Dick van Dijk v Wilkinson t/a HFF Construction [2000] ABC.L.R. 12/15

JUDGEMENT : Judge Bowsher QC. TCC. 15th December 2000

Introduction

1. In almost the last sentence of the evidence in this case, an expert described the case as a bizarre dispute about a Final Account. The same word had previously been used by another witness to describe the circumstances in which the contract between the parties came to be made. I agree with the use of that adjective and I add that I find this action desperately sad and its continuance regrettable. My first involvement with this action was at the beginning of the trial (not having been given the opportunity of reading the papers beforehand). Due to an accident with his computer, counsel for the claimant opened the trial in terms less helpful than he would have wished. Before the trial, there were considerable efforts to settle the action by without prejudice meetings and by a formal mediation. Those well-intentioned efforts have only resulted in a substantial increase in the costs to the parties, making the action even more difficult to settle. During the trial, I also have encouraged settlement. The claimant and the defendant are good men and their failure to reach agreement in this case will be for both of them a cause of unhappiness for the rest of their lives.

2. The claimant is a successful Dutch businessman who has had an international business supplying pipework. He describes himself as semi-retired. He owns an attractive large house, a listed building, the Moat House at Benenden, Kent. Over the course of his life, he has built up a collection of 80 or more classic cars, all restored and maintained in excellent condition. To house those cars, he wanted a large private museum including an entertainment area built on his land, together with an adjacent workshop for work to be done on his cars and a garage. Space was to be made for those buildings, in part by the demolition of an existing bungalow and outbuilding. In addition, the claimant wanted a large bund to be built round two sides of the museum as a security measure to discourage theft of his cars. In addition, he wanted to recreate a deep moat around his house, with three bridges across the moat. He also wanted an artificial lake. All of this required a great deal of excavation and ground works. The claimant also wanted roads, kerbing, the relaying of gas, water, and electric mains. In the lake there was to be a large jetty and an island. On the island there is an oak tree that is the subject of a preservation order. The island is in the shape of a small atoll. Across the mouth of the atoll a dam was to be built joining the arms of the atoll enclosing the central lagoon so that the level of water contained within it would be lower than the level of the surrounding lake. The objective of that dam was to keep the water from damaging the oak tree. Outside the museum was to be a large paved courtyard surrounding an ornamental pond. Areas of field were to be stripped for topsoil. Work was also required to improve the drives and the paving around the house.

3. The defendant is a man trading without limited liability under the name HFF Construction. His full name is Anthony Francis Garnham-Wilkinson and he lives at Hawkhurst Fish Farm at Hawkhurst, Kent, quite close to the claimant's home. At his premises he has built a complex of 22 acres of lakes and ponds, a koi shop, restaurant, and fishing complex. He employs 6 to 8 people in a construction business specialising in earthworks, including the building of lakes, ponds and waterfalls.

4. In September, 1996, the claimant visited the defendant at his property at Hawkhurst and interested him in doing work at the Moat House. The defendant was to be concerned only with external works, earthworks, foundations and some floors. He was not concerned with construction of superstructures. Other contractors were involved in substantial other works and a measure of programming was required to co-ordinate all the works.

5. The defendant asked a Mr. Clive Gray to act as Contracts Manager on the project. The terms of his engagement remain obscure. He says that the defendant agreed to "give him a drink" if the project was successfully concluded. Whether he has in fact received any reward at all has not been established in evidence nor has it been established whether he has any financial interest in the outcome of this action.

The Contract

6. The claimant instructed Madgwick & Dottridge, Architectural and Planning Consultants, to prepare a specification. In July, 1997, they produced a specification that named the claimant as both employer and contract administrator. It is unfortunate that neither Madgwick & Dottridge nor any other professional firm was engaged to supervise the execution of the works.

7. On the basis of that specification, the defendant, with the assistance of Mr. Gray, prepared a tender that was submitted on 28 August, 1997.

8. The claimant had about 3 meetings with Mr. Gray going through the tender in detail. A number of changes were agreed as to the way in which things were to be done, with a view to saving money. Mr. Gray and the claimant each had a copy of the tender in a tender book of between 30 and 40 pages long. They each made notes in their respective copies, changing prices and quantities. Unfortunately, in many instances, their notes originally seem to have agreed but changes have at some time been made in Mr. Gray's copy. They were aiming to reach a fixed price for the whole project. Between them, they concluded that the total price would be between about £272,500 and £273,500.

9. The claimant and the defendant and Mr. Gray discussed the tender at the claimant's house on Saturday 6 September, 1997. That was the morning of the funeral of Princess Diana. The attention of those present was divided between watching the funeral on television and discussing the contract. It was also unfortunate that Mr. Gray left at midday to go to Newhaven to play in a cricket match.

10. The defendant's recollection of that meeting is not good. But he does recall that by the time Mr. Gray left, the price had been negotiated down to £273,000 and that after Mr. Gray had left, the claimant and defendant agreed on a price of £270,000. The claimant wrote minutes of the meeting which were signed in their manuscript form by the claimant and the defendant. The document was headed "Minutes of Meeting at 06-09-97 and Final Agreement" and included the following:

"*11. Fixed Price for whole job. Change of quantities on request by Employer plus or minus to be added or deducted at the set rates per item nits length or cubic metres. All changes and costs for changes to be signed by the Contractor plus Employer before works start. Quantities to be changed on behalf of Employer by Acad Mapping, Maidstone.*

14. Method of payment Weekly or two weekly by progress of the works in round figures of £1,000 - 5% less than the actual-period of the works carried out. £10,000 mobilisation/site costs to be paid up front.

17. Unless otherwise stated and approved, all works stated in the Specification of Works and/or by the Contractor submitted tender form part of the overall contract.

25. Contract Price £2 70, 000 -for the total Exc. VAT VAT might be exempt on the various parts of the work. Alteration of the works + or - and unforeseen and unknown situations who might effect the price per item and the set final contract price will be discussed between the parties on forehand and when approved might change the contract price."

The defendant admits that those items 11, 14, 17, and 25 were part of the contract between them.

11. The tender documents referred to the terms of the ICE Minor Works (2nd Edition) including the following:

"*Article 1* *The Contractor will subject to the conditions of Contract perform and complete the works.*

Clause 3.1: *The Contractor shall perform and complete the works and shall (subject to any provision in the Contract) provide all supervision, labour, materials, plant, transport and temporary works which may be necessary therefor.*

Clause 4.6.: *Liquidated damages of £1,000 per week payable, subject to a limit of £10,000.*"

12. The manuscript minutes were typed up by the claimant's secretary in Holland and dated by her 6 September, 1997, but despite bearing that date, the typed document, headed "Confirmation of Contract", was in fact signed by the claimant and the defendant on about 24 September, 1997 after some small errors had been changed. Meanwhile, on 9 September, the claimant paid to the defendant £10,000 and he started work on that date. On 19 September, 1997 the defendant wrote to the claimant a long letter drafted by Mr. Gray, raising many points on their agreement. Mr. Gray did not like what had been agreed after he left for his cricket match. There were meetings on 12 and 22 September, but the overall price for the work was not changed. Some prices were adjusted to take advantage of the fact that some of the work was subject to VAT and other work was not. The reduction of the price at the meeting of 9 September was made as a global reduction: the individual prices in the tender were not reduced. The claimant contends that in considering the prices of remeasurement, extras, and omissions the prices of individual items should be reduced by a percentage proportional to the reduction in the overall price.

13. It is the claimant's case that the contract between the parties was made at the meeting on 6 September, 1997 and not changed thereafter. The case of the defendant is that as a result of the meetings after 6 September, and the letter of 19 September, the contract was changed after the work had commenced. In particular, it is denied that there was a term in the contract for the payment of liquidated damages. It is said that the ICE Minor Works terms did not apply. However, the letter of 19 September, 1997 shows that there had been agreement on liquidated damages and the defendant was asking that the term be removed from the contract:

"*We aim to complete the works by the end of January, however, this date was taken from our original programme assuming the start date of September 1. It would be fair to move the completion date back to February 6 to reflect the later start date of September 9.*

This contract will be given our undivided and constant attention and therefore we request that the £1000.00 per week penalty be omitted."

14. The pleaded Defence is consistent with there having been agreement on the payment of liquidated damages for delay because it is there pleaded in paragraph 10 that there were express and implied terms of the contract about delay:

Express term: "*Delays in time caused by raindays will not lead to costs of any penalties by overrunning the finishing date. Whereas a rainday will be considered as an unworkable day due to rainfall previous to the working day or rainfall at such a day. Every rainday, frostday or snowday will be counted and added on the agreed finished off days of works program*" (Confirmation of Contract, p.2)

Implied terms: "*The Claimant would not hinder or prevent the Defendant from carrying out its works in accordance with the terms of the contract and from executing the works in a regular and orderly manner.*"

The Claimant would take all steps reasonably necessary to enable the contractor to discharge its obligations and to execute the works in a regular and orderly manner."

15. The passage from the Confirmation of Contract pleaded in the Defence continued, "*Works plan to be finished off by February the 6th. ...*".

16. The claimant's evidence with regard to the letter of 19 September, 1997 was that he did not feel comfortable about that letter as he felt that the defendant wanted to pull out or change the signed contract. He had a meeting

with the defendant and Mr. Gray shortly afterwards and all matters in the letter were resolved amicably and the figures remained the same. I do not accept the defendant's contention that the letter of 19 September, 1997 became a part of the contract. The contractual documents were listed at the head of the Confirmation of Contract signed on 24 September, 1997.

17. I find in particular that there was an agreement for liquidated damages at the rate of £1,000 per day with a limit of £10,000.

18. That finding raises difficulties in relation to this trial. It had been ordered in advance that this trial should be limited to the trial of limited issues, but at the beginning of the trial those issues were not clearly defined and only reached definition during the trial. In the result, while I make a finding as to the terms of the contract, including a finding as to an agreement as to liquidated damages, other matters related to a liquidated damages claim have not been explored. Points to which counsel for the defendant would wish to return include:

    1. Were the liquidated damages agreed a genuine pre-estimate of loss?
    2. Were there so many variations and interruptions by other trades that time became at large?
    3. What were the finally agreed start and finish dates?
    4. Has sufficient allowance been made for bad weather and other interruptions? (The weather was particularly bad and the claimant has made a substantial allowance for bad weather. The claimant's case is that allowances for bad weather were recorded in the agenda prepared by him for site meetings).

    Because of those outstanding questions, I shall not be able to make a decision at this stage on the claimant's claim for liquidated damages.

19. I am asked to determine whether the contract provided for tender adjustments. I take that to mean, "Was there an express or implied term that in valuing additions or omissions the tender prices should be adjusted to take account of the overall reduction in the total price after the individual tender prices had been fixed". There was certainly no express agreement to that effect. No express or implied term to that effect is pleaded in the Particulars of Claim despite its being amended on the first day of trial and one is left to infer an allegation from the Scott Schedule. The relevant express terms as to variations are set out in items 11 and 25 of the minutes of the 6 September meeting (see Paragraph 10 of this judgment). Unfortunately, the changes and costs for changes were not "signed by the contractor plus employer before works start". Miss Hannaford points out that the first time that tender adjustments were mentioned was in the Scott Schedule. Mr. Lawrence who drew up the Schedule said that it was his idea and his previous "*Financial Appraisal*" had not mentioned tender adjustments. It follows that tender adjustments had not occurred to the claimant and therefore it is difficult to see that the requirements for the implication of a term could be satisfied. In any event, says Miss Hannaford, some of the adjustments are upwards and some are downwards, and if the parties had applied their minds to this at the time, they would probably have considered that the likely effect was that adjustments would be likely to cancel each other out. The experts, Mr. Langley and Mr. Robinson are agreed that it is common and usual for such tender adjustments to be made. In the absence of any statement in the pleadings setting out the basis of the implication and in the absence of definition of the term to be implied I find the claimant's case puzzling. It does not seem to me to be necessary to business efficacy to the contract that there should be tender adjustments. If it was so necessary, the concept would have been relied on much earlier than it was. The contract is perfectly workable on the basis that a large sum was deducted from the priced tender as a matter of horse-trading but the tender prices are to remain as the basis for omissions and additions. That would mean that if the claimant made no changes to the work he would keep the benefit of the reduction for which he had bargained, but if he put the defendant to the inconvenience of making changes to the scope of the work as he went along, those changes would be priced at the original agreed figures. If there were only additions, the defendant would benefit and I see nothing wrong with that, but if additional work replaced omissions, the benefit of using the tender prices would go in both directions. The express term of the contract dealing with variations, paragraph 11 of the Minutes of Meeting of 6 September, 1997, provided that changes of quantities on request by the employer plus or minus to be added or deducted ***"at the set rates per item nits length or cubic metres".*** The set rates per item must be the rates per item set out in the tender: there is nothing there about tender adjustments. If one tries to make tender adjustments, it is in many instances extremely difficult in this case to identify what adjustment should be made: there are important instances in which although the parties agreed on the rounded totals for work sections, they did not agree on the figures from which those rounded totals were reached. To apply tender adjustments, the court would have to guess at or make up figures. I find that there was no term express or implied as to tender adjustments. It is, of course, important as the claimant has always said, that the accounting should be done as a plus minus account and not as an as-built account.

Progress of the Works

20. The works progressed. There were regular site meetings for which the claimant wrote the agenda. The agenda record a number of variations. The claimant made substantial payments. Between 9 September 1997 and 29 July, 1998, he paid a total of £292,977.40. The original fixed price was for £270,000.

21. In general the system for payment was that the defendant made an application for payment, the claimant decided what was payable and paid it and the defendant then sent an invoice for that amount. Although the contract provided for 5% retention, the provision was not applied and the claimant's case is that the defendant was in the result always overpaid above the requirements of the contract.

22. In November, 1997, the VAT situation was finally resolved and the figures revised in consequence at a meeting on 10 November, 1997 with the defendant and his secretary. A revised invoicing programme was agreed at that meeting.

23. In early 1998, the defendant told the claimant that he had a cash flow problem arising in part out of other business ventures. The defendant made various demands for money linked to threats to stop work. On 24 July, 1997, the defendant stopped work and on 18 August left site. In October, 1997, there was correspondence between solicitors for the defendant and the claimant and Madgwick and Dottridge on behalf of the claimant. I shall refer in more detail later to that correspondence and subsequent communications between the parties. On 22 October, 1999, solicitors for the claimant wrote to the defendant saying that he was in repudiatory breach of the contract and accepting that repudiation. It is the defendant's case is that it was not he but rather the claimant who was in repudiatory breach of the contract.

24. On 29 November, 1999 the claimant began this action.

The Issues

25. I have now given enough background to enable me to set out the issues before me.

26. By his amended claim, the claimant claims:

£65,290.71 overpaid;

£10,000 liquidated damages for delay;

£7,500 professional fees caused by the defendant's repudiatory breach;

£6,667.00 for breach of contract causing damage to an electric cable.

In addition, by the Scott Schedule, the claimant claims the cost of having uncompleted work completed by others as damages for repudiation of contract.

27. By his amended Defence, the defendant denies liability and counterclaims £44,075.12 plus VAT £23,302.38 as sums underpaid for work done.

28. There are very many items in dispute between the parties, some very small and some larger. In an endeavour to make the costs of this action less disproportionate to the sums in issue than they would inevitably be, the judge having the conduct of case management ordered that a Scott Schedule should be prepared limited to 8 items. It was contemplated that a formula should be found by which the overall findings on those 8 items should be applied to the claims and counterclaims as a whole. Unfortunately, despite what I believe to be noble assistance from their counsel, the parties have found it difficult to agree on such a formula.

29. Even more unfortunately, the Scott Schedule prepared is a document of great complexity with cross references to other documents and it is very difficult to understand. In addition, the 8 items are divided into many sub-items so that the evidence has ranged over a mass of detail.

30. The issues agreed between counsel are:

1. Contract

1.1 How was the contract formed?
1.2 Did the contract incorporate the Defendant's letter of 19.9.97?
1.3 Did the contract contain a liquidated damages clause?
1.4 In respect of individual items, which party's tender document evidences the price for each item more accurately?
1.5 Was it a term of the contract that tender adjustments should be made to additional works?
1.6 If so, what tender adjustments should be applied to each of Sections (1) - (6) listed in Issue 2 below.

2. Final Account

What is the final account value for the following sections of the works:
(1) Foundations;
(2) Museum floor;
(3) Workshop floor;
(4) Drives;
(5) External works;
(6) The lake?

3. Repudiation

3.1 Which party repudiated the contract?
3.2 Did the innocent party accept the repudiation?

4. Additional Costs of Completion

If the answer to Issue 3 is that the Claimant accepted the Defendant's repudiators breach:
(1) Which works remained incomplete?
(2) What are the reasonable additional costs of completing such works?

5. Defects/ Breaches

5.1 Was the Defendant in breach of contract in relation to:
(1) The alleged dishing of the workshop floor;

(2) The alleged defects in the drives.
(3)The alleged defects in the paving by the northeast bridge.
(4) The cable;
(5) The dam?

5.2 If so:
(1) Has the Claimant suffered any loss as a result of such breaches?
(2) What are/were the reasonable costs of rectifying the breaches?
(3) Is the alleged reasonable cost of repair the true measure of the Claimant's loss?

6. Effect of judgment on balance of parties' claims
How should the judgment on the contract, the 8 items and repudiation be applied to the remainder of the parties' pleaded claims that do not form part of this trial?

31. I have considered the issues relating to the contract. I now propose to depart from the order of issues chosen by counsel and consider the issues relating to repudiation.

Repudiation

32. In relation to the issue of repudiation, it is necessary to consider in more detail the events leading up to the breakdown of the relations between the parties.

33. As I have already said, in early 1998, the defendant told the claimant that he had a cash flow problem arising in part out of other business ventures.

34. On 21 July, 1998 the defendant wrote to the claimant complaining of underpayment for certain specified work and threatening to stop work. The last paragraph of that letter was as follows: "*I understand that there are still monies being held by you against us should you fear us being overpayed. If the outstanding balance is not clarified by 6pm on the 22nd July then work will stop until we reach a mutually acceptable figure. If you feel our total is inaccurate please let us know what you feel you owe at your earliest convenience so we can discuss the matter further.*"

35. On 22 July, 1998 Mr. Gray wrote by fax to the claimant about a dispute about the depth of the museum floor (to which I shall have to return later in this judgment). That fax ended,

"*As of now the concreting has been cancelled until further notice, likewise the tarmac because I am sure we will not receive a remittance to cover Brian's invoice in the immediate future.*

It is a shame it has come to this when we are so near completion and ahead of programme. You must appreciate that of the £20,000, 10% is profits plus you fail to pay full VAT each time which leaves us sponsoring the job. WE ARE NOT PREPARED TO CONTINUE DOING THIS! We need your immediate comments."

36. On 22 July, 1998 the claimant replied to Mr. Gray. After dealing in detail with technical details about the workshop floor and the garage floor, the claimant wrote:

"*Expressions your side, we back off if we don't get payed straight away give me only the feeling to be careful, that you will back off in case I overpay on a certain moment.*

I am not running HFF and cannot be responsible for the cash flow problems you obviously have. Interrupting the works for this reason I will not accept and might lead to additional costs for me, in case I have to take action with other contractors to finish jobs who are in your contract, in what case I will claim to you. As, you just phoned me, told you I will check the outstanding sum today and will inform, pay you, accordingly."

As an aside, I would say that although that language appears a little quaint, the meaning is clear. The claimant's counsel commented that his client's written English reads like a literal translation of a Latin prose exercise. By contrast, the claimant's spoken English is the language of a well-educated Englishman. There may have been misunderstandings in this case, but they are not due to language difficulties.

It is quite clear that that letter evinces no intention to resile from the contract.

37. At the end of that letter, the claimant obtained three signatures from Mr. Gray. He signed an acknowledgement that the letter had been received. He signed a receipt for £3,000 for tarmac works. And he also signed against some text which has been disputed. I accept Mr. Gray's evidence that the text against which he signed was: "*Continue to rectify works*". Those signatures were given on 22 July, 1998. Despite the receipt of £3,000 Mr. Gray did not continue to rectify the works.

38. On 23 July, 1998 the claimant paid £3,525 inclusive of VAT to the defendant. At that stage, the claimant had produced a manuscript "overview" suggesting that the value of the work completed by the defendant was £269,803.05 exclusive of VAT and that the defendant had been paid £278,195.64 exclusive of VAT. That document is difficult to understand, but I am satisfied that, whether the document is accurate or not, the claimant believed it to be accurate.

39. On 23 July, 1998, the defendant by letter suggested that the claimant and the defendant walk the site and remeasure the whole job as an alternative to ending up in court. The letter ended, "*A court case would be an expensive and time consuming operation and likely to end with an inconclusive result.*" I very much regret that that was an accurate prediction.

40. On 24 July, 1998, Mr. Gray wrote a letter expressing some indignation, but indicating that the valuations of the two parties were £2,000 apart, which is hardly surprising on a project where the valuations were £286,000 and £284,000 respectively.

41. On 24 July, Mr. Gray also wrote another letter protesting about the complexity of the retention system operated by the claimant.

42. Again, on the same day, the defendant wrote a letter enclosing a list of disputed extras. The letter included the words: *"We have not had a reply to our fax dated yesterday afternoon so we have decided to stop work until these matters are resolved."* The defendant did stop work on that day.

43. However, also on 24 July, 1998, Mr. Gray wrote,

"We are perfectly happy to complete the works subject to:-

1) Re-measure of the works by an independent firm and that you agree to settle on the basis of this measure, on the prices tendered for and accepted.

2) You agree to pay the amount assessed within three days of the report being submitted.

... we require your written confirmation that you are prepared to accept this independent arbitration before proceeding further."

It is relevant to note that the ICE Conditions provide for both **adjudication** and arbitration. What was being proposed by Mr. Gray was within the spirit though not the letter of the **adjudication** provisions.

44. There was a flurry of other faxes on that day. I shall not refer to all of them. On the next day, 25 July, 1998 the claimant replied to the points made in the fax referred to in the previous paragraph of this judgment:

"Point I Within the specification of the contract. No problem. When you like to do so.

Point II No problem".

The claimant agreed with the defendant's proposals without qualification.

It is to be noted that at that point neither claimant nor defendant referred to "*Tender adjustments*".

45. By letter of 25 July, 1998, Mr. Gray wrote in a tone suggesting some surprise that the claimant had agreed to a remeasurement by an independent firm, but added an additional requirement that the claimant should pay £20,000 before the remeasurement.

46. After a further exchange of communications, the defendant wrote a letter of 27 July, 1998 imposing a yet further term.

"To clarify, we need:-

1) Your written confirmation that an independent re-measure based on our agreed rates and fixed price items would be adhered to.

2) Payment based an the above within 3 days

3) The receipt of £20,000 to continue

4) Receipt of damages in respect of costs and loss of earnings amounting to £1660.00 + VAT for a) Clive's time, b) professional advice and c) loss of earnings of 2 men and 2 machines.

We request your unequivocal confirmation of the above points to resolve our confidence."

47. There were other communications on the same day mainly related to the fact that the claimant wanted the defendant to submit what he called a ((plus minus account" and the defendant, by Mr. Gray, submitted an "*as built*" account. Mr. Gray made it plain that he agreed that the claimant's method was accurate and widely accepted, but he disagreed with the contents of accounts made by the claimant. He did not submit accounts by the claimant's method.

48. At this time, the claimant told the defendant that it was vital that the work proceed because his cars were in transit from Holland, and if the defendant did not do the work he would have to get it done by others.

49. On 27 July, 1998, the claimant faxed to Mr. Gray, *"As informed you already by fax dated 25-07-98 and 24-07-98 another contractor will finish off the tarmac coat in the museum building in case you are unwilling to do this today (Monday the 27th.). Because I do not see any action so far concerning this, I assume you do not intend to carry on. If by 1200 hours today noon I have not heard from you I will consider your absence as non-willingness to finish these time scheduled works and will give order to another contractor to finish these works starting tomorrow morning and finished tomorrow afternoon. The price of this work I will deduct from the balance."*

50. The defendant did not resume work, but on 1 August, 1998 he wrote asking for a payment of £15,000 on account of what he alleged was owing. On the same day, Mr. Gray sent an invoice for £124,302.03. In evidence, he sought to excuse this as having been sent in a moment of madness after a visit to the pub, but on 3 August, 1998, he wrote a letter demanding £128,691.20 excluding VAT within 7 days and threatening legal proceedings in default.

51. On 3 August, 1998 the claimant asked to see Mr. Gray's figures before he made any payment. On 4 August, he acknowledged receipt of a plus minus account and asked for the breakdown of day works set at £15,244.55 and later in the day raised queries about the day works.

52. On 6 August, 1998, the claimant wrote: "*In accordance to the amazing and strange letter I received yesterday the 5th of August by fax concerning my request for additional information and in combination with your letter of August 3rd requesting a sum of £128,691.20 ex VAT before you might consider to return to work I like to reply as follows:*"

I will not quote the whole letter verbatim, but the claimant said that he believed that his figures were correct, that he had always paid on time, that he had the impression that the defendant did not want to finish the work, and he then said: "*Based on these facts and other aspects I am considering as from now to work strictly in accordance with the contract and her related documents.*"

Later in the letter he wrote:

"*Your threat of legal action leaves me the opinion that we have reached an impasse but I will give the undertaking to promptly respond to and to cooperate with the conciliator or arbitrator.*

As mentioned in previous letters, I will bring in other contractors for those parts of the work who cannot be delayed avoiding damage to other contractors or goods.".

53. There followed correspondence about the figures and on 18 August, Mr. Gray wrote:

"*We have given you the opportunity on many occasions to discuss the matters but you have not accepted our offers. This has left us no alternative but to take this course of action. We have not even received an offer of even part of what has been proven to be owed which demonstrates your unwillingness to be bound by our agreement which is a repudiation of contract.*

Such fundamental action leaves us with no alternative but to vacate the site as you were clearly intent on not paying for the works recently or proposed to be undertaken. This being the case we were quite within our rights to leave the site. We have also noted that you aim to counter charge us for non-completion, but we will refute any claims.

We are determined to pursue our claim for the sums justifiably owed to us in accordance with the contract.

Obviously such action will be expensive and drawn out and therefore we are prepared to offer one last opportunity to enter into meaningful negotiations to conclude unsettled matters. These will of course be without prejudice to other actions that we have outlined above."

54. The claimant replied by letter dated 19 August, 1998 saying that he would co-operate with an arbitrator or conciliator. He added:

"*Your claim of £128.691.20 is more than wrong and your method to come to this figure is too simple to start a discussion about it.*

The way you interrupted the work I consider, as mentioned in previous letters, as unlawful and will claim the charge from this resulting additional costs and charges for non-completion as stipulated by the co

Your refusal to send me, after you have criticised my overview of omitted and additional works, your total overview so I could have checked and commented this and only sending me some parts of the works I consider as a deliberate imperfection. How can I check when you refuse to send me the details.

In your letters, 24, 25 and 27th Of July, you suggested already an independent firm to remeasure the whole job and by letters 25, 26 and 27th I answered continuously that I was happy to cooperate if you like to do this.

I still don't understand that you did not follow this. In this stage an arbitrator will do the same."

55. The defendant did not return to the site.

56. The claimant said in evidence that he was willing to pay what was due, but that he believed that he had paid more than was due. He believed that the dispute could be resolved through Quantity Surveyors, and he believed that the ICE terms provided for that. There were negotiations in early 1999. The claimant instructed Mr. Lawrence, a surveyor, and the defendant instructed Mr. Robinson of Davis Langdon Everest. But the claimant had the firm impression, which I find to be reasonable, that Mr. Robinson did not receive full instructions until after court proceedings had been started. The action began in November, 1999. Mr. Robinson said that he found it necessary to hold a series of meeting with Mr. Gray totalling 69 hours during the period November, 1999 to July 2000.

57. On 28 July, 1999 a solicitor's letter asked the defendant to return to site to complete the works within 3 months. The defendant did not return to site. On 22 October, 1999, the claimant's solicitors wrote accepting the defendant's repudiation of the contract and determining the defendant's employment.

58. On those facts, the defendant says that the claimant repudiated the contract by his failure to pay sums of money outstanding, by threatening to employ and employing another contractor to carry out works within the contract and by his letter of 6 August, 1998. The defendant says that he accepted the claimant's repudiation by leaving site and by his letter of 18 August, 1998.

59. To what extent do those facts justify the respective allegations of repudiation?

60. Unless provided for by contract, there is no general right to suspend work if payment is wrongly withheld. The principle is stated in Keating on **Building Contracts**, 6th edition page 167:

"No general right to suspend work. *Although particular contracts may give the contractor express rights if certificates are not paid, there is no general right to suspend work if payment is wrongly withheld. This is consistent with the principle that, except where there is a breach of condition or fundamental breach of contract, breach of contract by one party does not discharge the other party from performance of his unperformed obligations.*"

***In* Channel Group v. Balfour Beatty** [1992] 1 QB 656 at 666, Staughton L.J. said: *"There is a further potential dispute of considerable importance. The contractors maintain that they are entitled to suspend work on the cooling system, although they have not yet done so, by reason of Eurotunnel's breaches of contract described above. If it were solely a question of English law, this argument would face some difficulty. It is well established that if one party is in serious breach, the other can treat the contract as altogether at an end; but there is not yet any established doctrine of English law that the other party may suspend performance, keeping the contract alive. It is said that there is authority, at any rate in the Commonwealth, which would support such a doctrine."*

61. For there to be a repudiation, there must be a breach or breaches going to the root of the contract. In ***Woodar v. Wimpey*** [1980] 1 WLR 277 the House of Lords reviewed the authorities on repudiation. In ***The Hermosa*** [1982] 1 Ll LR 570 at 572, Donaldson LJ referred to ***Woodar v. Wimpey*** and helpfully distilled certain propositions from that decision:

*"For present purposes we take from it [**Woodar v. Wimpey**] the following propositions:*

(a) Dissolution of a contract upon the basis of renunciation is a drastic conclusion which should only be held to arise in clear cases of a refusal to perform contractual obligations in a respect or respects going to the root of the contract.

(b) The refusal must not only be clear, but must be absolute. Where a party declares his intention to act or refrain from acting in a particular way on the basis of a particular appreciation of his obligations, either as a matter of fact or of law, the declaration gives rise to a right of dissolution only if in all the circumstances it is clear that it is not conditional upon his present appreciation of his obligations proving correct when the time for performance arrives.

(c) What does or does not amount to a sufficient refusal is to be judged in the light of whether a reasonable person in the position of the party claiming to be freed from the contract would regard the refusal as being clear and absolute.

One further proposition must be added, although it is not gleaned from or confirmed by the decision in Woodar's case, namely, that (d) the conduct relied upon is to be considered as at the time when it is treated as terminating the contract, in the light of the then existing circumstances. These circumstances will include the history of the transaction or relationship. Later events are irrelevant, save to the extent that they may point to matters which the parties should have considered as hypothetical possibilities at the relevant time."

62. At one time it was thought by some lawyers that failure to make payment in accordance with the terms of the contract could not be repudiatory but that view has long been rejected. In ***Decro-Wall v. Practitioners in Marketing*** [1971] 2 All ER 216 at 222, the Court of Appeal dealt with a case which was similar to a contract for the sale of goods but was not in fact governed by the Sale of Goods Act. At page 222, Salmon LJ held that continual late payments on the part of the defendant on the facts of that case did not amount to repudiation of the contract. He added: *"The case would have been quite different if the defendants' breaches had been such as reasonably to shatter the plaintiffs' confidence in the defendants' ability to pay for the goods with which the plaintiffs supplied them."*

63. In ***The Brimnes*** [1973] 1 All ER 769, Brandon J. considered the conduct of a charterer that had been consistently late in making payments under a time charter. At page 791 he said:

"It is necessary to consider, however, the shipowners' alternative contention that the charterers' conduct in relation to late payment of hire, taken as a whole, amounted to a repudiation of the contract, which they were entitled to accept by withdrawing the ship.

The question whether the charterers' conduct in this respect was repudiatory or not is a question of fact and of degree. I set out earlier all the relevant primary facts concerning late payment. In assessing their weight I think that the following matters are relevant. Of the first 14 payments, 13 were late by a varying number of days. No complaint on this score was made at all until after the 13th payment, and no written complaint until after a further late payment. The next payment (for March 1970) was technically a day late, but, for what I accept were sensible commercial reasons, it was treated by the shipowners' agents as being in time. The April payment was only one day late. In order to justify a decision that the charterers' conduct was repudiatory it would be necessary to find that they evinced clearly by it an intention not to be bound by the terms of the contract. I am not satisfied that, on an objective view, their conduct in relation to late payment, although persisted in over a long time, went so far as this. For this reason I am not prepared to hold that the charterers repudiated the contract, so as to entitle the shipowners to treat it as at an end."

64. On the facts that I have stated, did the claimant evince an intention not to be bound by the contract? Absolutely not. He always said that he would pay whatever was due but believed that he had overpaid. He accepted a mechanism for determining what was due proposed by the defendant but the defendant then put unreasonable conditions on the acceptance of that proposal. Did the claimant act in such a way as to shatter the defendant's confidence in his ability to pay? There is no suggestion that the claimant was not creditworthy. Equally, it cannot be reasonably suggested that he was unwilling to pay whatever he was liable to pay. The parties just had different views on what he was liable to pay.

65. It is said that the claimant was in repudiatory breach because he threatened to and did instruct others to do work the subject of the contract. On 24 July, 1998, the defendant suspended work *"until these matters are resolved"*. As a matter of law, the defendants were not entitled to suspend work: ***Channel Group v. Balfour Beatty***. During that period of illegal suspension of the work, the claimant was expecting delivery of his collection of cars from Holland. The claimant gave notice to the defendant of that and asked him to come back to finish the museum floor

to accept the cars. It was perfectly reasonable to say, in effect, "*If you will not perform your contract someone else will have to do it because I cannot wait*". That was not a repudiation of the contract, it was an invocation of the terms of the contract.

66. In my judgment, the claimant was not in repudiatory breach of contract. I say that before embarking on the difficult task of deciding whether he did in fact owe money to the defendant or, whether as he contends, he had overpaid the defendant. Even if he is found to be wrong in his contentions about what was owed between the parties, I find that the claimant was not in repudiatory breach.

67. By contrast, I find that the defendant was in repudiatory breach of the contract. Without any legal justification, the defendant suspended work on the contract at a vital time. When the claimant agreed to proposals for determining the sums owed, the defendant insisted on unreasonable conditions, and then he left the work and failed to return when given a reasonable opportunity to do so. What else was the claimant to do but get on and complete the work by employing other contractors?

Final Account

68. The parties, the witnesses and their counsel have been dogged by misfortunes in this case. One of the misfortunes was that the claimant's first expert suffered ill-health making it necessary for him to withdraw as an expert. Mr. Brian Lawrence, a Chartered Quantity Surveyor and a Fellow of the Royal Institution of Chartered Surveyors, was instructed by the claimant on 12 October, 1998 to record the state of the works that should have been completed by the defendant and also to prepare a Final Account and establish the financial position between the parties. Due to ill-health, Mr. Lawrence was unable to give evidence as an expert but did give evidence of fact on the first day of trial, going into hospital the following day. Objections were taken to some parts of his statement as containing matters of opinion and I ruled on those objections. In place of Mr. Lawrence, the claimant instructed as an expert witness Mr. Barry Langley on 3 August, 2000. Mr. Langley also is a Chartered Quantity Surveyor and a Fellow of the Royal Institution of Chartered Surveyors. He suffers from the disadvantage of having been instructed late. He did not take part in the lengthy discussions with Mr. Robinson, the defendant's surveyor, undertaken by Mr. Lawrence. In the interest of proportionality he did not discard the work done by Mr. Lawrence, so that for good reasons he has felt under some pressure to support the work of another professional man. On the other hand, the defendant has had the advantage and the good fortune to have been able to call the evidence of Mr. Ian Robinson, a partner in the distinguished firm Davis Langdon & Everest. Mr. Robinson's practice was appointed on 3 February, 1999. His initial brief was to assess the nature of the dispute and if possible to broker a settlement. His first visit to the site was in early March, 1999. It is no criticism of Mr. Langley that due to the circumstances of his appointment, his report is limited in many respects. He has not considered many items in any detail and in some instances not at all. He frankly and fairly made a number of concessions regarding the claimant's claim. He was not involved in the figures for remedial works: he said that at least two of the figures were not reasonable by relation to national works of reference but were supported by invoices. Mr. Robinson, having had much more time to prepare his evidence and to think about it, was much more impressive in his grasp of detail of this extremely complex case and in general I prefer his evidence, though I repeat that is not a criticism of the competence of Mr. Langley.

69. Mr. Lawrence prepared a Scott Schedule and a Financial Appraisal covering the whole of the work. In a Case Management Conference the court ordered a Scott Schedule to be prepared dealing with only 8 items. He also produced a Schedule of Variations. In his oral evidence he gave evidence of certain observations of fact. Mr. Robinson said that he was extremely puzzled by confusing assessments prepared by and on behalf of the claimant each reaching different totals. I share his bemusement.

70. With that introduction, I turn to consider the evidence of fact and opinion regarding the 8 items on the Scott Schedule. Some matters have been mentioned in evidence going beyond the extensive detail in the Scott Schedule. I shall endeavour to confine my consideration of the matter to what has been pleaded in the Scott Schedule. It is an extremely confusing document.

Foundations

71. The first item relates to the foundations for the garage, museum and workshop.

72. There is a dispute about the starting point. What was the agreed price for this section of the work, the foundations? The Scott Schedule takes a figure of £19,686.21 and applies an adjustment of 6.76722% to arrive at a figure of £18354. It is not clear where those figures come from. The total of the amended figures on the defendant's copy of the tender document amount to £20,283.76. The claimant's copy includes one computation amounting to £22,862. The claimant's witness statement says that the agreed price was £20,000 and Mr. Langley agreed that the agreed price was £20,000. On this point as on so many others in this case, it is impossible to be sure what was agreed and I do not think that the parties really know themselves. I follow Mr. Langley and say that the agreed figure was £20,000. I have already indicated that I reject any tender adjustment.

73. The agreed figure for the agreed price for the **garage foundations** is £2558.03. The garage foundations were deeper than had been contracted for. There is an agreed extra of £1,703.28. (I say that it is agreed because that is what is in the Scott Schedule. In evidence an attempt has been made to depart from the pleaded figure but I will not pursue that departure). In addition, Mr. Gray says that when the local authority building inspector came to inspect the foundations he directed that they should be dug deeper. That is normal practice, and, as normal, there is no paper evidencing the order. I accept the evidence of Mr. Gray on this point. The value of that

additional extra is £582.80. There is also an agreed extra of £30. I accept the defendant's total for the garage foundations £4,874.11, about £500 more than the claimant's figure.

74. With regard to the **Museum/workshop foundations**, there is a dispute about what was agreed as the price for this work. The starting figure in the claimant's column in the Scott Schedule is £5,796.48 and in the defendant's column is £7,729.53. The latter figure can be derived from addition of figures in the defendant's tender. I do not know how Mr. Lawrence came to his figure of £5,796.48. In the claimant's tender document on the page facing these items there are figures for workshop £2,074.59 and Museum £5,879.94. Those figures are not so very far away from the defendant's figure and for that reason I accept the defendant's lower figure.

75. There was again a direction from the local authority surveyor to excavate the foundations deeper. Again, I accept the evidence of Mr. Gray on this point. The claimant's case is based on an architect's drawing made before the work was done and it is not an as built drawing. I accept the defendant's measurements and I also accept the reduced rate put forward by Mr. Robinson (£5 per cubic metre as opposed to £6.99 alleged by the defendant in the Scott Schedule). That gives a total value of this item £8,084.81.

76. The claimant seeks to make a deduction of £60.80 for steel bolts not fitted by the defendant, but I am not satisfied that the steel bolts were ever a part of the contract work and I disallow that deduction.

77. The defendant now accepts in his counsel's submissions, though he did not do so in the Scott Schedule, that £195 should be deducted for the omission of anchor bolts.

78. The defendant claims £1563.00 for podium walls to the domestic garage. I agree that figure. Like the defendant, I do not understand the claimant's figure.

79. The claimant seeks to make an omission for brick piers not having been done by the defendant. I accept the evidence of the claimant that those piers were done by English Heritage and that the omission should therefore be allowed.

80. At item 6.8.4 of the Scott Schedule, the parties differ on the overall value of the podium walls for the museum and workshop. I prefer the defendant's lower assessment of £8,433.20.

81. There are then 2 agreed additions of £122 and £232.

82. There is a dispute about the amount of face brickwork and blockwork for the workshop, open barn and museum. The claimant says that the difference between the parties may be accounted for by Mr. Robinson including some work done by Hurstway. On the basis of Mr. Gray's evidence, and in the absence of any confirmation in writing or otherwise that Hurstway did part of this work, I prefer the defendant's figures of £829.50 + £2442.00 = £3,271.50.

83. There are then other agreed items of £40 + 140 +60 + 200 = £440.

84. Disregarding the alleged tender adjustments, I find that the total for garage and museum/workshop foundations taken together is:

£4,874.11
8084.81
1,563.00
8,433.20
122.00
232.00
3,271.50
440.00
27,020.62
- 195.00
26,825.62

(The agreed cost of work to be corrected is included in a later section of this judgment).

None of those figures takes account of the 5% that could have been deducted for retention money).

Museum Floor

85. The tender documents show, (when one is led to the appropriate figures amongst all the scribbles) that the parties agreed on £36,304 for the museum floor and £4,895 for the entertainment area floor. The parties now want the whole floor to be remeasured and priced at prices on which they differ even though there was no one supervising to say what was done. There is a dispute about what materials were used. I see no basis at all for remeasuring this item. The work was done for an agreed price though not completed. If either party was wrong in the initial measurements, that is part of the risk they bear with a fixed price contract. I do not accept that there is any credible evidence that the defendants did not do what they agreed to do or use the agreed materials except that they did not finish the work (as I have mentioned when discussing repudiation) and there is also an allegation of a defect in the floor.

86. In those circumstances, it seems to me that the defendant is entitled to be paid the agreed sum less the cost of completing the work and less any damages payable for any proved defect.

87. I will refer to the cost of completing the work at a later point in this judgment.

Workshop floor

88. The claimant makes a deduction of £476.00 for an alleged reduction of 50mm. in the depth of hardcore bed. The claimant alleges that the hardcore bed was to be made free of charge. Mr. Gray said that he was instructed to remove some hardcore and removed no more than 2 dumper loads of stone. The cost of the removal would have about balanced the cost of the hardcore and I really do not think there is anything in this point.

89. There is a claim by the defendant for work done on the workshop floor. Mr. Robinson prefers the claimant's figure of £1,708.00 to the defendant's figure of £2,195.72 and I agree.

90. The defendant says that 2 men worked helping the claimant lay heating pipes. The claimant said that there was only one man and he named him. The defendant did not name the other alleged helper. I accept the claimant's evidence and on this item I allow £72, as opposed to the defendant's claim of £150.

91. The value of the work done on the workshop floor is therefore £1,708 + £72 = £1,780.

92. Since I find that the defendant was in repudiatory breach of contract, the claimant is entitled to be paid the reasonable additional cost of finishing the work over and above what it would have cost if the defendant had finished it. I shall deal with that later in this judgment.

93. There is also a claim for rectification of a floor said to be "*dished*". I shall deal with that later also.

Drives

94. Mr. Langley said very little in evidence about this topic, though Mr. Robinson dealt with it in detail. Again, I stress that I do not criticise Mr. Langley.

95. There are three drives, Drive A, B, and C. Drive A runs along the western edge of the claimant's property and is a shared drive leading as it does to other properties. It is, however, very important to the claimant as it is the access to Drive C which leads to the courtyard, the museum and the workshop. Drive A runs roughly south to north and at the back of the claimant's property there is a T junction where the drive turns into what is called the back gate where Drive C begins. Between the back gate and the T junction there is an area of dispute known as the turning space. Big lorries would drive up Drive A, turn right into Drive C and then have to back out into Drive A using the turning space to turn round. Drive B is a much simpler affair leading from the road to the front of the house.

96. It is extremely difficult to understand what are the issues between the parties from many lengthy pages of the Scott Schedule. I turn instead to counsel's closing submissions and to Mr. Robinson's report.

97. It is agreed that in certain areas of the drives, an enhanced specification was agreed upon in April, 1998 as a variation and that for that enhanced specification £16,806 was to be paid as a lump sum. The dispute is as to the area to be covered by that agreement. The claimant says that the turning area was included, the defendant says that it was not. The claimant would like the turning area to have the higher specification because it is used by heavy lorries. I prefer the evidence of Mr. Gray that the turning area was not included in the higher specification because that evidence is consistent with the claimant's own letter of 30 April, 1998. In that letter the claimant said that he measured the courtyard area, drive to garden, drive to backfields and drive backgate to courtyard, the whole of which came to 1450 m^2. Those areas were marked in yellow on a plan exhibit D2 and plainly do not include the turning area. On 29 April, 1998, Mr. Gray had quoted for 1850 m^2 at a price of £18568 but the claimant remeasured the area and negotiated the price down. What Mr. Gray had measured at 1850 M^2 was described by him in his letter as "the courtyard, entrance to garden up to the double gates and the field access to the repositioned hedge". The turning area was to be included in the work but not at the higher specification. I see no reason for departing from the agreed fixed price of £16,806 for the enhanced specification for the area I have described.

98. Railway sleepers bedded into the ground with the thinnest edge showing above the ground have been used as edging for the courtyard and some drives. The claimant decided to extend the area of the courtyard from the first plan by relocating the sleepers at the museum end of the courtyard. Mr. Gray said that this put those sleepers on soft ground and a quantity of crushed concrete fill was required under that area of the courtyard which now lay on soft ground. I accept the evidence of Mr. Gray that after some dispute with the claimant, the claimant did accept that he should pay for the extra fill. A reasonable price is the sum claimed by the defendant namely £495.

99. There is also a claim by the defendant for laying 81 m of sleepers in dry mix concrete at a quoted rate of £14.72. The defendant's claim is for £1,192.32 against which the claimant has allowed only £349.92. Mr. Robinson's report records the disputed difference of £842.40. I find that that difference should be allowed.

100. There is a small claim by the defendant for laying an extra 32 M^2 Of MOT type 1. In evidence, Mr. Langley admitted that £168 should be paid for that, and I find that the full claim of £180.80 (to include scraping) should be allowed.

101. There is a dispute about the cost of granite setts totalling 72.50 metres. In a letter of 8 November, 1997, the defendant quoted a price of £21.75 per metre. In the Scott Schedule, the setts are priced at £17 per metre. There is no document challenging the defendant's quotation and no evidence was given to challenge it. I find that the quotations was accepted by allowing the defendant to do the work without challenge and the defendant's claim should be allowed in the sum of £344.38.

102. Mr. Langley admitted a sum of £21 for repairs to the cottage.

103. There is a dispute about some granite chippings left on site. The defendant claims an allowance for these chippings in the sum of £700. The claimant allows nothing. Mr. Langley said in evidence that there might be a problem of contamination of the chippings with weeds but disclaimed any expertise qualifying him to speak on the topic. On the view of the site, I saw no particular problem about these chippings and there has been no authoritative evidence about any problem. During the trial I suggested that if there was a problem with weeds some weed-killer would solve it fairly cheaply and no witness challenged that inexpert expression of opinion. The defendant's claim for £700 should be allowed.

104. Mr. Robinson in his report deals with the drives at great length and in detail. For me to deal with every point at issue between the parties would make this judgment even longer than it will be. I hope that it will be sufficient for me to say that I agree with Mr. Robinson's report on the topic of drives and hardstandings (section 11 of his report) except where I have expressed a contrary judgment. On some points, Mr. Robinson has expressly said that he is unable to form a view because of a conflict of evidence that is a matter for the court. I believe and hope that I have made decisions on all those points.

External Works

105. The figure of £10,500 is given by the claimant for the price for external works. Unfortunately, there is no way that that figure can be related to the individual sums in the tender document of either the claimant or the defendant. The claimant, the experts and counsel have all tried to juggle figures but even allowing for the claimant's usual practice of rounding off figures it is impossible to relate that sum to the individual items in the tender. Accordingly, it is impossible to say that there was a fixed price for a known number of items.

106. In those circumstances, Mr. Robinson accepts, and I am driven to agree, that the defendant's case on external works has to be accepted, namely that "£10,500 ought properly to be treated as a provisional allowance in respect of an as yet undefined scope of work, and that this allowance ought now to be set aside and the defendant's entitlement assessed by reference to the value of the works as eventually constructed". That approach however leads one straight into further difficulty in that the individual rates and prices set out in the claimant's tender document do not in all respects agree with those in the defendant's tender document.

107. There is a minor difference between the parties about what paving around the house was or was not done by the defendant amounting to a difference of £280.50. I think that the claimant is more likely than the defendant to be right about what work was done in the immediate vicinity of the house. There is also a difference about the rate to be adopted. I prefer the defendant's rates where they differ from the claimant's on this part of the work for the reasons given by Mr. Robinson.

108. There is a larger dispute about the cost of the bund on two sides of the museum and workshop. The bund is a very large construction. The defendant quoted originally £1,750 for that work, a price that would not be unreasonable. The defendant's tender document suggests that the quoted price was negotiated down to £1,500. The claimant's document suggests that the agreed price became £250. The latter is so unlikely that I accept the suggestion that the claimant wrote in £250 as the amount of the reduction he negotiated and has now misinterpreted his own document. I find that the agreed price for the bund was £1,500.

109. There was a dispute about coping stones to the garden wall, but in cross-examination the claimant admitted that this item should be at the defendant's figure of £501.80.

110. There is a small dispute about the cost of rebuilding brick piers to the courtyard access. The defendant's original tender was £1,475.00. I accept from the defendant that that tender price was reduced by negotiation to £750.

111. The claimant allows only £440 for topsoiling and seeding. There is little or no evidence to dispute the defendant's higher figures set out on page 50A of the Scott Schedule and I accept the defendant's case on those figures.

112. There is a dispute about relaying flag stones and pavings. The claimant said that some pavings were included in the tender for the front bridge but the documents suggest otherwise. Mr. Lawrence goes far to support the defendant's case on other pavings. I accept the defendant's case on those and other pavings.

113. There is an item headed "sundry repairs to forecourt paving" at £645. It is agreed that this area was not included in the tender but Mr. Gray said that he was instructed by the claimant from time to time to make repairs to this area. I accept what Mr. Gray said. On the basis of Mr. Gray's account of what he claims was done, Mr. Robinson accepts that the charge is reasonable. I accept Mr. Gray's evidence and the amount of the charge.

114. The defendant charged £300 for new bricks for piers to a new access from the forecourt to Drive B. It had been intended that those piers should be made from bricks salvaged from a garden wall that was to be demolished and the tender. However, demolition of the wall resulted unexpectedly in the destruction of the bricks and the defendant had to but bricks. The fact and amount of the charge of £300 are both reasonable.

115. There was no challenge to other additional items in this category apart from the planting of trees. It is agreed that the parties agreed a price of £1,600 for the planting of 29 trees supplied by the claimant. In the event 36 trees were delivered to site and by letter dated 19 December, 1997, the defendant offered to plant the additional trees at the additional price of £55.17 (i.e. pro rata to the original agreed price). The claimant says that notwithstanding that letter he agreed with the defendant that all the trees would be planted for the original agreed price. I accept the claimant's evidence about that. He was very good at negotiating prices down. The claimant also complains that many of the trees died because they were inexpertly planted in impervious clay and they drowned. I am not clear what are the defendant's alleged sins of commission or omission though the claimant

says that he has since been advised that the trees should have been planted half in and half out of the clay. There is no evidence of what he did or did not do. The claimant relies simply on the fact that some trees died (though there was no count of dead trees and certainly many live). In his manuscript instruction to plant the trees dated 10 November, 1997, the claimant specified that the defendant should: "Unload plants - Dig holes - Transport trees to holes - Compost/tree -Plant tree - Stake and tie per tree in such a way that they do not fall by wind". That is not particularly consistent with his evidence that he was relying on the defendant's expertise to know how to plant trees in clay soil. 30 cubic metres of mushroom compost was provided. There is no evidence that the defendant's men did not comply with that instruction and in any event they were working under the supervision of the claimant's landscape gardener, a man named Paul. The claimant said that Paul was a South African who knew nothing about Kent clay, but a fax from the claimant sent on 12 December, 1997 included references to the landscape consultant including:

"Tree, shrub, herbaceous and other plant material to be planted in suitable size. Square holes at sufficient depth. This all to the satisfaction of the moat landscape consultant.

Backfilling topsoil will be used who need to be mixed with compost and fertiliser to the approval of the landscape consultant. ..."

116. Sadly, some trees that are planted do die. There is no evidence of any fault in the defendant's method of planting. If the claimant had seen anything wrong being done I am sure he would have had it corrected.

117. I find that for the planting of trees the defendant is entitled to £1,600 as an agreed sum (but not the sum claimed £1986.19) for the total and without any deduction for trees dying.

118. Mr. Robinson points out an error of £406.50 in the Scott Schedule in the form of unwarranted deductions of items that were not in the claimant's assessment in the first place.

The Lake

119. This is a substantial item in the Scott Schedule. However, the defendant's case is that the claimant and Mr. Gray agreed a final account figure of £46,214.07 for the lake at a meeting on 27 November, 1997 as was confirmed by Mr. Gray by letter of 29 November, 1997. That figure also appears in the claimant's overview of 22 July, 1998. That case was not seriously contested in evidence and was not contested at all in the closing submissions of counsel for the claimant. I therefore accept it despite evidence about disputed measurements made a considerable time after the agreement of the final account figure.

Electric cable

120. By amendment to the Particulars of Claim, the claimant claims damages amounting to £6,667.00 plus VAT for damage to an electric cable from the workshop to the house via the north bridge. The claim does not specify how, by whom or when the damage was caused, though it is specified that a short circuit occurred causing a most inconvenient failure of power supply on 26 December, 1999, a long time after the defendant had left site. There was obviously no work done on that day so clearly the damage was done earlier. The Particulars of Claim allege: *"The mechanical damage and the short circuit was caused by the defendant's failure to comply with the specification and its own method statement in installing the cable. In particular, the specification at page 54 paragraph C required services for electrical/ tele-communications trenches to be a minimum of 1,000mm deep, the sub-main cable was buried 100-200 ram deep. Further, the defendants' method statement at page 10 paragraph 5.7 required service pipes and ducts to be surrounded in sand prior to backfilling. The failed cable was surrounded in soil containing tiles and similar rubble."*

121. There were disputes about what was alleged there. The specification is agreed, but in cross-examination the claimant accepted that he agreed that in order to save money the cable should not be laid in a duct. To save money, the claimant agreed that the cable should be laid from the workshop to the north bridge in a drainage trench, not in a separate duct. Also to save money, the route from the bridge was changed to go around the pavings to avoid the expense of taking up the pavings. The claimant said that it was buried at too shallow a depth around the pavings. All of that makes significant departures from the original allegation.

122. The claimant's main difficulty with regard to this cable is on the question of causation. There is no evidence that there was any damage to the cable in any trench. At the site visit, it was suggested that there was a problem that the cable had been jointed outside the house and that was because only 80 metres of cable had been bought by the claimant. There was a dispute as to whether or not the defendant had advised the claimant to buy 100 metres of cable. The truth of that dispute does not matter because there is no evidence that the jointing outside the house caused the short circuit under the bridge. During counsel's opening and in the claimant's evidence it was said that the actual damage to the cable occurred under the north bridge. A section of cable was produced, about 1½ inches in diameter that appeared to have exploded along a gash of about 3 inches in length. The claimant said that moisture might get into a cable and travel along it to cause damage at a distant point. There was no expert evidence to that effect, but even accepting that as so, it seems an unlikely explanation for a short circuit under the bridge at a higher point than the main portions of the cable. Moreover, if that were so, I cannot see how the cable could have been repaired and made serviceable without detecting and repairing the point at which damp got into the cable. Mr. Robinson said that he and Mr. Lawrence saw some cable that had been exposed for their inspection along the edge of the patio next to the house and could see no obvious damage to the cable. Mr. Lawrence also said that on 29 December, 1999 he visited the site and saw some exposed cable laid on and surrounded with soil containing old tiles and similar rubble. But Mr. Lawrence gave no evidence of having seen physical damage to the cable. Furthermore, in the absence of expert evidence, I am entitled to use the evidence

of my own eyes and observe that the section of cable produced in court, about 14 inches in length, is for the whole of its length heavily wrapped around with insulating tape, strongly suggesting that someone had caused physical damage to the insulating easing of that cable and then sought to repair it with tape. In other words, it is more than likely that the damage to the cable was not caused in one of the criticised trenches underground or at the connection outside the house, but was caused to the section of the cable laid on the underside of the bridge while that cable was above ground. During the progress of the works, the cable was used, at the request of an electrical contractor, ES Electrics, for a temporary power supply to the workshop and it was suspended over the bridge from the house to the workshop. Because of the programming of the works, a quantity of the cable was exposed above ground for a considerable time. I find that the cable was most likely damaged at that time. The damage was probably done by some workman. It may have been done by one of the defendant's workmen, but it is more likely to have been done by others, Hurstway or roofers working on the roof of the house. The claimant has undoubtedly suffered damage. There is a dispute as to whether he has shown breach of contract but he has not demonstrated that the damage was caused by the defendant whether in breach of contract or otherwise.

Completion of the works and repairs

123. It follows from my findings about repudiation that the claimant is entitled to damages for completion of the works if the cost of completion reasonably exceeds what it would have cost to have the work done by the defendant. One would expect that someone brought in to finish off someone else's work would charge more for the tail end of the work than the original contractor. Equally, the claimant is entitled to be paid by the defendant the reasonable costs of making good and repairs. Those damages are not specified in the Particulars of Claim but can be extracted with some difficulty from the Scott Schedule.

124. I shall deal with the costs of completion and repairs under the same headings as the final account figures.

Foundations

125. Agreed cost of work to be corrected: £260.00.

Museum Floor

126. It is agreed that the wearing course to the tarmac road within the museum was not completed by the defendant. However, no claim is now made in counsel's closing speech for the cost of completion. The cost of completing the work raises a very small issue between the parties. The claimant's case is that it cost £2,200 to complete the work. The defendant says that it should have cost £1,900. It will inevitably have cost more to get someone else to do the work especially as it had to be done at short notice, and I prefer the claimant's figure of £2,200. That sum has in fact been paid, albeit in cash. The claimant is entitled to the difference of £300.

Workshop floor

127. The workshop floor was not finished by the defendant. Hurstway submitted a quotation for £6,000 for laying mesh reinforcement and concreting the floor. The claimant also obtained a quotation from Adawall Limited that would have been cheaper than Hurstway's, but Hurstway wer on site and more likely to do the work in the timescale required. The claimant accepted Hurstway's quotation, subject to certain amendments that he noted in manuscript on the quotation to make it more favourable to him. Those amendments included a stipulation that Hurstway should pay the defendant for some wire mesh on site and not take it as free issue. Hurstway did the work and have been paid £6,000. But Mr. Robinson assesses the reasonable value of the work at £4,000, bearing in mind that Hurstway were already on site doing other work. Mr. Robinson assesses the value of the additional cost of finishing this part of the work at £208. Mr. Langley's evidence in cross-examination went a long way to support Mr. Robinson's evidence. I accept that Mr. Robinson is right about what would have been a reasonable price but only if it were applied to a normal tendering situation. But there are times when one has little option but to pay what would in ordinary circumstances be, as part of a large contract, an unreasonable price. The claimant had been left high and dry by the defendant's breach of contract in leaving the job. He needed the work done quickly. He gave the defendant ample opportunity to finish the work. Hurstway were very much in the position of naming their own price. It has to be remembered that although Hurstway were already on site doing other work, they were being asked to do other unplanned and not insubstantial work in a hurry, so one would expect them to quote a high price. The claimant acted reasonably in accepting Hurstway's high price. I find that for completion of the workshop floor the claimant is entitled to £6,000 (cost) less £3,792 (defendant's price) = £2,308.

128. As to the dished floor, the claimant's case is that the floor was weakend by the defendant's failure to carry out instructions. The claimant required the level of the workshop floor to be taken down in level and by removing all the stone and reducing the topsoil level and then replacing all the stone but instead the defendant simply reduced the thickness of the stone. It is evident from the defendant's case set out in the Scott Schedule that the defendant did reduce the level of the floor by taking out some stone. As I have already said, Mr. Gray said he only took out two dumper loads. The claimant says that he proceeded with the completion of the floor in the belief that there remained 100mm of stone in the floor. The claimant says that after completion of the floor by Hurstway, the floor was inadequate to withstand the forces upon it and it became dished. Hurstway have done remedial works but have only been paid half of their bill (which in total was £2,627.08) on the footing that they share responsibility with the claimant for not noticing that the amount of stone was inadequate.

129. It is said on behalf of the defendant that this head of claim should be rejected because there is no expert evidence in support of it. However, in view of the size of this item it would have been totally disproportionate for the claimant to have called a building surveyor and permission to do so may well not have been granted for him

to do so. I am quite sure that if the floor were not dished the claimant would not have required Hurstway to do more work on it and Hurstway would not have done the further work. It is more than likely that If Mr. Gray only took out two dumper loads of stone as he says that he failed to ensure that the dumper loads were filled by stone evenly distributed across the floor. If that is what happened, and I think it likely, then Hurstway would be at fault if they failed to compensate for the unevenness when they spread the initial 170 mm of concrete to finish the job. I think the claimant should recover from the defendant the part of the costs that he has in fact incurred, namely 1/2 of £2,627.08 = £1,313.54.

Drives

130. The claimant claims sums for completing the drives and sums for repairs. I shall deal with those in order.

131. The sum claimed for completing the drives is in total £6,770.51. It is so difficult to derive that figure from the Scott Schedule that counsel for the claimant needed an adjournment during his closing speech to take instructions to enable him to answer my question about it. I should make it plain that counsel appearing before me was not responsible for the drafting of either the Scott Schedule of the Particulars of Claim. The figure is derived as follows:

Total (Sch 44A)	20,210.52
Less Duplicated items and repairs	437.50
	3062.50
	60.00
	275.50
	175.00
	196.00
	284.00
	36.00
	4526.00
	15684.50
Less defendant's contract cost	8914.01
	6770.51

132. **I begin with Drive A.** The additional costs of completing Drive fall into three parts: the turning space; the drive to Mr. Webb's bungalow dust to the north of the turning space); and the remainder of Drive A.

133. As to the turning space, I have already made my findings about that and I allow nothing for the turning space.

134. The defendant says that the small part of the drive leading to Mr. Webb's bungalow was never a part of the contract but that the claimant did make an extra- contractual payment of £100 to the defendant for laying crushed stone in this area. I do not accept that that was the agreement for the reasons given in the next paragraph.

135. As to the remainder of Drive A (other than the turning space), at Scott Schedule page 41A item 7.12.4.3 the claimant claims £2644 for cleaning and applying one coat tar and grey chipping finish for a total area of about 661 metres from the public highway to the line of the front gates and along the west of the garage block and round to the new back gate. Item 7.12.4.6A is for the cost of extending the drive up to Mr. Webb's bungalow over an area of about 57 metres. Those two items total about 718 metres. The defendant's case in the Scott Schedule is that by their tender they agreed to carry out 720 metres. When one looks at the tender books, one sees that both books have the typed figure 680 sq m. In the defendant's book, 680 has been crossed out and 720 substituted. In the claimant's book, the figure of 720 is set against 680. I find that there plainly was an agreement for an area of 720 square metres and I find that that is only explicable by the inclusion of the small part of the drive leading to Mr. Webb's bungalow. But the specification for the part of the drive leading to Mr. Webb's bungalow was the same as for the rest of the drive whereas in the Scott Schedule, the charge for completing the small section of the drive leading to Mr. Webb's bungalow is for a higher specification with MOT type 1 sub-base. I find that the defendant's contract was to finish the whole 720 square metres at the lower specification. I can see no reason why the claimant should have wanted to give Mr. Webb a higher specification on a part of the drive used by Mr. Webb and not used by the claimant.

136. The defendant proposes a sum for finishing 720 m of Drive A at the defendant's tender rate of £3 per square metre totalling £2160.80. The claimant claims £2644 for 661 metres and a further £1052 for the 57 metres leading to Mr. Webb's bungalow. Mr. Langley said that he had seen nothing that was MOT type 1 on the drive leading to Mr. Webb's bungalow and he suggested that a price of £55 would be reasonable for that small section of drive. Although that price comes from the claimant's own expert, I am bound to say that it seems to me to be low for that section of the drive. Mr. Robinson, having made enquiries of local contractors, formed the view that £3 per square metre would be a reasonable rate for doing the work to finish Drive A and he agrees that £2160 would be a reasonable price for 720 square metres. There was no reason to accept a price above the usual reasonable price so far as the drive was concerned. The rate agreed between the parties was £2.92 in the defendant's copy of the tender book and £2.93 in the claimant's copy. At £2.92 the defendant would have charged £2,102.40 for 720 square metres. I therefore award to the claimant for completing Drive A £2,160.00 - £2,102.40 = £57.60.

137. **I turn to Drive C and the Courtyard.** The parties agree that the defendants did not complete laying tar and chippings to the courtyard and Drive C. There is on site a pile of red granite chippings bought for this purpose. The extent of the work is agreed and it is also agreed that the cost if the defendant had done the work would have been £2,498.80. The work has not yet been carried out by the claimant but there is no doubt that he will have the work completed by others. Mr. Robinson calculates that the cost if another completes the work would be £2868 and the cost if the defendant had completed the work would have been £2,498. Difference £370. Those figures were calculated on the basis that either the defendant or the other contractor would use the granite chips on site without further charge. In paragraph 103 above I have already made an allowance of £700 to the defendant for the value of the granite chips. Accepting Mr. Robinson's evidence, I therefore allow to the claimant £370.

138. **There are minor items of remedial work for which claims are made.**

139. There was a claim for £65 for removing weeds from Drive B. That seems not now to be pursued and if it were I would reject it as going merely to matters of ordinary maintenance.

140. There is a claim for £60 for replacing a broken sleeper. Mr. Langley said he had seen no evidence to support this claim and it is in any event out of proportion the claimant's case on placing sleepers generally. I disallow that.

141. A claim is made for £175 for extra tarmac and edge detail around the gate housing. I allow that.

142. There was a claim for sundry repairs to drives. I am not sure whether those claims are now being pursued. The documents put in are contradictory. If the claims are pursued, I disallow them. Mr. Robinson's view was that those repairs were required as a result of the use of the drives by traffic, including heavy traffic.

143. There is a claim for £275 for a broken gatepost. Liability seems not to be disputed but Mr. Robinson says that a reasonable amount would be £150. Mr. Langley offers no opinion. I therefore accept the view of Mr. Robinson and allow £150 to the claimant.

External works

144. The claimant claims £690 for lifting and relaying flagstone paving to the north cast end of the north bridge. I have seen this and agree that some work needs to be done. Some pavings do have concrete under them as specified, as was demonstrated by Mr. Robinson: by poking a pencil through cracks, I satisfied myself that some flagstones do not have concrete under them. Maybe they had, as alleged, a mixture of dry sand and cement. Dry sand and cement is often a good surface on which to lay flagstone. But since concrete was specified, I assume that it was considered to be better in this instance. Mr. Langley's evidence was that an investigation should be carried out, but said that as he was not a building surveyor, he could not say whether any damage might result from the use of dry sand and cement. The defendant comments on the high increase of the claimed cost of the work over and above the defendant's quote. However, the defendant's quote did not include for lifting the flagstones. An investigation cannot be carried out without lifting some flagstones. Having seen the paving, I do not disagree with Mr. Robinson's opinion that there is some small movement in 3 flagstones and some cracking in the joints between them. I allow the amount suggested by Mr. Robinson and the defendant for a limited repair namely £187.50.

145. The defendant also claims £2,198.50 as the cost of completing the external works, to include everything on pages 55A to 57A of the Scott Schedule except the item of £690 to which I have just referred. Counsel for the defendant in her closing address invites reference to Mr. Robinson's evidence and says that she does not propose to deal with these items in her submissions. Counsel for the claimant deals with them in four lines and also gave me some figures in manuscript. Mr. Robinson deals with a number of items, most of which he says he cannot see were within the defendant's contract. I have tried hard to relate the evidence to the Scott Schedule with only limited success. I imagine that the reason why I have had so little help from counsel is that they find it difficult to make sense of this head of claim also. I shall deal with this head of claim by reference to Mr. Robinson's evidence.

146. Pressure washing of paved areas. Mr. Robinson says that the sum at issue is £479.50. I cannot derive that figure from the figures in the Scott Schedule, nor do I see in the Scott Schedule the limited admission by the defendant to which Mr. Robinson refers. However, in view of Mr. Robinson's general reliability I accept his evidence that it is reasonable that this work should be done and that the claimant's figure is reasonable.

147. **Work to the forecourt.** I accept the evidence of Mr. Gray supported by the documents that this was not part of the defendant's contract work and therefore I allow nothing under this head.

148. **Works to the east patio.** Although there is room for some confusion, the claimant has not proved to my satisfaction that this formed part of the contract work.

149. **Regrading/ forming ditch behind museum**. I find that there was an agreement between the parties for this work at a price of £375 by acceptance of the quotation given in writing by Mr. Gray on 1 April, 1998. When the defendant left site, the ditch was incomplete because of obstruction by scaffolding erected by Hurstway. It is significant that the claimant wrote against this item on Mr. Gray's quotation, "As far to the bund as possible. This is because of scaffold". I infer that it was agreed that the trench was to be dug by the defendant up to the scaffold, and that it would be completed later under some other arrangement. The trench was dug as far as it could be with the scaffold in place and I therefore find that the claimant has not proved any entitlement to have the work finished by the defendant.

150. **Cleaning ditch between summerhouse and museum**. Mr._Gray agrees that he did work to this ditch on a daywork basis. There was a dispute about the daywork charges but no complaint about the quality of the work. I disallow the claimant's claim for cleaning out this ditch.

151. **Completion of topsoiling to south of museum.** The defendant accepts that there was an area of about 60 square metres of topsoiling unfinished by him. There is a dispute as to the rate. Part of the dispute depends on whether there was topsoil ready stockpiled nearby. I find that there was. In those circumstances, I accept Mr. Robinson's agreement with the defendant that a reasonable price for completing this work would be £112.50 as opposed to £90 had the defendant completed it. The claim allowed under this head is therefore the difference between those two figures, namely, £22.50.

The Lake

152. It is agreed that work to an agreed value of £350 is required to complete the work on the lake.

The dam on the island

153. The claimant complains that the dam on the island (the purpose of which I have already explained) was too low because it dips in the middle and was not built sufficiently high. Because the dam is too low, the claimant cannot maintain the level of water in the lake as high as he would like without risk to the oak tree on the island that is subject to a preservation order. The lake is there only for aesthetic purposes and the desired level of the lake is purely aesthetic in that the claimant wants to be able to see the lake from various parts of his property, including his study windows. He has gone to a great deal of expense and trouble to have this lake, and provided the contract provides for his wishes, one would assume that they ought to be satisfied.

154. This claim appears only in the Scott Schedule. Though not clearly pleaded there, it is plainly a claim for breach of contract. For the terms of the contract one has to look outside the pleading.

155. The level of the lake can easily be kept below the level of the top of the dam, whatever that level may be, by regulating the level of an outlet weir and not blocking an invert pipe. The invert pipe is sufficiently low that if the outlet weir did not impede it, the level of the lake would be well below the level of the dam. The outlet weir is itself a small dam comprising boards resting in vertical slots in front of the invert pipe. When Mr. Gray left the site he realised that the boards were too big for the slots and left them on the bank of the lake with the intention that they should be machined to the correct size. The claimant or someone on his behalf came along and mistakenly forced the boards into the slots and they cannot now be removed by hand. However, it will not be expensive to remedy that.

156. The question is, since the lake can be kept below the present level of the top of the island dam, is the claimant entitled to say that at the expense of the defendant the dam should be raised so that the lake level; can be raised higher?

157. What is the term of the contract as to the level of the lake? Item 14 of the tender document provided that the level of the water should be 96.5m by reference to a specified datum level. The claimant agreed that in cross-examination. That was a little below the level of the base of the oak tree. Mr. Gray said that he dropped the level of the lake from previous proposed levels of 98.0 and 97.0 to protect the oak tree. In his agenda of 27 November, 1997, the claimant required that the water level should be 97.5 m. That was written after meetings in November between the claimant, the defendant, the council, and "the tree preservation people". Those meetings followed concerns expressed by the claimant that the water level of the lake would be rather low in relation to his house and Mr. Gray pegged out the proposed boundaries of the lake and it was agreed to increase the level of the lake. For that purpose the dam was proposed to protect the oak tree. In his agenda of 10 December, 1997, the claimant wrote: "Due to controlled water level at oak we can raise eventually the water level by 30 em as planned. Any problems with this?" It appears from the defendant's comments to the Scott Schedule at page 74A that he agreed to those requirements. The defendant's insistence that the requirements were due to the claimant's desire to have a higher lake rather than the desire of the planning authority to protect the oak is not to the point. The requirement to have a higher dam was due to a combination of the requirement of the planning authority and the desire of the claimant to have a higher lake. Neither without the other would have required a higher dam. The important thing is that the defendant agreed to the claimant's requirements and he should have built the dam accordingly. It is true that the first written mention of the higher level of water in the lake was in the agenda of 27 November, 1997 after the lake had been constructed and after the lake had begun to fill with water but before it was full. I do not accept that the dam could not have been built to a satisfactory height at that time without emptying the lake.

158. Mr. Gray said that the claimant suggested that the dam could be built from silt from the island pond to save money, but I do not accept that in the end the claimant was in favour of any material other than clay, which is what Mr. Gray preferred.

159. The level of the dam at its lowest point is 97.243, too low to satisfy the claimant's requirements even if one fails to take account of the need to cope with wind blown waves on the lake.

160. As to the cost of a remedial scheme, there are alternative proposals. Monson and Locks propose erecting oak boards on the top of the dam supported by vertical posts and filling in the gap between the boards with clay. The cost of that would be £5,448 claimed by the claimant. The alternative would be to let the level of the lake fall somewhat and after the dam had dried out, to heap more clay on top of it at a cost, in the opinion of Mr. Robinson, of £1,500. The former scheme would give the claimant a solution to his problem substantially better

than he had originally agreed. In this connection, it is relevant that Mr. Gray says that he agreed originally to make the dam for no specific sum by way of payment, it was part of the price for the lake.

161. In all the circumstances, it does seem to me that the claimant is entitled to have the dam raised to the level he requires at the expense of the defendant. If the more expensive option is chosen he will have a better solution than the defendant, by Mr. Gray, agreed to provide and accordingly I find that the defendant should pay to the claimant £1,500 for this work.

162. The claimant has not yet done the work and I would not be at all surprised if he were to take the £1,500 and use it as a contribution towards the more expensive option.

163. The defendant relies on the controversial decision of the House of Lords in ***Ruxley Electronics v. Forsyth*** (1995) 73 BLR 1 as authority for the proposition that the claimant should receive nothing even on the assumption of a finding of contract and breach. I do not accept that applying that decision has the effect for which the defendant's counsel contends. Unlike Mr. Forsyth, I find that the claimant has every intention of amending the defect. Secondly, the cost of doing so, even on the more expensive option which I have rejected, is not in any way disproportionate to the cost of the works on the lake. It is not as though the claimant is planning to scrap the lake and start again.

Conclusion

164. I have endeavoured to decide as many as possible of the disputes laid before me by the parties. There are in addition other disputes not at this stage laid before me by the parties. Miss Hannaford has devised a fairly complex formula for applying the effect of my decisions to other undecided issues. I urged the parties to seek to agree that formula but they have not found it possible to reach such agreement. Miss Hannaford. accepts that her formula is somewhat arbitrary and cannot be justified in strict logic though it might have been desirable to adopt it on grounds of expediency. In the circumstances, I do not feel able to impose the formula on the parties by order without the agreement of both of them.

165. As a way forward, I invite the parties, with the assistance of their counsel and quantity surveyors, to analyse the effect of the decisions I have made and to apply as appropriate for an order for interim payment or payments on the issues so far with judgments for costs accordingly. Once judgment has been so entered, the parties can then decide whether they wish to proceed further and can, if they or either of them wish to proceed, ask for directions accordingly.

Sebastian Neville-Clarke (instructed by Thomson Snell & Passmore) for DD.
Sarah Hannaford (instructed by Park Nelson) for HFF.