and 5 November 1998 were made during the telephone conversation with Mr. McSmythurs of which he spoke, and were agreed with him. At that stage Mr. Rose said that he considered that the terms of the ACE Memorandum as altered represented terms agreed with Mr. McSmythurs. In re-examination, however, Mr. Rose pointed out that the paragraph c) amendment was in a different writing medium from the words added at the end of the description of services, and on reflection he felt that the paragraph c) amendment had been made after the conversation on the telephone with Mr. McSmythurs and in pencil, while he was reviewing the document prior to asking for it to be typed up. The words added at the end of the description of services were, Mr. Rose felt, in ink. The appearance of the copy of the document put in evidence supports, in my judgment, the testimony of Mr. Rose in re-examination on this point.

43. Mr. Rose wrote a letter dated 5 November 1998 to Mr. Till in which he said:- "*As requested by Gleeds Project Managers, I enclose herewith one copy of the Memorandum of Agreement duly signed by myself.*

Could you please arrange for signature by the client or you as their representatives and date and return a copy for my own records."

The memorandum of agreement enclosed with the letter did indeed identify the parties proposed to execute the document as, respectively, *"Millbank Property Fund & Pensions Nominees"* and Gurney. As I understand it, there is and was in fact no company or other body the correct name of which is or was *"Millbank Property Fund & Pensions Nominees"*. No company or body claiming the role ascribed to *"Millbank Property Fund & Pensions Nominees"* in the memorandum, namely that of the *"Client"* of Gurney, in fact ever executed the document.

44. Mr. McSmythurs's letter dated 1 December 1998 to Mr. Rose was in these terms:- "*On behalf of Millbank Pension Fund, the client, I regret to advise you of the decision taken to terminate your appointment as Consulting Engineers for this scheme.*

Following the building collapse on 26 October 1998 and the ongoing investigations it is considered inappropriate for Gurneys to continue with their involvement.

I confirm the request for you to continue with and complete your commission in so far as it relates to the works presently being undertaken to Unit 2. The scope of these works are as set out in Gurneys letter dated 5 November 1998.

In addition I would ask you to prepare a full fee statement up to the date of this letter, which should include your fee to complete Unit 2. Payment against such fees is without prejudice to any future liability Gurney's [sic] *may have to the client.*

Beyond this no further works should be undertaken without prior written authority from the undersigned, unless on the grounds of immediate safety.

I would ask you to collate all documents, drawings etc. for return to ourselves. In the circumstances, copies of these may be kept by yourselves for record purposes.

Please acknowledge receipt and compliance with this letter and also confirm my understanding that you have notified your Professional Indemnity insurer's [sic] *of this incident.*"

45. Mr. Rose replied to Mr. McSmythurs's letter dated 1 December 1998 in a letter dated 7 December 1998:- "*Thank you for your letter dated 1st December 1998 advising our Appointment as Consulting Engineers has been terminated. As mentioned in my letter dated 25th November, I am concerned and disappointed that we are currently the only Provider of Services to the Client who has had their appointment terminated.*

I consider your Client's action in terminating our Contract unlawful, noting that the Main Building Contract is still running presumably with Extension of Time occurring and therefore we reserve our rights with regard to any damages due to the premature and unlawful termination of our Services.

We fully concur that the making safe works as my letter dated 5 November for No. 2 is very important and should be completed as soon as possible and of course I would want to undertake that task for the Client. However it must be subject to the payment of all outstanding fees to date, i.e. the attached advice note and our unpaid Advice Note No. 3507 (copy enclosed). On receipt of settlement of the above, VAT invoices will be issued.

Having only received your letter on 3rd December and responded as early as I could today, I would point out that I am unavailable between 10th - 17th December inclusive and during that period it is unlikely we could respond to any requests from yourselves until my return to the offices on Friday 18th December.

I await your early response to the above and settlement of our fees to enable us to complete the duties requested."

46. There was no further relevant contact between Gurney and Gleeds or the Trustees.

The submissions of the parties

47. As I have indicated, the principal live issue in this action was whether a contract was concluded between the Trustees and Gurney. It was not in dispute that, if a contract had been concluded which incorporated the Standard Form, it also incorporated the arbitration clause contained in it. Although it had at one stage seemed that there might be an issue as to whether Gurney appreciated that the party with which it was intended it should contract was the Trustees, under some version of their respective names, or Lazard, in the event it was accepted that Mr. Rose was aware from the time he received, as he agreed that he had, the minutes of Technical Review Meeting No.1 held on 29 April 1998 that the intended other contracting party was *"Millbank Property Fund and Pearsons Nominees Limited"*. That was not quite the form of the name inserted as the name of the *"Client"* in the ACE Memorandum enclosed by Mr. Rose with his letter dated 5 November 1998 to Mr. Till, but it was similar. Mr. Sutherland did place some reliance upon the literal discrepancy in the form of the name, however.

48. Although the principal live issue in the action, broadly stated, was whether a contract had been concluded, a step on the way to resolving that issue was the resolution of the conflict of evidence between Mr. McSmythurs and, principally, Mr. Marsh, as to telephone contact between them in about May 1998. Mr. Sutherland submitted that I should accept the evidence of Mr. Marsh in preference to that of Mr. McSmythurs because, as he put it at paragraph 8 of his written skeleton argument prepared before Mr. McSmythurs, Mr. Marsh and Mr. Rose were cross-examined, *"Mr. McSmythurs:*

(a) clearly did not have access to many documents when his statement was prepared, and even those documents which he does refer to, he did not trouble to read properly. See e.g. para 14 of Mr. Rose's 2nd statement, where he misdescribes Gurney's recommendation of a building contractor, as a "reference" which Gurney were allegedly providing in respect of their own practice …. [What Mr. McSmythurs said about Mr. Rose's letter dated 25 March 1998 to him, which plainly, as it seems to me, contained a suggestion as to a contractor which might be considered to undertake the Project, and not the identity of someone who could provide a reference concerning Gurney, at paragraph 10 of his witness statement was:-

As I had not worked with Gurney before, I asked for some references. Following the meeting I received a letter from Peter Rose … setting out details of the refurbishment works he was involved with for one of his clients, Visa, in Kensington High Street.] *A similar point arises at para 9(a) of Mr. Rose's 2nd statement* [which was concerned with the name of the person said to be the *"Client"* on the McKinnia drawings to which I have referred.]

(b) has a poor recollection of events: e.g. his account at para 20/21 of "conversations" with Mr. Marsh, which are at odds with the contemporaneous attendance note taken by Mr. Marsh himself on 07.05.98 …

(c) admits that it was inaccurate of him to have asserted to Gurney on 12 August ….. that he had not received copies of their May 1998 invoices, for which Gurney had been chasing for payment for some time. In his statement at para 22 he confirms that he did receive those invoices."

49. Mr. McMullan submitted that I should prefer the evidence of Mr. McSmythurs to that of Mr. Marsh and that of Mr. Rose where there was a conflict between them. He did not advance specific reasons in support of that submission, but relied on the impression which he contended I should have formed from having seen Mr. McSmythurs, Mr. Marsh and Mr. Rose cross-examined.

50. The submissions of Mr. Sutherland as to whether a contract had been concluded, and those of Mr. McMullan on that question, as set out in their respective opening skeleton arguments, did not change materially in the light of the oral evidence adduced at the hearing. Mr. Sutherland's submissions at the end of the hearing were essentially those set out in his skeleton argument at paragraphs 9 to 13 inclusive:-

"*9. At first, Mr. Rose understood, from what had been said at the meeting on 24.3.98 .. and from his experience, that Gurney's appointment was to be by an exchange of letters (Item 10:* "Appointment letter to be prepared with Lazards but letter to AMCS*].*

10. However, it soon became clear that ***Gurney's appointment was only to be concluded by a properly executed "formal" standard form appointment.*** *In particular, one which was typed up and executed by both parties. See:*

(a) The Minutes of Meeting of 07.04.98 …. See in particular p.10, para 1.3:
"Design Team fee submissions not received, to be issued to AmcS within 1 week. Appointments will be based upon:
- **appropriate professional body "standard"**
- BPF warranty (copy handed out)
- GMS master programme

(b) the letter from AMcS of Gleeds to Mr. Rose of Gurney dated 13 May 1998, final para …: " **… Please confirm your receipt and acceptance of the above, following which I would appreciate receiving your first draft of the appointment for signature.**"

(c) Minutes of Meeting of 18.06.98 … : reminder that all design team to submit details of commissions **using appropriate professional bodies standard appointment with BPF standard warranty;**

(d) Mr. Rose's letter of 23 June 1998 to Gleeds, enclosing a handwritten draft ACE Memorandum …, "I enclose herewith a **handwritten marked up copy of ACE Memorandum of Agreement which on receipt of your comments and completion of client details I can have typed out for signature.**" *(the client details were blank)*

(e) Between 23 June 1998 and 26 October 1998 Gurney then chased for a response to this, but to no avail:
- *letter of 04.08.98 …:* "Finally I have heard nothing further from you since my letter of the 23 June regarding our Formal Appointment and Draft Warranties.

- *letter of 17.09.98 ….:* "I look forward to your early response together with resolving our formal appointment"

  Both of these letters were answered by Gleeds … but the chasing re appointment was ignored.

(f) Very shortly after the collapse on 26 October 1998, AmcS contacted PDR re the proposed memorandum to discuss its terms. Mr. Rose made changes to the manuscript draft of 23.06.98 as appear in the passages of p 118 in Mr. Rose's writing but in a different pen …

(g) On 5 Nov 98 … Mr. Rose sent a typed up Memorandum, signed and witnessed by him, to Paul Till of Millbank Property Fund inviting him to sign it. But:

- *No-one ever did execute it on behalf of the Defendants;*
- *Nor could they; it had the wrong client name on it:* "**Millbank Property Fund & Pensions Nominees**"

11. The witness evidence confirms this. See Mr. Rose 2nd statement at para 21 …: "Although I accept that I signed the typed version of the Memorandum, I am not aware (and I do not believe) that **this was ever accepted by the client, still less formally executed by it, as I believe both parties envisaged was necessary before our appointment was formally concluded".**

12. Far from challenging this proposition, Mr. McSmythurs gives evidence to precisely the same effect. See particularly para 21: "The final reference to a formal draft was a matter Jeff Marsh and I had agreed and was clear from my letter of 13th May 1998."

See also Mr. McSmythurs at para 28: "In the final paragraph of Peter Rose's letter of 17th September 1998 … he refers to the resolution of "our formal Appointment": That is my understanding of the point that had been reached. I do not think any discussions took place about finalising the formal appointment between 17th September and 6th October 1998 because in a note of the meeting with Paul Till and Tony Williamson … I noted, at Item 6, "Gurneys – Gurneys draft agreement agreed, formal draft requested."

13. Accordingly the parties' intention was plainly that Gurney's appointment was to be concluded by a formal standard form of appointment, signed by both parties. This never happened. There was therefore no appointment, and thus clearly no arbitration agreement."

51. Mr. McMullan set out his submissions to the effect that a contract had been concluded at paragraphs 8 to 17 inclusive of his skeleton argument:-

"*8. The chronology sets out the important dates in the exchange of correspondence that took place. From an early stage the parties had agreed that any agreement would be on the ACE conditions. Mr. Rose suggested this in his letter of 20 April 1998. …*

*9. There was then a conversation or conversations between Mr. McSmythurs (on behalf of the Defendants) and Mr. Marsh on behalf of the Claimants. At the end of that conversation Mr. McSmythurs was of the view that matters had been agreed. He wrote recording what he understood the position to be on 13 May 1998 including ….: "**Scope of works to be generally as Items 1 – 4 of your letter, undertaken in accordance with ACE Conditions.**"*

10. On 18 May 1998 Mr. Rose responded. He stated that he accepted all comments and agreements apart from two matters concerning a report on damp and the fee payment schedule ….

11. As Mr. McSmythurs explains in his witness statement at paragraph 21, he was content with these two matters, and he was therefore of the view that all outstanding issues and terms of Gurney's appointment had been agreed. Given the minor nature of the two matters raised that is hardly surprising.

12. Shortly thereafter, on 27 May 1998 Gurney submitted invoices for payment albeit in the wrong name …

*13. On 23 June 1998 Mr. Rose wrote again … "**However, as requested at the meeting last week, I enclose herewith a handwritten marked up copy of an ACE Memorandum of Agreement which on receipt of your comments and completion of client details I can have typed out for signature.**"*

14. It was thus the Claimant who put forward the ACE Memorandum of Agreement. This was confirmed as the basis upon which Gurney were prepared to enter into an agreement. The fee payment schedule reflected that suggested in the Claimant's letter of 18 May.

15. *Subsequently, Mr. Rose's proposal that he would later sent* [sic] *out a typed version of the Memorandum of Agreement indeed came to pass. He had it completed and sent it to Mr. McSmythurs … He signed it, and had his signature witnessed. This, it is respectfully submitted puts the question of the contract beyond doubt. It had been and was agreed.*

16. *Paragraph 19 of Mr. Rose's second statement states:* ***Mr. McSmythurs also suggests that in my letter of 20 April 1998 I had proposed that "terms for the appointment would be subject to the ACE Conditions of Engagement". In fact my letter stated*** "**We will carry out our role generally in accordance with the ACE Conditions**"**.** ***I did not intend this to mean that the actual ACE Conditions would be incorporated into our appointment, had an exchange of letters been concluded. I accept however that I probably was prepared to agree to such terms had a contract ever been concluded.***

17. *The suggestion that Mr. Rose was only "probably" prepared to agree to the ACE Conditions must be considered in the light of his letter of 18 May 1998 and the two memoranda of agreement he sent through. If it is seriously contended that he was only "probably" prepared to agree to such terms his actions are inexplicable.*"

52. The case for the Trustees thus seemed to be that the contract for which they contended was concluded on the telephone between Mr. McSmythurs and Mr. Marsh sometime round about 7 May 1998, or when Mr. McSmythurs received Mr. Rose's letter dated 18 May 1998 and formed the view, uncommunicated to anyone else, and in particular not to Gurney, that in respect of the two matters to which Mr. Rose objected he was prepared to accept Mr. Rose's proposals, or when Mr. Rose sent to Mr. Till under cover of his letter dated 5 November 1998 a copy of an ACE Memorandum executed by Mr. Rose. In his oral closing submissions Mr. McMullan indicated that his primary case was that a contract was concluded during the course of the telephone conversation between Mr. Rose and Mr. McSmythurs in which the terms in which an ACE Memorandum were to be completed were agreed, while the contention that a contract had been concluded in about May 1998 was his secondary case. Mr. Sutherland anticipated those ways of putting the case in his written skeleton argument. He sought to deal with them in this way:-

"*16. Mr. McSmythurs suggests at paras 21/22 that terms were agreed on 7th May 1998 or 18th May 1998. This is plainly not the case, as Mr. Rose indicates … In any event, a draft agreement (in different terms) was subsequently prepared by Gurney, and sent to Gleeds on 23 June 1998, with no response, despite chasing. Even this was later altered …*

17. *Moreover this is not a case in which parties ever agreed to or intended to be bound on a "pro tem" basis pending execution of a formal appointment. Indeed, at all times up to 26 October 1998 they were still negotiating over terms. Thereafter, Gurney's involvement effectively ceased. In any event, any "pro tem" contract was no more than a simple contract, with no arbitration agreement.*

18. *It may be suggested that Mr. Rose's typed Memorandum was somehow accepted "by conduct". However, aside from the primary points set out above re the parties' intention (that the appointment be concluded by a jointly executed document):*
    (a) Acceptance/agreement cannot have been effected by Mr. McSmythurs. He does not even suggest that he had authority to accept/agree the formal appointment.
    (b) Nothing occurred after the Memorandum was sent on 5 November 1998 that might have represented acceptance: …
    (c) Gleeds "termination" letter sent to Gurneys on 1 December 1998 … cannot operate as an acceptance of an appointment. By definition it is the reverse.

19. *Gurney's letters on and after 25 November 1998 … referring to termination of their "appointment" do not represent an admission that a contract was concluded. Gurney are not contract lawyers, and themselves explain that their attention was focused on the fact of termination, i.e. being pulled off the job, not on whether an appointment had ever been concluded. So far as they were aware, that issue had now become academic.*

20. *Finally Gurney refer to the fact that the typed Memorandum sent by Gurney to "Millbank Property Fund" on 5 November 1998 in any event wrongly identified the client/employer as "Millbank Property Fund & Pensions Nominees" … Not the Defendants. This was never corrected. Indeed neither the Defendants nor Gleeds ever responded to that letter. In their evidence they do not explain why they never responded, and the Defendants*

themselves do not suggest that the terms were acceptable to them. Indeed, there is no evidence from the Defendants themselves."

53. In opening the case for Gurney orally Mr. Sutherland summarised his case in four propositions.

54. The first was that the parties were only ever seeking to make a formal agreement in writing, and not any other sort of agreement. Mr. Sutherland laid stress on the express requirement of Mr. McSmythurs's client for formal written appointments of members of the professional team, utilising the standard form of engagement appropriate to the relevant professional discipline. He also relied on the issue of appropriate BPF Warranties, which Mr. McSmythurs's client obviously considered of importance and which of necessity would have to be given in writing pursuant to an express contractual obligation to do so.

55. The second of Mr. Sutherland's propositions was that the parties did not in fact reach agreement on all of the terms which they desired to include in a contract. In this context again the question of BPF Warranties was important, because no form of BPF Warranty ever was agreed – Mr. McSmythurs simply never responded to the draft marked up BPF Warranty which Mr. Rose sent under cover of his letter dated 23 June 1998, and the terms of the ACE Memorandum discussed on the telephone between Mr. Rose and Mr. McSmythurs after 26 October 1998 did not include any obligation on the part of Gurney to provide any warranty. Mr. Sutherland relied on the fact, as he invited me to find, that the paragraph c) amendment was not actually discussed between Mr. Rose and Mr. McSmythurs and agreed. He also relied on the fact that Mr. McSmythurs never expressly dealt with the two numbered matters raised by Mr. Rose in his letter dated 18 May 1998.

56. The third of Mr. Sutherland's propositions was that the parties in fact never made any interim agreement in anticipation of a formal final agreement.

57. Finally, Mr. Sutherland submitted that if his third proposition was not well-founded, any contract made did not incorporate the Standard Form.

58. Mr. McMullan in his closing submissions sought to rely heavily upon what he contended was the belief of Mr. Rose that a contract had been concluded, demonstrated by the terms of his letter dated 7 December 1998. The existence of that belief was supported, submitted Mr. McMullan, by the evidence of Mr. Rose in cross-examination that he considered, following the telephone conversation between himself and Mr. McSmythurs after 26 October 1998, that the terms of the ACE Memorandum as typed up and sent to Mr. Till on 5 November 1998 had been agreed. The relevance of this, asserted Mr. McMullan, was that it demonstrated that the present was not a *"Subject to Contract"* case.

59. In relation to his secondary case Mr. McMullan contended in his closing submissions that each of the points set out by Mr. Rose in the numbered paragraphs of his letter dated 18 May 1998 had been dealt with at a practical level in such a way as to show that they had been accepted by Mr. McSmythurs. The Trustees in fact engaged others to undertake the preparation of timber infestation and damp reports. Gurney did actually render an invoice on the assumption that the Trustees had agreed to pay 50% of the agreed fee of £30,000 on the completion of the design of Phase 2. The latter point, which was correct so far as it went, might have had more force if the Trustees had paid the invoice rendered.

Consideration and conclusions

60. Having seen and heard Mr. McSmythurs, Mr. Marsh and Mr. Rose give evidence I accept the submission of Mr. Sutherland that I should prefer the evidence of Mr. Marsh and that of Mr. Rose to the evidence of Mr. McSmythurs where there was a conflict. I did not find Mr. McSmythurs to be a satisfactory witness. The criticisms of his reliability which Mr. Sutherland made in anticipation of his cross-examination at paragraph 8 of his written skeleton argument I found to be made out in the light of his oral evidence.

61. Mr. McSmythurs was clearly wrong in his recollection of the reason for the mention of the VISA project by Mr. Rose in his letter dated 25 March 1998. The fact that Mr. McSmythurs made the comment which he did about that letter at paragraph 10 of his witness statement indicates, in my judgment, not merely that his recollection of the matter, which after all arose over six years ago, was at fault, but also that he had taken inadequate care to refresh his memory from reading the letter itself. That Mr. Rose's evidence about the letter was correct was plain just from reading it. Although the point had been signalled in Mr. Sutherland's skeleton argument, prepared for a hearing which was adjourned, Mr. McSmythurs did not seek to correct

his evidence when called into the witness box to confirm or modify as necessary his witness statement. He vouched for the accuracy of his witness statement without qualification. When the point was drawn to his attention at the start of his cross-examination, he sought to evade it, contending that he had in fact sought references concerning Gurney, and that his witness statement was just badly expressed. He told me that the second sentence of paragraph 10 of his witness statement was unrelated to the first. I do not accept this. It seems to me that Mr. McSmythurs was clearly both wrong in the evidence which he gave about the relevant letter and careless in failing to avoid the error by at least reading the letter before commenting on it. However, rather than just accepting that he was wrong, he tried to brazen things out.

62. The question of the accuracy of the assertion of Mr. McSmythurs in his letter dated 12 August 1998 that he had not received the originals of the invoices raised by Gurney was the next matter to which his cross-examination turned. It was suggested to him that in his witness statement he had accepted that he had in fact received the invoices when they were first sent. The basis for that suggestion was that paragraph 22 of his witness statement began with the words, *"Following receipt of Peter Rose's letter, I received two fee accounts* [identified as the originals by cross-reference at this point] *from Gurney, submitted in accordance with what had been agreed."* *"Peter Rose's letter"* referred to was a cross-reference to the last letter written by Mr. Rose mentioned before the start of paragraph 22 of Mr. McSmythurs's witness statement, that is to say, the letter dated 18 May 1998 mentioned in paragraph 21. Mr. McSmythurs did not agree that he had accepted in his witness statement that he had received the originals of the invoices. He contended that *"Peter Rose's letter"* referred to at the beginning of paragraph 22 was in fact Mr. Rose's letter dated 4 August 1998, to which Mr. McSmythurs made specific reference at the appropriate chronological point in paragraph 25 of his statement. I reject the oral evidence of Mr. McSmythurs on this point as wholly implausible. On a fair reading of his witness statement he was in fact accepting that he had received the originals of the relevant invoices, and thus that he had falsely denied this in his letter dated 12 August 1998. That raises the possibility that, on occasion, Mr. McSmythurs is, or at least was, prepared to make assertions as to facts which he knew to be unsound.

63. Against this, I was impressed by both Mr. Marsh and Mr. Rose as witnesses. Not only that, but Mr. Marsh had made a contemporaneous note of his conversation – I find that there was just one – with Mr. McSmythurs, and I find that that note was comprehensive and accurate. Moreover, the suggestion that all necessary matters had been agreed on the telephone between Mr. McSmythurs and Mr. Marsh was contradicted, as it seems to me, by the terms of Mr. McSmythurs's own letter of 13 May 1998. The acceptance by the *"Client"* of Gurney's proposals was expressed to be *"subject to the comments below"*, which matters included the precise scope of the works to be undertaken by Gurney, the fee payable and the fee payment schedule. It seems to me to be clear that the relevant comments were at least a modification of what had been discussed previously, and not, as Mr. McSmythurs would have it, a confirmation of matters discussed previously, because otherwise it would not have been necessary or appropriate to conclude the letter, *"Please confirm your receipt and acceptance of the above,"*.

64. I also accept the submissions of Mr. Sutherland that no contract was concluded between the Trustees and Gurney. Given my rejection of the evidence of Mr. McSmythurs where it differed from that of Mr. Marsh and Mr. Rose, if a contract were to have been concluded between the Trustees and Gurney, that contract would have to have been concluded in the course of the written exchanges between the parties. I accept the submission of Mr. Sutherland that by no later than May 1998 the parties were not seeking to make a contract other than by the formal execution on behalf of the Trustees and Gurney of a written document in the appropriate ACE form – in fact the Standard Form. That never happened. However, I also accept the submission that in fact the parties never agreed upon the terms of the written document which, as executed, was to form the contract between them.

65. Analysed conventionally, the relevant exchanges between the parties were as follows. Mr. McSmythurs's letter dated 17 April 1998 to Mr. Rose was simply an invitation to Gurney to make a proposal as to the terms of a contract. Such a proposal, albeit in somewhat indefinite terms, was made by Mr. Rose in his letter dated 20 April 1998 to Mr. McSmythurs. There was then a negotiation as to the fee element in the proposal between Mr. McSmythurs and Mr. Marsh on the telephone on 7 May 1998, but no discussion or agreement of any matter other than as recorded by Mr. Marsh in his note of the conversation. Mr.

McSmythurs next made a proposal in his letter which was not an offer capable of acceptance, because the letter in terms stated that if Gurney agreed to what was proposed what was to follow was *"your first draft of the appointment for signature"*, that is to say, a written document in which other proposed terms were anticipated as being set out. The description of the document as a *"first draft"* made it plain, as it seems to me, that it was not being suggested that the Trustees would accept whatever Gurney chose to put forward, but rather that whatever was put forward would be considered and possibly the subject of further negotiation. In his letter dated 18 May 1998 Mr. Rose indicated that there were two matters forming part of the proposal in the letter dated 13 May 1998 from Mr. McSmythurs which were not acceptable. He also did not address the production of a first draft of some written document. On no view of the matter, as it seems to me, was Mr. Rose's letter dated 18 May 1998 either an acceptance of the proposal in the letter dated 13 May 1998 or an offer itself capable of acceptance. It was simply a reaction to the proposal in the letter dated 13 May 1998, that is to say, a step in what seemed at that stage to be continuing negotiations. Those negotiations were not taken forward until Mr. Rose wrote his letter dated 23 June 1998 to Mr. McSmythurs. The draft ACE Memorandum enclosed with that letter was not, in my judgment, on its own an offer capable of acceptance, but rather it was an invitation to treat in respect of entering into a formal agreement in the terms of the draft if the draft was acceptable, the contract being made when the formal document was executed. There was simply no response to that invitation, despite chasing by Mr. Rose in his letters to Mr. McSmythurs dated, respectively 4 August 1998 and 17 September 1998. The purpose of the discussion on the telephone between 26 October 1998 and 5 November 1998 between Mr. Rose and Mr. McSmythurs concerning the terms in which an ACE Memorandum was to be completed was to settle the terms of a document to be executed formally once neatly prepared, not to make any sort of agreement in advance of that happening. In any event, I find that the paragraph c) amendment was not discussed or agreed during the relevant conversation and I accept the evidence of Mr. Rose in re-examination on this point. The sending by Mr. Rose of a version of the ACE Memorandum executed by himself on behalf of Gurney to Mr. Till under cover of his letter dated 5 November 1998 was, as it seems to me, an offer to enter into an agreement with the Trustees in the terms of the enclosed memorandum, capable of acceptance by execution of the document by or on behalf of the Trustees. That never happened, so the offer was never accepted. It was in fact rejected by Mr. McSmythurs by his intimation contained in his letter to Mr. Rose dated 1 December 1998 that the engagement of Gurney in connection with the Project was terminated. It is interesting that the purported termination was not said to be pursuant to some term of an alleged contract which would have justified that course or on account of alleged breach of some term which amounted to a repudiation of the alleged contract. Thus no contract ever was concluded between the Trustees and Gurney.

66. As I have said, Mr. McMullan did seek to place reliance upon the terms in which Mr. Rose wrote in his letter dated 7 December 1998. In my judgment the submission made by Mr. Sutherland at paragraph 19 of his written skeleton argument was a complete answer to any suggestion that Mr. Rose had somehow *"admitted"* in that letter that a contract had been concluded between the Trustees and Gurney or was otherwise evidence of such a contract.

67. In the result I grant the declaration sought by Gurney in its Claim Form that there is no valid arbitration agreement between the Claimant and the Defendants. I shall hear further submissions from Counsel as to whether, in the light of that declaration, any further relief is necessary or appropriate.

Paul Sutherland (instructed by Reynolds Porter Chamberlain for the Claimants)
Manus McMullan (instructed by Lane & Partners for the Defendants)