

JUDGMENT : MR JUSTICE CHRISTOPHER CLARKE: TCC. 16th May 2008.

1. This case is another example of the perils of proceeding with work under a letter of intent. The preliminary issues before me require the determination of what were the terms of a contract constituted (in part) by a letter of intent, whether that contract came to an end, whether it was replaced by another one, and, if so, what were its terms.
2. The defendant - Molkerei Alois Gmbh & Co Kg ("Müller") - is a well known leading European dairy product supplier. At its premises in Market Drayton it produces, amongst other things, different brands of yoghurt and dairy rice products. The Claimant - RTS Flexible Systems Limited ("RTS") - specialises in the supply of automated machines for packaging and product handling in the food and consumer goods industry.
3. Müller manufactures its products with two types of packaging: a round single pot containing yoghurt or rice product, and a square twin pot in which there is yoghurt or rice product in one section and fruit purée or cereal in another smaller one. The yoghurts and the fruit purées come in different flavours. As well as selling individual pots of yoghurt Müller sells variety packs ("multi-packs") containing a number of pots (usually 6) of different flavours (usually 3). In order to produce the multi-packs Müller's employees would take pallets of single flavour yoghurts, mix the individual pots to form the desired multi-pack (the combinations of flavours in which differed), and then put the complete pack into a flow wrapping machine. The flow wrapped packs would then be placed into trays before being re-palletised.
4. Müller wished to automate the process of collating and flow wrapping multi-packs of different flavours of twin pots. It also wished to produce multi packs of its single pot products which could be placed into a tray that had originally held 12 single pots. Flow wrapping could not be used for this purpose because the trays that held the single pots could not accommodate the flow wrapped packs. As a result the original trays were wasted – probably as many as over a million a year.
5. Müller and RTS made contact initially in 2000. Discussions continued in subsequent years, particularly from December 2003 onwards. In April 2004 RTS produced a quotation – Quotation A – for the automation of the infeed (mixing of pots and placing them) into an existing flow wrapper machine on one line. Thereafter RTS produced 10 further quotations for equipment (down to Quotation K), all of them after Quotation A in a format requested by Müller. In the course of this process the scope of the project expanded, contracted and then expanded again as Müller discussed its requirements with RTS and other potential suppliers.
6. The work which, in the event, RTS undertook was the design, manufacture, assembly, works testing, delivery, installation and commissioning at Müller's factory in Market Drayton of the equipment described as Line 1 and Line 2 as shown on a drawing. A version of that drawing, showing the equipment to be supplied by RTS in red, is annexed to this judgment.

Line 1

7. The equipment for Line 1 was intended to solve the problem of wasted trays for single pots. Single pots in trays (12 to a tray) were to be loaded onto **infeed conveyors** supplied by RTS. In the case of three of the conveyors the loading was to be done manually. In the case of the fourth it was to be done automatically by a **depalletiser** which RTS was to supply. Each conveyor would convey trays of pots of a single flavour to one of four **de-traying units**, also supplied by RTS. In these units the pots would be lifted up (by suction) together with the trays (by grip). The grip would then release the trays which would be conveyed (by the conveyor shaped rather like an extended paperclip) towards the **Vepatec Packer**, also supplied by RTS. The sets of 12 pots, now de-trayed, would be deposited on a short conveyor belt which would take them towards one of 4 "**Flex Picker**" robots again supplied by RTS.
8. Meanwhile pre-printed and cut pieces of card would be loaded into the *Mohrbach Erector* (in blue on the plan). The erector partially forms a cardboard carton with 6 holes in it for the pots. This carton is then carried along the *Mohrbach conveyor* to a position in range of the robots. Each robot was to be capable of picking up and placing up to 2 pots of a single flavour at a time, so that up to 4 different flavours could be placed in the multi pack. When, but not before, the cartons reach the right spot the robots pick up the pots (usually 2 per robot) and place them in the pre-cut holes in the semi formed cartons. At this stage the pots are suspended, the majority of the pot having passed through the hole in the carton and the top being caught by the cardboard in which the holes have been cut. The cartons, each now holding 6 single pots in a variety of flavours, are then conveyed to the *Mohrbach Closer*. This finishes the creation of what is known as Top Clip packaging by folding the top of the carton and gluing it into a closed position.
9. The cartons then move to the **Vepatec tray loading machines** (supplied by RTS) for loading into the original trays – 2 packs of 6 yoghurts per tray. The cartons then move to the *Markem labelling machine* and the *Loma Checkweigher* and then the *Palletiser* and *Stretch wrapper*.
10. In addition Line 1 was to mix and repack square pots into boxes but at a reduced rate.

Line 2

11. Line 2 was for the flow wrapping of twin pots. As with Line 1, four **infeed conveyors** (all to be loaded manually) were to convey 12 individual twin pots on trays to the RTS supplied **de-traying units**. The trays would then, following de-traying, be conveyed to the RTS supplied **Vepatec tray loading machine**. Meanwhile the twin pots would be conveyed towards the **Flexpicker robots** which would place them, two at a time, onto a piece of flat printed cardboard which is carried along the line by a conveyor towards the *Rose Forgrove flowrapper*. The contents of each pack (3 pots stacked on 3 other pots resting on a flat piece of cardboard) are then presented to the *flowrapper machine*. This wraps the 6 twin pots in a printed plastic wrapper which it then cuts and seals. The

packs are then conveyed to the **Vepatec packing machine** which loads them into their original trays, 2 packs to a tray. They then pass to the *labelling machine, weighing machine, palletiser and stretch wrapper*.

12. Two things are apparent from the above description. Firstly RTS was not to supply all the equipment for Lines 1 and 2. It was not to, and did not, supply (i) the Mohrbach erectors, conveyor and closer; (ii) the Rose Forgrove flowrapper and associated conveyor; (iii) the Markem labellers; (iv) the Loma checkweighers; (v) the palletisers and off-pallet infeed terminals; and (vi) everything further down the line.¹ As is apparent from that list Müller was to supply, *inter alia*, the packaging equipment for the lines. Secondly, the ability of the lines to produce the desired number of packs per minute was dependent on the proper functioning of all the equipment and the efficient interaction of different pieces of equipment. That which was not to be supplied by RTS was described as "Free Issue Equipment".

The negotiations prior to Quotation J

13. Each of RTS' quotations, with the exception of Quotation E, referred to RTS' terms and conditions (and from quotation F RTS' *standard* terms and conditions) of sale. These were, however, never provided to Müller until November 2007 when RTS' solicitors disclosed them. Müller did not ask for them in 2005.
14. On 20th August 2004, after Quotation E had been delivered, there was a meeting between Mr Etienne Croquette, the Sales Manager of RTS, and Mr David Salisbury of Müller at which Müller indicated that it wished any contract to be based on its own commercial terms rather than those of RTS. RTS said that it was happy to discuss this and asked Müller to produce a copy of the terms that it wished to use. At a further meeting on 17th September 2004 Müller raised the issue again. Mr Croquette suggested that Müller should use form MF/1 as a base. MF/1 is a model form devised by the Institute of Electrical Engineers, which RTS regarded as neutral as between employing and contracting interests.
15. On 26th November 2004, by which time RTS had produced Quotation G, Müller produced a first draft of the special conditions it sought to incorporate. This involved some 27 pages of amendments. RTS roundly rejected this in December.

Quotation H

16. On 7th January 2005 Mr David Bradford, RTS' Managing Director, submitted Quotation H to Müller. In his letter of that date he recorded the parties' anticipation that all or part of the quotation document would be used as the User Requirement Specification ("URS") for the project. He pointed out that the quotation was currently based on RTS' standard terms and conditions "*as it was agreed that any amendments to the standard MF1 contract would be decided after supplier selection*". He said that RTS would make themselves available to discuss a set of amendments to MF/1 "*and would then re-issue our quotation under the new agreed terms*".
17. On Monday 10th January a meeting took place between RTS and Müller. David Bradford and Etienne Croquette presented RTS' quotation H to a Müller team consisting of (i) Trevor Benyon, the Chief Engineer, (ii) Mick St John, the Project Manager, (iii) Simon Foster, the Project Engineer, and (iv) Gary Highfield, the Product Manager. There was a detailed discussion of various commercial terms. A number of matters were agreed including:
 - (a) the payment profile under the contract, namely 30% on receipt of order, 30% on delivery of the robots to RTS, 20% on delivery to Müller, 10% on completion of commissioning of the equipment, and 10% after takeover;
 - (b) the percentage to be added to costs as payment for variations, namely 12.5% (a compromise between 15% in the quotation and 10% suggested by Müller);
 - (c) liquidated damages up to a maximum of 2.5% for delay, and up to a maximum of 2.5% if availability was less than 95% (see Mr Croquette's letter of 19th January 2005); and
 - (d) a number of technical details.

The technical discussion included the suggestion by Mr Foster of using 4 robots on Line 2 for a 3 flavour variant, which enabled RTS to increase the throughput capability of Line 2 from a previously quoted figure of 70 packs/min to 80 packs/min.

Performance Measurement

18. A producer such as Müller is concerned to know how many packs of product will come out of the process per hour in order to determine its ability to meet its annual production requirements. An equipment supplier such as RTS will measure the performance of its equipment by the number of pots and packs that can be handled by the robots (and other equipment) it supplies per minute. It is concerned – at any rate initially – with the throughput of its equipment rather than the output of the production line, the figure for which is dependent on matters not within its control, such as equipment supplied by others, the number of shifts worked, the time the equipment is run per shift, the time spent in maintenance and breaks, etc.
19. In order to determine whether a given rate of production is possible it is necessary to know - in addition to the number of hours to be worked per week (itself the product of the number of shifts per day, the days worked, and the net operator hours per shift) - what is the efficiency of the factory? "Efficiency" in this context is the percentage of the highest theoretical output that is likely to be achieved when allowance is made for all contingencies which reduce production below that level. Müller originally identified its efficiency at 85% but later reduced it to 75%. Using that figure RTS produced on 11th January 2005 a version of a previous Müller

¹ In the preceding paragraphs the equipment to be supplied by RTS is in bold; and that to be supplied by others in italics.

calculation which showed that, if the factory had a 75% efficiency and machine rates of 80 packs per minute, Müller's 2005 predicted volume requirements would absorb 94% of (and was, therefore, within) the available yearly capacity. This calculation was later attached to Quotation J as Appendix 2.

20. The 75% efficiency figure was not a figure to be warranted by RTS. It was a figure which allowed for production at less than the full theoretical capacity of all the equipment (including RTS' equipment). A criterion which RTS was, however, to be required to satisfy was a figure of 95% availability i.e. that the RTS equipment should be available for 95% of the maximum possible time.
21. On 13th January 2005 RTS issued its Quotation I. Mr Bradford of RTS also wrote to Müller expressing concern as to the time that it could take to reach agreement on the contract conditions, should RTS be successful in winning the contract. He indicated that RTS would be happy to enter into a contract with Müller based on the MF/1 conditions appropriately modified to meet the specific requirements of the project. He expressed concern about the sheer extent and number of the changes that Müller had proposed in October 2004 and about the content of those changes. He enclosed for Müller's consideration a copy of some conditions which had applied to another contract which RTS had recently carried out. He added:
"As a final point, bearing in mind the importance of the project timescales, we would also be quite prepared to commence work even before signature of a contract, on the basis of a Letter of Intent/Instruction to Proceed".
22. On 13th February Mick St John telephoned Etienne Croquette to tell him that RTS had been awarded the contract.

Quotation J

23. On 16th February RTS issued Quotation J. Section 2 headed "Pricing Schedule" specified a fixed price of £ 1,682,000 for the design, manufacture, assembly, works testing, delivery, installation and commissioning "of the equipment as described and as generally shown as Line 1, Line 2 and De-Palletising Cell" on the drawing in Appendix 3, which was similar to the drawing appended to this judgment. It also provided for Liquidated Damages if the Site Acceptance Test ("SAT") of Lines 1 and 2 or of the De-palletising cell was delayed from the agreed programme date and the delay was entirely due to the fault of RTS. The damages were to be 0.5% of the Total Contract Value ("TCV") per whole week of delay up to a maximum of 5 weeks.
24. Section 3 was headed "Conditions of Contract". It provided in clause 3.1. that the quotation was "based on the RTS Standard Terms and Conditions of Sale". Clause 3.2. provided that RTS' parent company would guarantee RTS' performance. Clause 3.3. provided a schedule of payments: 30% of TCV on receipt of order; 30% on delivery to RTS of the major items (i.e. robots) of bought out equipment; 20% on delivery; 10% on completion of commissioning; and 10% within 30 days, but no later than 90 days of takeover. Clause 3.4. provided for variations to be at RTS' 2005 standard rates for labour and materials at cost plus 12.5%. Clause 3.5 stated that the quotation was based on the assumptions and exclusions detailed in section 8.
25. Section 4 set out the User Requirements for both Lines and the De-Palletising Cell. Section 5 set out the Technical Description of both Lines and the De-Palletising Cell. Section 6 was a Summary of Performance Criteria. Section 7 specified the Scope of Supply. Section 8, headed "Limits of Proposal", contained Exclusions and Assumptions.
26. The Quotation had a number of appendices. Appendix 1 headed "Product Specification" was a one page diagrammatic representation of the cartoning and flow wrapping sequence. Appendix 2 headed "Production Throughput Data" contained the calculations referred to in paragraph 19 above. Appendix 3 was a general arrangement drawing. Appendix 4 was a specification of the robots. Appendix 5 contained Müller mechanical and electrical specifications. Appendix 6 contained the Parent Company Guarantee, which was never given. Appendix 7 contained the Provisional Project Plan. That provided for delivery of the Free Issue Equipment by 6th May 2005. Appendix 8 was a diagram of de-palletising sequences. Appendix 9 was a diagram indicating the locations of tray handling conveyors.

The Letter of Intent

27. On 21st February Müller sent to RTS the following Letter of Intent:
"Project: Build, delivery, complete installation and commissioning by RTS Advanced Robotics Limited ("RTS") of the Automated Pot Mixing Lines 1 & 2 and the De-Palletising Cell ("the Equipment") for the Repack line ("Repack Line") within the Repack facility in Market Drayton of Molkerei Alois Müller GmbH & Co (UK Production) ("Müller").
Thank you for your mail dated 16th February 2005 setting out your offer (number FS04014 – Issue J) to supply the Equipment to Müller ("the Offer")
Please accept this letter of intent as confirmation of our wish to proceed with the Project as set out in the Offer subject to the following terms:-
 - (i) *The agreed price for the engineering, build, delivery, installation and commissioning as set out in the Offer is GBP 1,682,000....*
 - (ii) *RTS is now to commence all work required in order to meet Müller's deadlines set out in the Offer to allow commencement of full production by Müller on the Repack Lines by 30th September 2005. Delivery of line also to be in accordance with the timetable set out in the Offer.*
 - (iii) *That the full contractual terms will be based on Müller's amended form of MF/1 contract and the full terms and the relevant technical specifications will be finalised, agreed and then signed within 4 weeks of the date of this letter. Prior to agreement on the full contractual terms, only Müller shall have the right to terminate this supply project and contract. However, should Müller terminate, Müller undertakes to reimburse RTS for the reasonable demonstrable out of pocket expenses incurred by RTS up to the date of termination. Müller will not be liable for*

any loss of profits (whether direct or indirect), loss of contracts, loss of anticipated savings, data, goodwill and revenue or any other indirect or consequential loss arising from such termination. No further legal rights or remedies shall be available to RTS upon such termination.

Please confirm your acceptance of the above by signing below where indicated.

This letter of intent shall be governed by English law and subject to the exclusive jurisdiction of the English Court."

28. On 1st March RTS wrote to Müller confirming that they had commenced work on the project subject to Müller accepting two points. The first was that the equipment would be commissioned by 30th September (which was the date specified in Appendix 7) and would be ready for Site Acceptance Testing activities as shown on the programme. But the equipment would not then be expected to be at full production quantities. Section (ii) of the Letter of Intent would be revised by omitting "full".
29. The second point was expressed as follows:
"2. *The Letter of Intent section (iii) also states that Müller will "reimburse RTS for the reasonable demonstrable out of pocket expenses incurred by RTS up to the date of termination". During the four week period covered by this Letter of Intent RTS will incur costs in both engineering time and in order to meet the project programme, will have placed orders for the long lead items such as robots, conveyors and tray erectors. In the event of Termination we would require reimbursement for these costs, including cancellation costs of subcontract commitments as well as any out of pocket expenses, albeit without profit".*

The construction of the Letter of Intent contract.

The rival submissions

30. RTS submits that Müller accepted the whole of RTS' Quotation J, including RTS' terms and conditions, upon the basis that within four weeks of 21st February the parties would agree a new set of contractual terms to replace RTS' terms. When Müller confirmed its wish "to proceed with the Project as set out in the Offer" it confirmed not only its wish "to proceed with the Project", but equally its wish to "proceed as set out in the Offer", indicating thereby that it accepted the terms of the Offer. Whilst the Letter of Intent contemplated that the contractual terms would be agreed and signed within four weeks, it did not provide that the contract would come to an end after four weeks. Nor should such a termination be implied. The parties made a limited provision about termination, namely that prior to the agreement on the full contractual terms only Müller should have the right to terminate. No further provision is necessary, not least because, if the agreement terminated automatically after four weeks, RTS would lose any entitlement either to remuneration or to expenses.
31. Müller contends that the Letter of Intent was a counter-offer to the Offer contained in the quotation. That counter offer, which was intended as a stop gap measure, did not incorporate any of the terms of the quotation, not even those that describe the scope of the work. The Letter of Intent was simply an intimation of Müller's wish to proceed with the Project as identified in the heading of the Letter of Intent on the basis that, if Müller terminated the project, it would reimburse RTS for the reasonable and demonstrable out of pocket expenses incurred by it up to the date of termination. That counter offer was, itself, the subject of a further counter offer from RTS contained in its letter of 1st March, which was then accepted either by Müller's conduct in allowing RTS to continue or by the terms of Müller's letter of 13th April (see paragraph 45 below) which extended the four week period up to 16th May.
32. Müller submits that the agreement thus constituted would expire at the end of the four weeks or any agreed extension of that period and that it was implicit in the agreement that, on such expiry, Müller would have the same responsibility for the payment of expenses as it would have if it had terminated the agreement during the four weeks. But after the four weeks RTS would not be under any obligation to continue working and Müller would have no obligation in relation to work performed after that date.

My conclusions on the Letter of Intent contract.

33. In my judgment the proper analysis of the communications between the parties is as follows. Quotation J was an offer to carry out the work specified in it on the terms set out or referred to in the Quotation including RTS' standard terms. The Letter of Intent was a counter offer which was then responded to in RTS' letter of 1st March which accepted the Letter of Intent terms subject to the two qualifications contained therein; and that counter offer (of 1st March) was accepted at the latest by Müller's letter of 13th April. I call the agreement thus made "the Letter of Intent contract".
34. I reject or qualify each of the following propositions:
- (a) *that there was no contract at all or that the reference to finalising the terms and the technical specifications meant that the agreement was too uncertain or incomplete to have contractual force.*
- The language of the Letter of Intent ("*the right to terminate this supply project and contract*")/"*This letter of intent shall be governed by English law*") militates against such a conclusion and the parties are agreed that they entered into a contract of some sort pursuant to the Letter of Intent.
- (b) *that none of the terms of the Quotation were accepted:*
- The parties cannot have intended, as Müller submitted, that RTS' obligation was simply to commence work which fell within the general words in the heading of the letter. They must have intended that RTS should embark on such work as was necessary to ensure the provision of the equipment to be supplied by it in accordance with the provisions of sections 4 – 8 of Quotation J and the timetable set out in Appendix 7 thereto, with commissioning being completed by 30th September 2005 and the equipment being ready for

Site Acceptance Testing as shown in that Appendix, although the equipment would not be expected to be producing full production quantities at that date.

(c) that RTS' standard terms and conditions were incorporated into the contract.

The effect of RTS' construction is that for a period of uncertain duration, determinable only by Müller, the full contractual terms would be RTS' terms. I regard that as inconsistent with Müller's wish, expressed in the Letter of Intent, to proceed with the Project as specified in the Offer *subject* to the provision in sub-paragraph (iii) that the full contractual terms would be based on Müller's amended form of MF/1. The purpose and effect of that sub-paragraph, viewed against the background of Müller's previously expressed desire to contract on MF/1 terms amended to its satisfaction, was to stipulate that it was such terms (yet to be agreed) that were to regulate the relationship between the parties; and not those of RTS. The sub-paragraph does not contemplate an interim period during which the RTS terms would apply, after which they would be superceded by an amended MF/1, if agreed. The effect of such agreement would be highly prejudicial to Müller since RTS terms would be the default terms, and, absent agreement, Müller's option would be limited to terminating the Project or accepting those terms. That, during the interim period, there should be no applicable terms (in the sense of general conditions) appears to me consistent with the suggestion made in the paragraph of RTS' letter of 13th January to which I referred in paragraph 21 above.²

The Unfair Contract Terms Act 1977 ("UCTA 1977")

35. In the light of my conclusions in (iii) above the question of whether the RTS conditions satisfy the requirement of reasonableness under UCTA 1977 does not arise. This is fortunate. By their letter of 18th January 2008, enclosing a Reply to the Amended Defence to Counterclaim³ dealing with Müller's case on this topic, Müller's solicitors reserved Müller's right to have RTS plead and prove the reasonableness of the exclusion clauses. RTS never did so. Their points as to the reasonableness of the clause appeared in their opening skeleton, in the light of which Müller said that it would have wished to file evidence on the topic. Müller submitted that RTS should not be allowed to advance a factual case that it had not pleaded. RTS said that the points were within a short compass and should be dealt with; and that its advisers had understood from the discussion before Akenhead, J, that it was accepted that the issue could be dealt with without evidence.
36. Had the issue been live I would have adjourned the consideration of the issue until RTS had put its pleadings in order and Müller had had the opportunity to put in any evidence it wished. This is not, however, a situation that should have been allowed to develop. RTS, upon whom the onus of establishing reasonableness lies, should have pleaded its case, or, at the least, secured confirmation from Müller that it did not require it to do so.

The term of the Letter of Intent contract and its payment and performance obligations

37. That leaves for consideration the term of the Letter of Intent contract and what payment and performance obligations were to apply during or upon the expiry of that term. The difficulty in this respect is that the parties contemplated that they would agree final terms within four weeks but did not clearly express what was to be the position if they failed to do so.
38. The Letter of Intent in part expressed the basis upon which Müller *wished* to proceed and in part laid down specific obligations for the interim period before the contract was finally agreed and signed. So far as the latter are concerned, they consisted, firstly, of an obligation on RTS' part to commence all work required in order to meet the deadlines set out in the Offer, subject to the qualification set out in the letter of 1st March. That involved doing whatever was necessary to be done during that period to enable RTS to build, deliver install and commission the equipment specified in the Quotation by the agreed deadline. Secondly Müller undertook that, if it terminated the agreement within 4 weeks (as during that period it alone had the right to do), it would reimburse RTS its reasonable demonstrable out of pocket expenses incurred up to the date of termination. By the letter of 1st March these were to include not only costs of engineering time but also costs incurred in placing orders for long lead items, including cancellation costs of subcontract commitments as well as out of pocket expenses, but without profit.
39. I regard it as implicit in the agreement that, upon the expiry of the four weeks, the agreement would come to an end. Müller's wish to proceed is subject to the full contractual terms and relevant technical specifications having been finalised, agreed and signed within that timescale and is dependent on that taking place. If that does not occur its wish to proceed with the Project would, itself, terminate together with the contract based upon that wish. The absence of agreed full contractual terms would be of limited significance over a four week period; but more significant, if it could continue until the end of the project. The parties did not, in my judgment, contemplate that, in the absence of finalisation and signature within the specified timescale (or any agreed extension), RTS would be bound to continue with a project for which the applicable terms had not been agreed. Consistent with that the Letter of Intent says nothing about when any part of the price would be payable and gives Müller a right to cancel upon payment only of expenses and cancellation costs – a right that is entirely reasonable during a four week period but inappropriate for a contract for the entire project. The payment schedule in the Quotation does specify a series of percentage payments, but the first of those is the 30% of TCV payable on receipt of order and the Letter of Intent is not an order.
40. I do not ignore the fact that sub-paragraph (ii) in the Letter of Intent and sub-paragraph (1) in the letter of 1st March address the time of delivery of the final product and that sub-paragraph (i) in the Letter of Intent agrees

² It happens also to be consistent with Mr Guest's subjective understanding that the letter of intent did not accept RTS' terms and conditions.

³ This pleading was served because, when Müller indicated to Akenhead J in January that it wished to take a point on the reasonableness of the clauses, he had invited Müller to serve a pleading to that effect, whether or not there was an obligation on it to do so.

the full price. That does not, however, mean that the parties have made a contract which, absent termination by Müller, will last until completion. Both of those matters are an expression of the basis upon which Müller wishes to proceed when the full terms are agreed. Neither party could be expected to have been comfortable in embarking upon a project for which neither the price nor the completion date had been agreed.

41. I also accept Müller's submission that, in the event of the expiry of the four weeks, Müller would be liable to reimburse RTS in like manner as they would if Müller had terminated the project during the four weeks. Whilst it is arguable that Müller only agreed to make reimbursement if it terminated the project in the four weeks and that RTS bore the risk of non reimbursement if the parties failed to finalise their agreement during that time, it seems to me unreasonable to suppose that they contemplated that, if Müller called a halt on day 27, it would have to reimburse; but that, if it waited until day 29, it would not. I would be prepared to regard a failure to go ahead with the project on or after day 29 as an "event of Termination" within sub-paragraph (2) of the letter of 1st March; or, if not, that it was implicit in the contract that Müller would make the stipulated reimbursement if the Project did not go ahead.
42. Accordingly the answers that I give to the following questions posed in the preliminary issue are as follows:

Issue 1.1. What are the terms of the contract formed by the Letter of Intent and RTS' letter of 1 March 2005 and what are the obligations of the parties under it?

Answer

- a) The agreed price for the engineering, build, delivery, installation and commissioning of the work set out in the Quotation was to be £1,682,000;
- b) RTS was bound to embark on such work as was necessary to ensure the provision of the equipment to be supplied by it in accordance with the provisions of sections 4 – 8 of Quotation J and the timetable set out in Appendix 7 thereof. Commissioning was to be completed by 30th September 2005 and the equipment was to be ready for production (but not full production) and Site Acceptance Testing as shown in that Appendix at that date;
- c) Müller and RTS were to have a period of four weeks from 21 February 2005 to finalise, agree and sign a contract based on Müller's amended MF/1 form of contract. Following the expiry of that period the contract would terminate;
- d) Prior to agreement of the full contractual terms and conditions based on Müller's amended MF/1 contract, only Müller had the right to terminate the supply project;
- e) If Müller did so terminate or the term of the contract expired, it would reimburse RTS for the reasonable, demonstrable out of pocket expenses incurred by RTS up to the date of termination, including the cost of engineering time, cancellation costs of subcontract commitments, and any out of pocket expenses, but without profit;
- f) RTS would have no further legal right or remedy on termination and Müller would not be liable for any loss of profit (whether direct or indirect), loss of anticipated savings, data, goodwill and revenue or any other indirect or consequential loss arising from termination;
- g) There were no exclusions or limitations of liability in the contract.

Issue 1.1.1. Does the Contract of 1 March 2005 incorporate any of the detailed terms of the Quotation or RTS' standard terms and conditions?

Issues 1.1.2 and 1.1. What were the parties' obligations under the Contract of 1 March 2005?

Issue 1.1.4. Are the obligations under the Letter of 1 March 2005 limited in time?

Issue 1.1.5. What are Müller's payment obligations under the Contract of 1 March 2005?

Issue 1.1.6. What exclusions or limitations of liability are contained in the Contract of 1 March 2005 and can RTS rely on them?

Answers to all of the above

The reference to the Contract of 1 March 2005 is inapposite. The relevant contract is the Letter of Intent Contract; and the answers to the above questions are as in the Answer to Issue 1.1 above.

Termination of the Letter of Intent contract

43. On 4th March 2005 Mr Bradford of RTS wrote to Mr Trevor Benyon, Müller's Chief Engineer, pointing out that RTS agreed to commence work on the basis of a Letter of Intent prior to the agreement of a formal set of contract terms⁴ and that under the Letter of Intent the terms and conditions of contract were to be agreed within 4 weeks "after which the Letter of Intent will expire. The Letter of Intent is therefore due to expire on 22nd March 2005". He expressed RTS' preparedness to enter into a contract based on either (i) RTS' Terms & Conditions; (ii) Standard MF/1 Conditions; or (iii) MF/1 plus appropriate modifications to meet the specific requirements of the project. But he expressed RTS' remaining concern about the sheer extent and number of changes made to the MF/1 form in the document produced by Müller in 2004. He sought to arrange a meeting to discuss the issues.
44. On 15th March 2005 Mr David Salisbury, the Senior Buyer in Müller's purchasing department, e-mailed to Mr Croquette of RTS a draft contract in anticipation of a meeting on 22nd March. This was based on MF/1. RTS regarded it as a significant improvement on Müller's first amendment of MF/1. On 21st March Mr Gavin Brown,

⁴ Noticeably he did not suggest that a set of contract terms had already been agreed on an interim basis.

RTS' Operations Director, wrote to Mr William Morris in Müller's legal department, with a number of detailed comments on the draft. He had been helped in this by Mr David Wright, a consultant engaged by RTS to deal with legal matters. On 23rd March there was a meeting attended by representatives of the parties at RTS' premises at Irlam, near Manchester at which there were negotiations on the terms and the schedules thereto. It was at this meeting that Müller asked RTS if RTS would create a URS by pasting section 4 onwards of Quotation K⁵ into a new document that would then form the URS. Someone at the meeting pointed out that the Letter of Intent had expired.

45. On 13th April Mr Benyon of Müller wrote to Mr Bradford of RTS as follows:
"Thank you for your letter of 1st March and your acceptance (subject to the qualifications you list) of the terms of the letter of intent dated 21st February 2005.
In accordance with section (iii) of the letter of intent above, we agreed that a formal contract with full contractual terms would be executed within 4 weeks of the date of the letter of intent. We have now mutually agreed to extend this period up to and including 16th May 2005 during which period the terms of the letter of intent will continue to have full force and effect.
Please confirm your acceptance of the above by signing below where indicated."
Mr Bradford signed a copy of this letter on behalf of RTS. The parties thereby agreed, or confirmed their agreement to, the qualifications made by RTS in its letter of 1st March; and to the fact that the period for execution of a formal contract would expire on 16th May.
46. Negotiations in relation to the contract continued. On 13th May Mr Morris of Müller e-mailed to Mr Brown: *"Given that the contract is now almost agreed we hereby confirm that the expiry date for the current letter of intent can be extended until the 27th May 2005, or, if sooner, the date the contract is actually signed..."*
47. In the light of the exchanges between the parties on 4th March, 22nd March, 13th April and 13th May, it is apparent that they agreed that the Letter of Intent contract would expire on 27th May 2005. That they did so confirms me in the view I take of the true construction of that contract and means that, even if I am wrong, that contract was, by the agreement of the parties, treated as expiring on that date.

The final stage of the negotiations

48. On 16th May Mr Morris of Müller e-mailed to Mr Brown the contract "with final tweaks", adding "Perhaps you can drop me a quick e-mail confirming you are happy – we can then all concentrate on completing the schedules". What he sent was the body of the contract (two pages headed "Machine and Equipment Supply and Installation Contract 4500360589") with the following by way of schedules:
- Schedule 1: General Conditions extending to 48 paragraphs.
- Schedule 3: A page headed "*Functional Design Specification*". This is a document which states the intended functionality of the RTS equipment. It is usually derived from the User Requirement Specification: see below.
- Schedule 4: A page headed "*User Requirement Specification*"
This is usually compiled by the client but, on this occasion, was lifted from RTS' Quotation K at Müller's request.
- Schedule 5: A3 page schedule, drafted by Müller, divided into Part 1 "*Tests on Completion*" and Part 2 "*RTS Tests*".
- Schedule 6: A two page schedule, drafted by Müller, headed "*Performance Tests*". The last paragraph of this read as follows:
THIS SCHEDULE NEEDS TO PROVIDE THAT IF THE TEST WITHIN A CERTAIN PERCENTAGE OF THE REQUIRED LEVEL LDs WILL APPLY AND THE EQUIPMENT WILL STILL HAVE "PASSED". IF THE PERCENTAGE ACHIEVED IS LOWER THAN THAT SPECIFIED BY LDs (I.E. LOWER THAN THE MAXIMUM PAYOUT UNDER LDs) THE EQUIPMENT WILL HAVE FAILED THE TEST AND THE OTHER REMEDIES WILL BE AVAILABLE TO THE PURCHASER"
- Schedule 7: An Advance Payment Guarantee to be given by RTS' parent.
- Schedule 8: A defects liability demand guarantee also to be given by RTS' parent.
- Schedule 9: This made provision for the supply of a list of stock items and wear and non-wear parts.
- Schedule 10: A description of what the programme needed to include.
- Schedule 11: An empty table of Key Performance Indicators, Performance required and Liquidated Damages.
- Schedule 12: A page headed "*Certificates of Payment*" together with a form of Delivery Certificate, Completion Certificate and Final Certificate of Payment.
- Schedule 13: A list of the operating manuals and other drawings and maintenance schedules required.
- Schedule 14: A Schedule dealing with Training Requirements
- Schedule 15: A Schedule headed "*Health and Safety Requirements*" but otherwise blank
- Schedule 16: A Schedule headed "*Free Issue Equipment*" but otherwise blank.
- Schedule 17: A Schedule headed "*Site Preparations*" but otherwise blank.

⁵ Quotation K is the same as Quotation J save for a reference to a gripper which was now to be outwith the scope of RTS' supply.

Finalisation of the terms

49. On 19th May Mr Brown of RTS e-mailed Mr Morris saying "*Latest draft seems fine except for one issue*" and he then proposed the reinstatement of three words in clause 24.3 of the General Conditions which Müller had removed. On 25th May Mr Morris e-mailed that Mr Brown's comment looked fine but that he needed to get back to him on "*Force Majeure and any tidy-ups*".
50. On 5th July 2005, after further negotiations (see below), Mr Morris proposed a compromise form of force majeure clause which Mr Brown told him "*seems fine*" and which Mr Morris said he would incorporate into a contract when he put all the schedules together with Mick St John. He said that the agreement should be in a position to be signed and forwarded to Mr Brown for signature that week. This did not happen.

Finalisation of the Schedules

51. On 26th May Mr Brown, who was about to go on holiday for a fortnight, sent an e-mail to Mr Morris setting out his understanding of the contract schedules as follows:

SCHEDULE	Understood status	My Comment
1	Not referred to in the e-mail	No need. Schedule 1 consisted of the General Conditions.
2	Assumed not required as the payment schedule is included in the body of the contract.	This schedule is described in the Contract as setting out the price; but that is in the General Conditions in Schedule 1 anyway.
3	FDS – currently being reissued Brown suggested it should be referred to rather than incorporated.	The FDS was later agreed: see the RTS e-mail of 29 th June and paragraph 52
4	URS. Agreed that section 4 of the Quotation would form the URS, which was attached.	The URS had the appendices referred to at paragraph 26
5	Agreed that RTS Test plan would form this Schedule. With Müller for approval.	The RTS Test plan was later agreed: see the RTS e-mail of 29 th June: paragraph 52
6	RTS Test plan	RTS REGARDED ITS TEST PLAN AS COVERING THE GROUND OF SCHEDULES 5 AND 6 AND MÜLLER WAS HAPPY WITH THAT PROVIDED THAT IT DID SO. BUT THE ONLY VERSION OF SCHEDULE 6 CONTAINED MÜLLER'S WORDING.
7	Advance Payment guarantee already agreed.	The guarantee had been attached to the e-mail of 16 th May
8	Defect Liability guarantee – RTS' parent company to approve.	A draft had been attached to the 16 th May e-mail. The parent company never approved it.
9	To be completed during the project.	Part 1 related to stock items. It was never completed. Part 2 contains provisions for the durability of Wear Parts, which is capable of standing on its own.
10	Approved programme attached	The attachment was either as in Quotation I or Quotation ⁶ This programme was overtaken by the overall project plan and installation-at-Müller plan referred to in paragraph 52 below.
11	KPIs agreed: attached.	These included details of the Performance Required and Liquidated Damages
12	Müller to complete ⁷	This related to Certificates of Payment. Never completed.
13	To be completed during the project.	This related to operating manuals. Never completed, It would not have been possible to provide them at the time.
14	To be completed during the project.	This related to Training Requirements. Never completed
15	Müller to provide details.	This related to Health and Safety Requirements. Never completed
16	As per attached document.	The attached document contained the Assumptions for Free Issue Equipment for the Project
17	Müller to provide site preparation details.	This does not seem to have been provided, but the site was prepared.

⁶ The document in the trial bundle following the e-mail of 26th May (CB 2/14/176 a-b) is dated 13th January 2005 and refers to Quotation I. But the description in the e-mail of the attachment is "*Schedule 10 FS04014 production plan 16.02.05.mpp*", which is the date of Quotation J and of the comparable plan annexed thereto.

⁷ It is not clear whether this notation meant that Müller was to approve the form of certificate; or whether it simply signified that the approved form would be completed by Müller as and when the matters to be certified occurred.

52. On 29th June, after further discussion, David Guest of RTS sent to Mr Morris of Müller copies of (i) the FDS, (ii) the Test Plan, (iii) the Project Plan, and (iv) the Installation at Müller plan, which Müller had approved. A few moments later he sent to Mr St John a copy of a detailed Test and Build schedule.

Performance

53. On 23rd February 2005 there had been a "kick-off" meeting. RTS' work on the project began then. The expiry of the Letter of Intent did not bring that work to a halt. RTS continued as before. The Free Issue Equipment that was to be provided included the Mohrbach and Rose Fosgrove equipment, which, according to the Project Plan attached to quotation J was to be delivered to RTS by 6th May, and, according to the Project Plan attached to the e-mail of the 29th June, on 4th July and 6th June respectively. 4th July was the delivery date that RTS agreed with Mohrbach's distributors. Müller had placed an order in March, and sought a May delivery date. They did not get it and by mid June Mohrbach admitted that they could not deliver by 4th July.
54. Both the Rose Forgrove and the Mohrbach equipment were delivered late. The Rose Forgrove filling conveyor was delivered on 6th June but the flow wrap machine was not delivered until 30th June. The Mohrbach equipment did not arrive with RTS until 8th August and, even then Müller asked for it not to be interfaced with the robots for a further 2 weeks. On 10th August there was a meeting at RTS' premises at which the delay was discussed between Mr Guest of RTS and Messrs Highfield and Foster of Müller.
55. On 11th August Mr Benyon of Müller contacted Mr Bradford of RTS. He expressed his deep frustration with Mohrbach's lateness and asked for RTS' help in mitigating the effect of their lateness on the project programme. He told Mr Bradford that Müller had obtained a contract with Tesco's⁸ pursuant to which Müller had to provide at least 150,000 Top Clip rice product packs in the week beginning Monday 10th October. This was because the product was due to be launched in stores on 17th October. (Failure to provide the packs as ordered can cause deep trouble since supermarkets have a practice of writing suppliers who fail to deliver as promised off their list for at least six months). Mr Bradford said that RTS would do its best to meet Müller's needs but did not promise that the 150,000 target would be met.
56. 150,000 packs would not take more than a day and a half to produce if Line 1 was up and running. That number of packs equates to a production of 10 pallets per 12 hour shift for a 7 day period when the specified requirement of 80 packs per minute equates to 10 pallets per hour for a 24 hour shift. But under the plan attached to the e-mail of 29th June Site Acceptance Testing ("SAT") was not due to begin until Monday 10th October and finish on Friday 14th October with training and production support occupying Monday to Thursday of the following week. In the telephone conversation of 11th August Mr Bradford said that RTS would do its best so to prioritise its activities as to try to meet Müller's needs. He gave no further assurance, not surprisingly since the Mohrbach equipment had only arrived 3 days before.
57. Quotation J and the URS had provided for a Customer Factory Acceptance Test ("CFAT") to be carried out at RTS' premises, after which the equipment was to be installed and commissioned at Müller's factory, after which there would be a "SAT".⁹ The program that had been contemplated had involved installing Line 2 first.
58. On 15th August Mr Guest of RTS e-mailed Mr Foster of Müller with a revised schedule for Line 1, which involved the equipment for Line 1 being sent immediately to Market Drayton, without CFAT testing. Under the schedule low volume production capability was planned as starting on Wednesday 28th September, with SAT beginning on Monday 24th October. This was on the assumption that Line 2 could be installed after Line 1.

The variation

59. On 25th August 2005 there was a meeting to discuss the problem, at which, as is common ground, there was an agreed variation of the delivery plan.
60. It was agreed that there would be no CFAT at RTS' premises and that Line 1 would be installed first so that production could begin on this Line as soon as it could be made operational once delivered. At the meeting Mr Brown gave Müller certain warnings to which I shall refer hereafter.
61. Most of the RTS components for Lines 1 were delivered to Müller on or about 5th September 2005. The RTS components for Line 2 were delivered on or about 2nd December. Line 1 was run on automatic, for the first time, on 1st October. The 150,000 packs were produced, although much of the production was the result of manual operation without the robots. SAT testing has never taken place. One of the matters in dispute is as to whether it should have done.

Payment

62. Müller paid RTS 30% of £ 1,682,000 + VAT on about 28th April 2005, a further 30% in September 2005 and 10% in January 2006. It did so following the issue of invoices which claimed the specified percentages of a total contract value of £ 1,682,000.

⁸ According to Mr Benyon Müller's obligations extended to other supermarkets as well.

⁹ It was later agreed that the testing at RTS would have to be at about 50% of the full speed applicable for SAT testing. This was because the robots to be supplied by RTS will only operate at the required throughput speeds if there are enough products available to feed the robots in order for them to pick and place pots at the required rate per minute. It proved logistically impossible to have enough pots at Irlam to feed the lines manually and achieve the required throughput. It was also impossible to test at Irlam the palletiser, some of the labelling machines, the checkweighers, and some of the longer input conveyors. So testing for the required throughput of the lines could only be carried out in the SAT testing at Market Drayton.

63. Although 30% was specified in Quotation J as the amount of the first two payments under the contracts, the payments made were not all stage payments specified in Quotation J. That quotation called for (a) 30% on receipt of order, (b) 30% on delivery to RTS of the major items of bought out equipment, (c) 20% on delivery to Müller, (d) 10% on completion of commissioning and (e) 10% within 30-90 days of takeover although (a) was to be within 7 days of receipt of order and (b) (c) and (d) within 30 days of the date of invoice. There was no order and, even if the Letter of Intent is to be regarded as the equivalent, payment was not made within 7 days of it. The second 30% was paid after delivery to RTS of major items and submission of an invoice. But the 10% was not the 20% due on delivery.
64. Nor were these payments the stage payments specified in Schedule 1 to the contract included with the e-mail of 16th May. That provided for 30% of the Contract Price to be paid after RTS had furnished a duly executed Advance Payment guarantee in the terms of schedule 7 (which RTS never did); 30% within 30 days of delivery of the equipment to RTS; 20% within 30 days of presentation of the Delivery Certificate to RTS by Müller; 10% on Completion (as defined) and 10% after presentation by Müller of the final certificate of payment. All but for the first of such payments were only to be made after RTS had applied to the Engineer (who was never appointed) and upon him issuing the applicable Certificate (which did not occur) and RTS issuing an invoice.

The contractual position after the expiry of the Letter of Intent contract

65. As is apparent from the above, after the Letter of Intent contract expired RTS continued to build the Equipment, delivered it to Müller and were partially paid for it. In those circumstances the court strongly inclines to concluding that the parties have entered into some contract even though such a contract cannot be spelt out by a classic analysis of the sequence of offer and acceptance.
66. As Steyn LJ, put it in *Trentham v Archital Luxfer* [1993] 1 Lloyd's LR 25:
"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....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... 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 sometime 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... "

Müller's submissions

67. Müller submits that, although the parties reached a final draft of the contractual terms and conditions, namely Schedule 1, which contains the general conditions, as modified in the e-mails of 19th and 25th May, and 5th July 2005 set out in paragraphs 51-2 above, that final draft never became binding on the parties. This is because it was the parties' intention that detailed terms negotiated by them would not have contractual effect until the documentation i.e. the contract and the accompanying schedules, was formally executed and signed. That that is so appears from:
- a) the Letter of Intent which referred to the full terms and the relevant technical specifications being finalised, agreed and then signed within 4 weeks of the date of that letter;
 - b) Mr Morris' e-mail of 13th May, which referred to the Letter of Intent lasting until 27th May or, if sooner, the date the contract is "actually signed"; and is consistent with
 - c) the evidence of Mr Brown of RTS, in paragraph 46 of his witness statement, referring to his e-mail of 26th May 2005 that: *"My view was that whilst we had agreed the wording in principal (sic), until the whole contract including the schedules had been compiled as a complete document and signed as accepted by RTS then it wasn't enforceable. Whether this is right or not I don't now know, but it was what I thought then. Therefore, to my mind, the milestone event at which the terms and conditions of the anticipated contract were agreed and in force was when RTS signed the document"*¹⁰
68. Accordingly the contract between the parties and the obligations of RTS and Müller, are – Müller submits - to be found in the following documents which constitute an agreed description of the goods and services which RTS was to provide:
- (i) the documents attached to the email of 26th May 2005 namely:
 - (a) the URS and its Appendices save that the Parent Company guarantee was never given and the Provisional Project Plan was overtaken by the documents at paragraph 52 above in June 2005;
 - (b) the KPIs;
 - (c) the Assumptions for Free Issued Equipment ("the Assumptions"); and
 - (ii) the documents attached to Mr Guest's first and second e-mails of 29th June namely:
 - (d) the FDS;
 - (e) the Test Plan;

¹⁰ Müller invited me to ignore many paragraphs in the witness statement of Mr Brown (and those of other witnesses) on the ground that they constituted irrelevant and inadmissible evidence of opinion or belief. I note that paragraph 46 was not one of them, although it is equally inadmissible.

- (f) the overall project plan (which superceded the delivery programme attached to the e-mail of 26th May) which was to form Schedule 10;
 - (g) the installation plan;
 - (h) the Test and Build Schedule.
69. Müller's payment obligation was to pay £ 1,682,000 plus VAT in return for the goods and services that RTS was to provide as specified in the above documents. No further contractual terms as to payment having been agreed, RTS is not entitled to payment of the balance of the contract price until it has completed substantial performance.
70. This submission is a departure from the contention advanced by Müller in a letter to RTS of 12th April 2006 which asserted that "the contractual terms for the engagement of RTS were clearly agreed following discussion that took place throughout March, April and May 2005"; and that "An exchange of e-mail correspondence between the respective contract administrators at that time Confirmed that all of the key contract terms were settled and agreed". The letter purported to rely on clause 34.1.2 of the conditions in Schedule 1, which provides, inter alia, for the purchaser to give notice to remedy defects, and, in default of remedy within 30 days, a power to terminate.

RTS' submissions

71. RTS' primary submission was (i) that the Letter of Intent contract incorporated Quotation J, including RTS' standard terms, (ii) that it did not expire in May 2005, and (iii) that it was never replaced by any new contract. I have rejected (i) and (ii). In that event, RTS' alternative submission is that, if there was a new contract, it incorporated the agreed amended MF/1 conditions. If, as Müller submits, most of the Schedules were incorporated, so also were the terms and conditions in Schedule 1, which is the basis of the contract. These submissions are a departure from the contentions made by RTS' solicitors in their letter of 10th August 2006. In that letter Addleshaw Goddard, in setting out RTS' case on the contractual position, contended (a) that the parties' conduct was governed by the Letter of Intent until 16th May 2005 after which "a separate contract arises"; and (b) that the terms of Contract 45003600589 i.e. the contract enclosed with the e-mail of 16th May 2005 were not enforceable. This is consistent with the note to the accounts of RTS' parent for the year ending 31st December 2006, which records RTS' dispute with Müller "pursuant to a contract entered into during May 2005".

My conclusion

72. In my judgment Müller's submissions are well founded. After the lapse of the Letter of Intent the parties reached full agreement on the work that was to be done for the price that they had already agreed. It is, as Lord Justice Steyn contemplated, unrealistic to suppose that they did not intend to create legal relations. The natural inference is that their contract was that RTS would carry out the agreed work for the agreed price. It was not essential for them to have agreed the terms and conditions and they did not do so. In this respect they continued after the expiry of the Letter of Intent just as they had before, i.e. calling for and carrying out the work without agreement as to the applicable terms.
73. I decline to infer that the parties' contract included the final draft version of the MF/1 conditions for a number of reasons. *Firstly*, Müller's Letter of Intent and its e-mail of 13th May 2005 indicated that the final terms were not to be contractually agreed until signature.
74. *Secondly*, the contract sent with the e-mail of 16th May was designed to operate as a composite whole, consisting of (a) the basic two page, seven clause contract, and (b) the 17 schedules that are annexed to it and referred to in the general conditions which constitute Schedule 1. Although many of these Schedules were agreed several were not. In particular it was not agreed what Schedule 6 would contain. The words in capitals set out in paragraph 48 above represented a proposed, but never agreed, refinement – to give Müller some ampler remedy than liquidated damages if the performance of the equipment was lower than that degree of non performance which would give rise to the maximum liquidated damages.
75. *Thirdly*, the parties did not proceed on the basis of the conditions. RTS did not procure the provision of the Advance Payment Guarantee (Schedule 7), which, under the conditions, was required to be procured prior to the advance payment being made. Schedules 15 and 17, which address matters relevant from the start of the contract, were not completed. Müller did not appoint an Engineer. Payment was not made in accordance with the application and certification procedure laid down in clause 11 and the procedure for Changes to the Contract laid down by clause 39 was not followed. The dispute procedure required by clause 41 was not followed.
76. *Fourthly*, clause 48 of the general conditions provides that: "This Contract may be executed in any number of counterparts provided that it shall not become effective until each party has executed a counterpart and exchanged it with the other" The contract was not executed nor were any counterparts exchanged.
77. I hold, therefore, that, by no later than 29th June 2005 the contract between the parties, which was to apply retrospectively, was that RTS was to provide the goods and services specified, and comply with the obligations set out, in the documents set out in paragraph 68 above, subject to the conditions specified therein.
78. Accordingly the answers I give to Issue 1.2, 1.2.1 and 1.2.2 are as follows:
Issue 1.2- did Müller and RTS enter into any contract after the Contract of 1 March 2005?
Answer: Müller and RTS did enter into a new contract after the Letter of Intent Contract.
Issue 1.2.1-what documents evidence the contract or are incorporated into it?
Answer: Those specified in paragraph 68 above. The contract did not include the draft terms and conditions based on MF/1.

The nature of the obligation

Issue 1.2.2. Under the contract, what were the Parties' obligations? In particular:

- a) does the Claimant take a responsibility for the lines as a whole, or just for the equipment which it supplied?
 b) What is the nature of the obligation in terms of the performance criteria of either the lines or the equipment as appropriate.
79. In essence Müller submits that RTS was bound to procure that Line 1 and Line 2 passed the prescribed tests and achieved the required throughput, although that requirement would be reduced if the Free Issue Equipment was defective or its performance insufficient. RTS contends that its obligation was to ensure that the equipment which it supplied was capable of producing the throughput through its machines prescribed by the URS. It may well be that the practical effect of the difference is small and goes largely to the incidence of the onus of proof.
80. The URS has five sections, these being what were originally sections 4 - 8 of the Quotation.
81. **Section 1** of the URS was headed "User Requirements" and Section 1.1 was headed "Line 1 – Automated mixing/re-packaging into carton packs". Section 1.1.1 summarised "the main functionalities" of Line 1, which included the work of the detraying unit; the robots and the Mohrbach carton closing machine ("robotic loading of pots into pocketed trays on the flighted infeed conveyor of the Carton closing machine"), and the Vepatec tray packer ("automatic tray packing of mixed flavour Carton packs"). Section 1.1.4 provided that "The system will produce the following product formats/patterns" and then set out the output in terms of formats and patterns required of Line 1. Section 1.1.5, headed "Systems Functions/Performance" provided that the system would perform various functions including "picking and collating of pots at a maximum rate of 640 per minute (Equivalent to a throughput of 160 pots/min/robot)" and "collating and packing of Variety Carton packs into trays at a maximum rate of 80 packs per minute". Section 1.1.6 specified that the new equipment would be required to interface with a list of specified equipment which included the Mohrbach Cartoning machine (Erector, flighted conveyor and closing machine).
82. In respect of Line 2, Section 1.2. headed "Automated re-packing into Flow-wrapped packs", describes in Section 1.2.1. the main functionalities of Line 2 and includes the detraying units, the robots and the Rose Forgrove flow-wrapper and the Vepatec tray packer. Section 1.2.2 provides, inter alia, that "When producing flow-wrapped packs, the system will automatically load collations of mixed pot flavours onto the packaging media by picking pairs of pots and placing them in collations on the packaging media being transported on the flow-wrapper infeed conveyor. Flow-wrapped variety packs will then be automatically loaded back into the original trays." Section 1.2.4 summarises the output of Line 2 in terms of various formats of flow wrapped packs reloaded in empty trays. Section 1.2.5 specified the functions that the system was to perform including "picking and collating of Yoghurt pots at a maximum rate of 640 per minute (Equivalent to a throughput of 160 pots/min/robot)" and Section 1.1.6 specified that the new equipment would be required to interface with a list of specified equipment which included the Rose Foregrove flow-wrapper
83. **Section 2** sets out a technical description of Lines 1 and 2. The description of the cycle of activity on each line included all activities on the line from de-palletising through to the exit of completed packed trays. Thus the Cycle Description for Line 1 provided, inter alia, that: "The four Pixcell units will each place two pots into the pocketed trays on the flighted closing machine infeed conveyor at a rate of 80 picks per minute (160 pots per minute) creating mixed or variety formats" and then went on to describe the operation of the automated tray-loading machine i.e. the Vepatec machine.
84. **Section 3** of the URS provided that "the performance criteria for equipment acceptance tests, both at RTS and on site at Market Drayton, are listed as follows" and then set out under the headings "Line 1 throughputs" and "Line 2 throughputs" figures for the Cartoner infeed on Line 1 and the twin pot flow wrapper infeed on Line 2 of 80 of packs per minute (ppm).¹¹ These infeed units are the Robots for both lines. Section 3.4. provided that:
 "The components detailed above are designed to achieve a compounded availability of 95%.
 The availability figures are based on the performance of the RTS supplied equipment only and will exclude any effects of the following factors
 o Product quality
 o Operator downtime
 o Product changeovers
 o Consumable changeovers
 The method of calculation of the availability performance is detailed in the Customer Factory Acceptance Test (CFAT) procedure in section 7.5. of this document
 The availability of 95% will be demonstrated both during the Customer Factory Acceptance Test (CFAT) at RTS and the Site Acceptance Test (SAT) on site in Market Drayton.
 Once the equipment has been taken over and is used in production, this performance criterion is subject to factors outside of RTS' control and as such does not form part of the scope of our guarantee."
85. **Section 4** was headed "Scope of Supply". It provided that RTS' scope of supply "includes for the design, manufacture, assembly, inspection, testing delivery, installation and commissioning of the equipment described in section 5 of this proposal". Section 4 then contained specific provisions about Project Management; Design;

¹¹ The provisions of section 3 of the URS are repeated at section 2.1.8.1.1 of the FDS (CB2/17/261).

Manufacture and Assembly; Pre-delivery Tests; the CFAT Procedure; Delivery; Installation requirement; Installation and Commissioning; Take-over; Documentation and Training.

86. The Pre-delivery tests were to be the CFAT tests. The CFAT procedure envisaged a 1 hour test for each of the throughput parameters defined in sections 6.1, 6.2, and 6.3,¹² which were to be measured at regular intervals and averaged to confirm individual machine/line efficiencies against performance requirements. The CFAT procedure provided a formula for availability calculations by which, in essence, the time for stoppages in respect of equipment for which RTS was responsible was to be expressed as a percentage of the total time elapsed minus the time lost in respect of stoppage for elements outside RTS' scope of supply.
87. Under "Takeover" section 4.9 provided:
"Once the equipment has been commissioned, the Site Acceptance Test (SAT) will be carried out. The SAT is a repeat of the CFAT, and is therefore carried out according to the CFAT procedure described in 7.5 to confirm compliance with the Specification.
*The equipment will be **formally taken over** when the SAT has been successfully completed. SAT trials are expected to take place within 7 days of completion of commissioning..."*¹³
88. **Section 5** was headed "Limits of Proposal". It specified a number of matters excluded from the offer, including the delivery and commissioning at RTS and Market Drayton of any free issued equipment, and a number of assumptions which were the basis of the tender.
89. The "Assumptions" document provided, inter alia, as follows:
"1. ASSUMPTIONS
○ *RTS cannot be held responsible for delays incurred due to the late delivery of any of the Free Issue items of equipment*
○ *Date of delivery to RTS and completion of integration of the free-issued items, particularly Flow-wrapper and Cartoning machines will be agreed as required by our programme*
○ *.....*
○ *We have assumed that the performance of free issued items will be sufficient to perform the SAT and CFAT tests. Should the performance of free issued items be insufficient to test the elements of RTS' scope of supply, the CFAT and SAT tests are expected to be based on the maximum throughput allowed by the free issued items.*
○ *...*
2. FLOW WRAPPER
○ *It is a requirement of this project that the flow-wrapper be delivered to RTS in Manchester for system testing in accordance with the agreed timing plan*
○ *....*
3. CARTONING MACHINE
○ *It is a requirement of this project that, as a minimum, the conveyor that transports the trays formed by the tray erector to the tray closer will be delivered to RTS in Manchester for system testing in accordance with the agreed timing plan*
○ *Preferably the tray erector and tray closer will be also delivered to Manchester for a period of time to facilitate the performance tests."*
90. The **Test Plan** contained an elaborate set of provisions in relation to the tests to be applied both before and after the delivery of the equipment to Market Drayton. Section 2 provided:
"2. TEST PLAN
2.1 Test Philosophy
This testing of the Automated Pot Re-Packaging is separate for each line, namely: Internal Factory Testing (IFAT), Customer Acceptance Testing (CFAT) and Test on Completion and Performance Test (SAT) at Müller site.
Internal Factory Acceptance is testing conducted by RTS at RTS and the Customer Factory Acceptance is testing conducted by RTS in the presence of the customer's representative.
The assembly at RTS will be a simultaneous build of Line 1 and Line 2 and the line testing will commence with Line 2 followed by Line 1.
Both the IFAT and CFAT will include testing of Line 1 and Line 2 but in order to meet the schedule only part of the conveying system for each line is to be fully assembled and tested at RTS.
The assembly at RTS of each line is as follows:
[Details were then set out]
The assembly at site will commence with Line 2 and then Line 1 but in order to meet the schedule only part of the conveying system for each line will be assembled, however the testing on-site will commence with Line 1 followed by Line 2.
The Site Acceptance Testing is testing conducted by RTS at Müller in the presence of the customer's representative. Both Line 1 and Line 2 will be fully assembled at site and the SAT will have no exception or simulation...
Full testing by the customer representative is not mandatory and is at the discretion of the customer representative.

¹² This must be a reference to the performance criteria in Section 3, which was, originally, section 6 of the Quotation.

¹³ Similarly, section 1.2.8 of the FDS provides in relation to take-over that: "once the equipment has been commissioned, the Site Acceptance Test (SAT) will be carried out.....The equipment will be taken over when the SAT has been successfully completed..."

2.2. Test Sequence

The testing will follow a strict sequence, each test to be a pre-requisite to the next and build up to complete the testing. Testing will commence with static checks, power up and safety check to dynamic and functional checks. Each line will have an IFAT, CFAT and SAT and each will cover the following:

91. Section 2.2 then set out an elaborate series of tests. The Performance Checks which section 2.2 stipulated were to include "all Key Performance Indicators (KPI) for each line". Section 2.2.1. provided for Functional Checks for Line 1 which were to "demonstrate the functionality of the whole line and form the core testing philosophy for Line 1". Each of the tests was to be performed at RTS and Müller but the testing at RTS was to be restricted in order to meet the schedule. One of the tests in respect of Line 1 was to see whether the line would produce 80 packs/min of single packs put in to cartons. Section 2.2.2 provided for the Test on Completion and Performance Tests for Line 1. These tests were designed to show compliance with the KPIs. Section 2.2.3 dealt with the functional checks for Line 2 and Section 2.2.4 with the Test on Completion and Performance Tests for Line 2.
92. Section 3.5. provided, inter alia, as follows: "Once all tests detailed in this test document for the SAT have been passed or otherwise agreed, a System Acceptance Certificate shall be signed by the RTS and customer representative to confirm take-over of the system by the customer"

Müller's submissions

93. Müller contends that the parties' obligations under the contract were as follows:
 - a) RTS was obliged to provide the goods and services set out in the URS and to cause each of Lines 1 and 2 to pass the tests set out in the Test Plan. That included an obligation to pass the Site Acceptance Tests. Accordingly, RTS was obliged, inter alia, to cause the lines to produce a throughput of 80 packs per minute, with 'availability' of 95% over a twenty four hour period. In this sense, RTS took a responsibility for the lines as a whole.
 - b) If, however, the Free Issue Equipment was defective or its performance insufficient, then the throughput criteria for the SAT tests would be reduced from 80 packs per minute to the maximum throughput permitted by the Free Issue Equipment.
 - c) Müller did not owe RTS a contractual obligation to deliver the Free Issue Equipment by a particular date. If, however, delivery was delayed beyond the expected date, then RTS would not be liable to Müller as a consequence of that delay.
 - d) RTS was not obliged to carry out the physical task of connecting the Free Issue Equipment to the RTS supplied equipment, which task remained with Müller.
94. In support of this submission Müller draws attention to the following matters:
 - (i) section 1 of the URS provides for what *the system* is to produce or do;
 - (ii) the description of Lines 1 and 2 in Section 2 includes in sections 2.1.2 and 2.2.2 of *all* activities on the line;
 - (iii) in the functional description of lines 1 and 2 in the URS (section 1) and in the technical description (in section 2) no distinction is made between the equipment to be supplied by RTS and the Free Issue Equipment;
 - (iv) the specification of the performance criteria in section 3 refers to *line* throughputs in terms of packs per minute required for each line (80 packs per minute on each of lines 1 and 2 for top clip and flow wrapped packs respectively) – a measurement that could not apply to the equipment supplied by RTS in isolation;
 - (v) section 3.4 provides that the availability figures "*are based on the performance of RTS supplied equipment only*" but section 3 does not make similar provision for the throughput criteria.
 - (vi) one of the assumptions is that the performance of free issued items will be sufficient to perform the CFAT/SAT test and that, if not, those tests are to be based on the maximum throughput allowed by the free issue items. The effect of that is that, even when the Free Issue Equipment is defective RTS' obligation is measured by the maximum line throughput permitted by that equipment.
 - (vii) the functional tests for lines 1 and 2 set out in sections 2.2.1 and 2.2.3 of the Test Plan are expressed to be such as "*will demonstrate the functionality of the whole line and form the core testing philosophy for line [1][2]*";
 - (viii) the performance tests for each line set out in sections 2.2.2 and 2.2.4 require, inter alia, each line to produce packs at the rate of 80 packs/min over one hour, with availability of 95% over a 24 hour period. The Plan therefore requires the throughput of the lines as a whole to be measured and not merely the capacity of the RTS supplied equipment.

My conclusions

95. Müller's submissions are, in my judgment, essentially correct. Whoever it was at RTS who drafted the URS faced the problem of defining the obligations of a contractor who was to supply much, but by no means all, of the equipment that was necessary to make the end product (lines 1 and 2) function in the way that Müller desired. He did so, inter alia, by describing Müller's system requirements overall and specifying what the system would produce (section 1 of the URS); giving a Technical Description of the equipment on the lines (section 2); a summary of Performance Criteria relating to the RTS equipment (section 3); a definition of the Scope of Supply (section 4) and of the Limits of the Proposal (section 5) and providing a Test Plan, compliance with which required establishment that the lines as a whole would fulfil Müller's requirements.
96. In giving an overview of the main functionalities of the Lines Section 1 included reference to the work of various items along the whole line and specified what were to be the functions and performance of *the system* in terms of packs per minute.

97. Sections 2.1.1 and 2.2.1 under the heading "System Scope" describe the equipment to be supplied by RTS. The cycle descriptions in sections 2.1.2 and 2.2.2 describe the cycle of operation of the lines. These include both RTS supplied and Free Issue Equipment with specifications of performance that involve the proper operation of both sets of equipment, including the Mohrbach flighted closing machine infeed conveyor and the Rose Forgrove flow wrapper infeed conveyor. In section 3 the performance criteria relate to the equipment to be supplied by RTS but in terms of Line throughputs. Sections 3.4 and 4.5.3 provide that the availability figures relate to the RTS equipment; but no provision is made that the 80 packs per minute figure is to be assessed otherwise than by reference to the operation of the line. Section 5 excludes RTS responsibility for a number of things including the Rose Forgrove Flow wrapper and the Mohrbach cartoning machinery, which is consistent with a performance specification which measures success by reference to the operation of the line. The parties did not choose as a measurement of performance the speed of the robot picks per minute in isolation. This is not surprising given Müller's interest in the output of the system and the fact that RTS had the responsibility of integrating their items with the Free Issue Equipment.
98. The Test Plan provides for a sequence of tests. These include Performance Checks, which themselves include all KPIs for each line. The KPIs themselves require performance measured in packs/min per Line; the functional checks, as specified, require, inter alia, demonstration of the ability of the lines to load pots into cartons at a rate of 80 packs/min (see 2.2.1. F3 and 2.2.3 F2); and the Tests on Completion and Performance Tests require, inter alia, demonstration of the ability of the Lines to load pots into cartons at 80 packs/min (see 2.2.2 and 2.2.4). These tests, which could not by definition apply to RTS equipment in isolation, had to be passed – see sections 4.4, 4.5. and 4.9 of the URS and sections 2 and 3 of the Test Plan. The tests might, of course, have failed because of the deficiencies in the Free Issue Equipment. For that reason the agreed assumptions included an assumption that performance of free issued items would be sufficient to test the elements of RTS' scope of supply together with a provision that, if those items were insufficient to test the elements of RTS' scope of supply (i.e. to enable RTS to pass the Tests), the test would be based on the maximum throughput allowed by the free issued items. The former assumption confirms that RTS had to pass a test by reference to the throughput of the lines; and the latter provision ensures that it is not penalised by the failure of the Free Issue Equipment.¹⁴
99. The question posed by Issue 1.2.2 (a) cannot be answered simply by selecting one of the alternatives. My answer to it (and also to Issue 1.2.2. (b)) is that RTS was obliged to provide the goods and services set out in the URS and its appendices (other than Appendices 6 and 7) subject to the provisions of the URS and the Assumptions. It was also obliged to satisfy the tests set out in the Test Plan, again subject to the provisions of the URS and the Assumptions. It is necessary to express the position in those broad terms because the assumptions contained in the latter documents are not limited to an assumption that the performance of the free issued items will be sufficient to test the elements of RTS' scope of supply – see, e.g., section 5.2. of the URS.
- Issue 1.2.2 (c) *What is the nature of the Defendant's obligation with respect to delivery and commissioning of the Free Issue Equipment?*
100. Two questions arise: (a) did Müller owe RTS a contractual obligation to ensure that the Free Issue Equipment, which Müller was to provide, arrived on time and (b) what constitutes late delivery. As to the former, my answer is that it was a requirement of the project that the Free Issue Equipment be delivered at the dates specified in the project plan, but Müller did not owe RTS an obligation to ensure that the Equipment arrived by any specific date. The documents which constitute the contract do not contain such an obligation. It is for that reason that the Assumptions document contains the following provisions:
- " 1. ASSUMPTIONS**
- *RTS cannot be held responsible for delays incurred due to the late delivery of any Free Issue items of equipment*
 - *Date of delivery to RTS and completion of integration of the free-issued items, particularly Flow-wrapper and Cartoning machine, will be agreed as required by our programme*
 - *The delivery, set-up and integration & support of the free issue equipment will be the responsibility of [Müller], and has not been included in this proposal.*
- 2. FLOW-WRAPPER**
- *It is a requirement of this project that the flow-wrapper be delivered to RTS in Manchester for system testing in accordance with the agreed timing plan*
- 3. CARTONING MACHINE**
- *It is a requirement of this project that, as a minimum, the conveyor that transports the trays formed by the tray erector to the tray closer will be delivered to RTS in Manchester for system testing in accordance with the agreed timing plan"*
101. If RTS had contracted to procure delivery by a specified date, these assumptions would not be necessary. There remains the question of what would be late delivery, given that the dates for the provision of the free issued equipment were different in the plan annexed to Quotation J (6th May) and that annexed to the e-mail of 29th June (6th June – Rose Forgrove and 4th July Mohrbach). In my judgment the relevant dates for the contract that arose after the Letter of Intent contract came to an end are those in the plan attached to the e-mail of 29th June for two reasons; (i) that document is to be regarded as a contractual document and not simply as a working document showing the current state of play on the project; and (ii) the 4th July date for the delivery of the Mohrbach equipment was a change agreed by Mr Guest of RTS.

¹⁴ E.g. if the robots are unable to place pots into the top clips because the Mohrbach equipment does not present the clips correctly so as to enable the robots to place the pots in the clips.

Issue 1.2.3. Is SAT testing by the Claimant mandatory and, on the proper construction of the relevant contractual provisions, what are the necessary elements of the Defendant taking over the equipment.

102. Section 2.1 of the Test Plan made plain that "Full testing by the customer representative is not mandatory and is at the discretion of the customer representative". But, unless dispensed with by Müller, SAT testing was mandatory for RTS: see section 4.9 of the URS:

"Once the equipment has been commissioned, the Site Acceptance Test (SAT) will be carried out.....The equipment will be formally taken over when the SAT has been successfully completed"

and section 3.5. of the Test Plan:

"Once all tests detailed in this test document for the SAT have been passed or otherwise agreed, a System Acceptance Certificate shall be signed by the RTS and customer representative to confirm take-over of the system by the customer".

103. Takeover under the contract was to occur once the SAT tests had been successfully completed at Müller's premises: see the sections cited above, section 3.4. of the URS, section 2.1. of the Test Plan, and section 1.2.8 of the FDS which provides:

"Take-over

Once the equipment has been commissioned, the Site Acceptance Test (SAT) will be carried out..."

Issue 1.2.4. What is the payment obligation of the Defendant, whether under the contract and/or by way of a quantum meruit?

104. Müller's obligation was to pay RTS £ 1,682,000 plus VAT in return for the goods and service to be provided by RTS pursuant to the contract. Müller is bound to pay (subject to any applicable set off) the balance of the contract price upon substantial completion of the work to be performed. This is the general rule in respect of a lump sum contract; and, in my judgment it is applicable here. The parties agreed on the work that was to be done and the total price. They also agreed on the stage payments that were in fact made. But they made no further binding agreement as to when the remaining 30% would be paid. Such terms as they had discussed as to stage payments were those in Quotation J and in the amended MF/1 general conditions contained in Schedule 1 to the contract submitted on 16th May. These do not say the same thing and neither of them were contractually agreed. In those circumstances the general rule for lump sum contracts should apply. Substantial completion, in this context, would be achieved once the SAT tests were passed. I leave open the question as to whether substantial completion could still be achieved notwithstanding a failure to comply 100% with the SAT tests. Whether that is so appears to me to require further factual inquiry, to be tied in with RTS' contentions as to waiver and the like: see paragraphs 138 – 140 below.

105. In respect of any additional work requested by Müller outside the scope of the contract RTS is entitled to be paid a reasonable sum for such work. An implied contract to that effect arises from the fact of Müller's requesting such work and RTS complying with that request in circumstances where it was plainly not acting for free.

Issue 1.2.5. What exclusions or limitations (if any) is RTS entitled to?

None save those contained in the documents specified in paragraph 68 above. *Issue 1.2.6. What contractual limitations are there on the damages that the Defendant might recover for breach of contract by the Claimant?*

Answer: None

The variation

Issue 1.3. What are the terms of the variation agreed by the Claimant and the Defendant in August 2005? What are the consequences of that variation in terms of the performance of the equipment or the lines (as appropriate) or the legal obligations of the Claimant? In particular, did the variation remove the requirement, or opportunity or any legal obligation of the Claimant to commission and test the equipment and the lines? If so, did that have the effect, as contended by the Claimant, of requiring it to provide equipment which was capable of meeting the required specification, but relieving it of the obligation to ensure that the equipment was, in fact, meeting the required specification at the time of taking over?

106. It is common ground between the parties that the contract between them was varied on 25th August 2005 at a meeting at RTS' premises in Irlam between Messrs Brown and Guest from RTS and Messrs St John, Benyon, Foster, and Highfield, and possibly others, for Müller, at which the parties agreed to alter the delivery schedules of the lines and to dispense with the need for RTS to conduct CFAT tests on Line 1.

107. RTS' contention was that the effect of the variation was that it was not possible for RTS to carry out the fine tuning and commissioning of the equipment which was necessary to ensure that the equipment met the specification. Since CFAT testing was cancelled it was not possible properly to test in steady state conditions the equipment that RTS was to supply, linked up with the Free Issue Equipment and with the majority of the electrics installed and tested (for which the whole system had to be complete). As a result it was absolved from any obligation successfully to perform SAT testing. All that was necessary was that the equipment provided by it remained capable of performing at the throughput specified for it in the contract.

The warnings

108. At the meeting on 25th August both parties were aware of the need to produce 150,000 pots in the week beginning 10th October, and that Müller proposed to increase production in the following week. Mr Brown of RTS told Müller that, as RTS would be shipping essentially untested equipment, it could not guarantee what level of

production would be available on a particular day, or even a particular week. This was, as he explained, because, in the light of the way in which RTS was being asked to proceed, RTS could not say how much work would be required, what problems might be encountered, and how long it would take to resolve them.

109. The need for this warning – that everything might not work in the first week so that the 150,000 pots could be produced - arose because of the changes to the original plan.
110. The *original programme* attached to Quotation J provided for the Free Issue Equipment to be delivered to RTS on 6th June and commissioning to be complete by 30th August. The first functional tests of RTS equipment (pre SAT preparation), once installed at Market Drayton, were to start on 3rd October and SAT testing was to take place over 6 days beginning with October 10th.
111. The *plan attached to the e-mail of 29th June* provided for the Free Issue Equipment being delivered on 6th June (Rose Forgrove Flow-wrapper) and 4th July (Mohrbach equipment); CFAT to be completed on Line 2 by 13th August and Line 1 by 19th August, with Pre SAT preparation starting on 3rd October, SAT Testing taking place over 4.5 days beginning on 10th.
112. The *plan discussed on 25th August*, and agreed on that date, involved (for Line 1) no CFAT testing, reception of equipment including Free Issue Equipment at RTS' premises, and some very limited commissioning of some of it on a stand alone basis. Delivery of the equipment to Market Drayton was to take place between 31st August and 6th September. It would then be assembled, with the first testing of RTS equipment taking place on 14th September leading to low volume production capability on 28th September, Testing Carton recipes from 4th – 7th and Tray mixing recipes from 10th – 14th, pre SAT preparation from 17th – 24th, and SAT testing from 24th to 28th October. I call this "*the Revised Project Plan*".
113. Mr Brown said that there was no margin for error in the plan and that it assumed that all the equipment would function properly on switch on. But he also pointed out that the proposal had the advantage that RTS would be able to test the equipment with a full volume of product rather than the lesser volume which would have been available for a CFAT. The SAT is a repeat of the CFAT but at full speed and in the refrigerated environment at Market Drayton in which the lines would operate.

The warning

114. Mr Brown did not, however, say anything that constituted a warning that RTS could not guarantee or warrant that the equipment supplied by it would ever satisfy the criteria laid down in the schedules (in particular the 80 packs per minute requirement), or pass the requisite tests; or that the SAT tests could not or would not be carried out. This is not surprising because, at this stage, he thought that the RTS equipment would be capable of meeting the performance specification and assumed that SAT testing would take place at some stage. Further, as appears from paragraph 112 above, a plan was agreed that provided for SAT testing in the last week in October.
115. If anything had been said to the effect that the equipment might never pass the SAT test, I would expect it to have been in writing and, whether given orally or in writing, it would have rung alarm bells at Müller and would have been the subject of much discussion and report. Nothing to that effect was said and, as Mr Brown accepted, Müller was entitled to expect that SAT testing on both lines would be carried out.
116. I note in this context that in an e-mail of 18th August Mr Guest asked what the planned Line 1 production requirements were because they would affect RTS' ability to complete "*the full & final commissioning*". There was no suggestion that such commissioning, including SAT testing, would not or could not happen because of the elimination of CFAT testing, or that SAT testing was optional for Müller. Nor was any such suggestion made in meetings which took place on 10th,¹⁵ 15th and 18th November, nor in RTS' letter of 16th November, nor in response to Müller's letter of 22nd November 2005 referring to the need for RTS to achieve "*the contractually agreed efficiency*". At the meeting on 15th November it was agreed that the 24 hour performance trial for the following week would be undertaken at 75% line speed.
117. At the meeting on 25th August Mr Brown indicated that there might be cost implications in adopting the revised plan. Mr Benyon's response was that everyone should focus on getting the job done and that costs could be discussed later. When Mr Benyon left the meeting Mr Brown accompanied him back to the reception. As he did so he told him that RTS would put all their efforts into the Revised Project Plan but that this method of working would inevitably lead to increased costs that RTS would pass on to Müller. Mr Benyon said that he could not approve any costs at that time, because RTS was not in a position to calculate what those costs might be. Müller would review any claims for additional costs that RTS would provide in the future. For the meantime RTS should do all it could to get the RTS equipment for Line 1 to Market Drayton.

Events after the 25th August meeting

118. The effect of concentrating on Line 1, as requested, meant that Line 2 fell behind. Resources which would otherwise have been dedicated to Lines 1 and 2 had to be dedicated to Line 1 only.
119. On 29th August Mr Guest updated a timing sheet for Line 1 which showed production of the 150,000 packs beginning on 7th October the remaining work leading to SAT testing starting on 13th October; and SAT testing on 7th November. On 12th September he passed this sheet to Simon Foster of Müller.

¹⁵ At the meeting on 10th November the parties had been at cross purposes. Müller wanted to discuss what RTS proposed to do in order to get Line 1 up and running. RTS wanted to discuss its claim for additional costs.

120. Most of the RTS equipment was delivered to Market Drayton on or about 5th September and by the week commencing 10th October Müller had put Line 1 into production in order to meet their customer's demands. From the week beginning 17th October the lines were used to produce large numbers of yoghurt pots per week. Some of the RTS conveyors were delivered around 20th October.
121. The need to deal with the supply of Line 1 so as to meet Müller's production requirements seems to have caused everyone to divert their efforts away from finalising contractual documentation, of which the negotiation had gone quiet in mid July. A meeting took place in Mr Morris' office at Market Drayton on 18th November 2005 to discuss finalisation of the contract. By this stage the relationship between the parties was beginning to break down. Mr Brown expressed the view that so much had changed since the last round of contract discussions in May/June 2005 that, if the parties signed the contract in the form that had largely been agreed in May/June 2005, both parties would find themselves to have been in breach. He had indicated to Müller in advance of the meeting that, if the contract was going to be signed, there would have to be a side letter which explained what had happened since August 2005 and how that affected the parties' obligations. At the meeting he repeated the need, if any contract was to be signed, for a side letter, confirming that RTS was not in breach and indicating that RTS' costs claim would be addressed.
122. Although the parties went through Mr Brown's annotations on the general conditions, a copy of which he had received from Mr St John of Müller in July and which he had returned to Müller with annotations before the meeting, no concluded agreement on the applicable terms and conditions or the terms of any side letter was reached at this meeting. The parties are in dispute as to whether any agreement was made in respect of the completion of Line 1, or the commencement of the defects warranty period in respect of that Line. Since the resolution of that dispute falls outside the preliminary issues, I do not propose to make findings in respect of it. Mr Morris suggested that the issue of the proposed side letter and the additional costs claim should take place at an all parties meeting, which, in the event, never occurred.
123. A test was conducted on Line 1 on 1st December when the line was run for about 12 hours with a six pack. The production availability was about 93-94% on the line's then speeds. Later on 12 x 12 hour tests (i.e. a test over 2 days of two sets of 12 hours) were done on both lines with similar results. There were also measurements of the pack count at various speeds and for various times.
124. The RTS components for Line 2 were delivered to Market Drayton on or about 2nd December.
125. On 7th December there was a further meeting between Müller and RTS at which RTS' claim for additional costs was discussed. The parties were in dispute as to whether the extra costs claimed were properly attributable to the change in the project programme, or the result of RTS' inability to get Line 1 to function properly, or an overrun of RTS' original budget. No suggestion was then made that RTS was no longer bound by the performance specification nor bound to undertake SAT testing. Nor was such a suggestion made in a telephone conversation between David Hopper, RTS' Technical Director, and Mr Benyon on 9th January 2006, during which Mr Hopper explained that RTS was working hard to achieve the required performance levels on Line 1.
126. Production started on Line 2 on or about 13th January 2005, although at low rates of throughput.

Effect of the variation

127. The variation agreed on 25th August 2005 absolved RTS from any obligation to conduct CFAT testing on Line 1. But it did not absolve RTS from its obligations under the agreement to commission and test the equipment that it was due to supply or the obligation to pass the SAT tests. There was no agreement to that effect. On the contrary the Revised Project Plan provided for SAT testing to take place between 24th and 28th October, following pre-SAT preparation.
128. Equally, the variation did not take from RTS the benefits of the Assumptions or alter the Scope of Supply laid down by section 4 of the URS.
129. Nor did the variation, or the fact that production began before SAT testing, relieve RTS of its obligation to ensure that the performance criteria were met. The last sentence of Clause 3.4 of the URS, which deals with line availability, provided that, once the equipment had been taken over and was used in production, "*this performance criterion is subject to factors outside of RTS' control and as such does not form part of the scope of our guarantee*". The reference to "*this performance criterion*" under the heading "*3.4. Line availability*" in a section relating to "*Performance Criteria*" appears to indicate that it is only the line availability criterion with which the last sentence of clause 3.4 is concerned. But, in any event, the provisions of the URS, Test Plan, and FDS set out in paragraphs 102 and 103 above make clear that take over follows SAT testing. I do not accept that the fact that section 4.9 of the URS referred to the equipment being "*formally taken over*" when the SAT had been successfully completed meant, or contemplated, that, for the purposes of clause 3.4 of the URS, there would or could be an informal take over before SAT testing. The take over was no doubt described as "*formal*" because, once all the tests had been passed or otherwise agreed, a certificate was to be signed by RTS and the customer representative to confirm take-over of the system.
130. I confine myself to addressing the principal points at issue in relation to the alleged variation. I do so because at least two matters appear to me to have been passed over somewhat lightly in evidence and submission. This may be because they are common ground. If so, no issue arises. If not, the evidence and the submissions made are not sufficient to reach a concluded view.

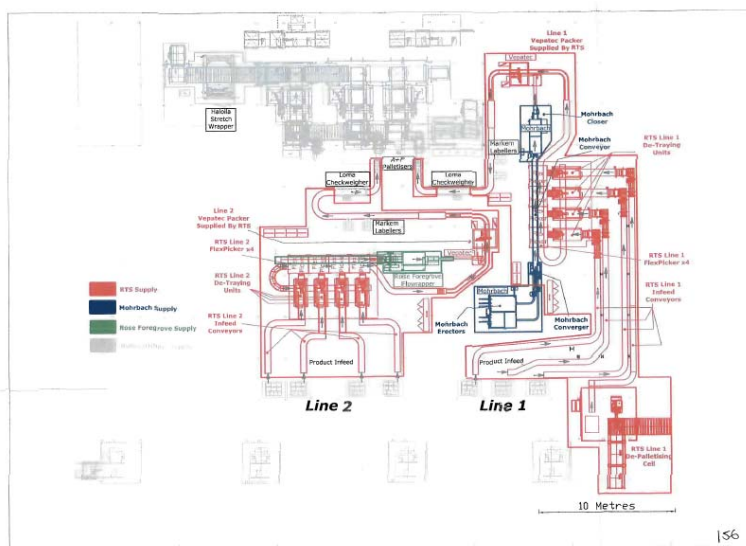
131. Firstly, I take it to be common ground that it was agreed that the CFAT testing be removed from the programme for both lines.
132. Secondly, as to timing, Müller's note of the meeting of 25th August sets out various key dates for Lines 1 and 2. The dates for Lines 1 and 2 appear consistent with the Revised Project Plan for Line 1, agreed at the 25th August meeting.

Line 2

133. In paragraphs 115-118 of his statement however, Mr Guest refers to a discussion between himself and Mr Brown and Mick St John on 29th August of the amended programme and schedule for installation, at which it was confirmed that the equipment for Line 1 would be shipped first and the equipment for Line 2 sent out at the end of November/beginning of December. The latter is a date later than the key date for Line 2 in Müller's note of the meeting of 25th August, which refers to Line 2 arriving complete at Market Drayton on 24th October.
134. Mr St John's recollection is that at the meeting it was agreed that Line 2 would be delivered 8 weeks late, that a schedule for the delivery of Line 1 was agreed, and that shortly after the meeting RTS circulated a revised project timetable showing the new dates discussed at the meeting. But he does not identify to which document he is referring.
135. In its letter of 12th April 2006 Müller also referred to a document entitled "*Installation at Müller Line 2 (24Oct).mmp*" issued by Mr Guest on 30th August 2005 showing a delivery date of 24th October and describe it as having been later amended, with Müller's consent to 14th November 2005.

Line 1

136. On 12th September Mr Guest sent out the plan for Line 1 referred to in paragraph 119 above, which has later dates than those in the Revised Project Plan: see paragraphs 112 and 127 above. It is not apparent to me whether or not this variation in timing was agreed by Müller.
137. In those circumstances I leave open the question of what exactly were the agreed delivery dates in respect of lines 1 and 2 following the meeting of 25th August. I also do not address the matters referred to in the following paragraphs.
138. In paragraph 98 of his witness statement Mr Brown states that Müller did not allow RTS to do SAT testing between 24th and 28th October or at any time subsequently, nor did it ask for SAT testing to be done. He also says that, because millions of pots of yoghurt were produced from 17th October onwards, RTS did not have adequate access to the RTS Equipment during production to carry out proper testing.
139. Müller contends that it provided RTS with ample opportunity to carry out testing if it wished. For 7 weeks from 7th October to 22nd November 2005 Müller was operating Line 1 in manual (i.e. without the robots) during the 12 hour night shift, leaving, it claims, the 12 hour day shift for whatever testing RTS desired. In truth, RTS was trying to resolve the inability of Line 1 to achieve the required performance of 80 packs per minute, the consequence of which was that there was no point in undertaking the testing.
140. These rival contentions, which involve claims by RTS that Müller cannot rely on any failure of RTS' performance brought about by Müller's prevention of that performance and of waiver, also lie outside the scope of the preliminary issue.
141. I invite submissions as to what order should be made in the light of my findings.



Charles Manzoni (instructed by Addleshaw Goddard) for the Claimant
 Kenneth MacLean QC & Michael Fealy (instructed by Pinsent Masons LLP) for the Defendant