JUDGMENT OF COLIN REESE Q.C. TCC. 29th September, 2000

INTRODUCTION

1. The Claimant is an architectural practice with offices in Kansas City, Missouri, USA. It specialises in, amongst other things, the design of sports arenas. It trades under the name of, and I shall refer to it as, *"Hok Sport"*. The claim is for invoiced amounts totalling US$593,628.23. The invoices were submitted in respect of planning and/or design works for a proposed new sports arena in Hannover. The claim is pleaded in contract alternatively in quasi-contract.

2. The Defendants, Mr Geoffrey King and Mr Gernot Frauenstein, are the two signatories to a "*subject to contract*" letter of intent and participants in contract negotiations which thereafter took place. The letter of intent was dated 5th February 1997 (file 2 page 251, hereafter all references given simply as 2/251) and it was issued on behalf of "*Arena Hanover A.G. (in formation)",* which I will call "*AHAG".* AHAG was to be the single purpose joint venture vehicle for the development of this new proposed sports arena. Immediately after the letter of intent was prepared it was decided that a "GmbH" would be a more appropriate type of corporate vehicle to utilise and, in consequence the style of the notepaper of the intended company was changed from "AHAG in formation" to *"Arena Hannover GmbH (in formation)"* - (compare 2/251 with 2/331). However, this particular change has no significance in the context of the litigation because the intended single purpose joint venture corporate vehicle was never formed. For ease of reference, I shall refer to the intended company as "AHAG".

3. In these proceedings, Hok Sport claimed that each of the Defendants was personally liable in respect of the sums which, had it been formed, AHAG would have been liable to pay for the professional services which it (Hok Sport) undertook between February and June 1997. Hok Sport relies on Section 36C of the Companies Act 1985 which provides - *"A contract which purports to be made by or on behalf of a company at a time when the company has not been formed has effect, subject to any agreement to the contrary, as one made with the person purporting to act for the company or as agent for it, and he is personally liable on the contract accordingly."*

   By regulations made pursuant to Section 130(6) of the Companies Act 1989, Section 36C has been applied to companies incorporated outside Great Britain (see Regulation 3 of The Foreign Companies (Execution of Documents) Regulations 1994 - SI 1994/950). When considering the statutory predecessor of Section 36C in ***Phonogram Limited v. Lane*** *[*1982] QB 938, the Court of Appeal held that, unless there was an express agreement that the person signing was not to be liable, a person purporting to contract for a company not yet formed was personally liable even if **all** those involved were aware at the time that no company then existed (see per Lord Denning MR at pages 943D and 944 D-E). The applicability of Section 36C in cases of quasi-contractual liability has, so far as I am aware, not been considered in any reported case - certainly none was cited to me.

4. Mr King and Mr Frauenstein each denied the alleged personal liability. In his Re-Amended Defence Mr King relied on the "*subject to contract*" heading of the letter of intent. It was contended that the letter did not give rise to any legal relationship; there was no intention to create legal relations; it did not comprise an offer capable of acceptance alternatively any offer which it did contain was not accepted. In summary, it was submitted that the letter was simply a document which had been written in the course of what were continuing negotiations; those involved in the negotiations hoped that a contract would be made at some future date but, unless and until a formal contract was signed any work undertaken by Hok Sport was undertaken on a speculative or anticipatory basis without any assurance of payment. In the event AHAG was not formed, the Hannover project did not go ahead, no formal contract was ever signed and, in those circumstances, it was contended that Hok Sport had no entitlement to payment for the planning and/or design works which it had carried out.

5. At an adjourned Case Management Conference on 20th December 1999, H.H. Judge Bowsher Q.C. ordered the trial of the following preliminary issue - *"Are the Defendants or either of them personally liable to pay the Claimant for the works it carried out for the Hannover Arena project ?"* (1/113 to 114)

6. In my summary of the Defendants' contentions I mentioned only the position taken by Mr King. I ignored Mr. Frauenstein because, in January 2000 the claim against him was settled. The settlement agreement is at 1/116A to 116F. The parties to the agreement were Hok Sport (1) and Mr. Frauenstein and the German corporations for whom he acted (2). By the terms of the settlement Mr. Frauenstein agreed to pay DM350,000 in full and final settlement of the claims against him. It was agreed that all drawings, plans, specifications etc. provided by Hok Sport in connection with the proposed project including the copyright, design right and all other intellectual property rights in that work were and should remain its sole property. It was also agreed as part of the settlement that Mr. Frauenstein would disclose documents and be prepared to give factual evidence in the continuing proceedings between Hok Sport and Mr. King. I mention the terms of the settlement because, in the submissions made by Mr Brook Smith on behalf of Mr King, reliance is placed on the benefit which Hok Sport has received as a result of it. However, I think it worth noting at the outset that the settlement terms cannot deprive Mr King of the interest he has acquired in those drawings, plans, specifications etc. if Hok Sport succeeds in establishing the personal liability for which, in these proceedings, it contends.

THE EVIDENCE

7. At the trial of the preliminary issue evidence was given by Mr J. F. Walters (senior vice-president of Hok Sport), by Mr W.C. London (a Hok Sport project manager) and by Mr G.T. King (the First Defendant). Although he played a prominent part in the material events, most particularly in February 1997 between Hok Sport receiving the letter of intent dated 5th February 1997 and the start-up meetings in Kansas City later that same month, Mr

Lischer of Hok Sport's London office was not called as a witness. He is no longer in Hok Sport's employment but, according to Mr Walters, he remains in London having set up his own company.

8. In my judgment, the contemporary documents, objectively read, very largely show what happened. The comments of the witnesses, each of whom was reviewing events and re-reading the documents in the light of the clear understanding which he had gained of the parties' respective submissions/aspirations in this litigation were, whilst interesting, of comparatively little assistance in the resolution of the preliminary issue. To a limited extent the witness statements and oral evidence assist in fleshing out certain parts of the story.

9. Insofar as Mr Walters and Mr London gave direct evidence of what happened at meetings and/or of the gist of conversations during meetings or in the course of telephone conversations, I accept almost all of the evidence which one or other of them gave. The part of Mr Walters' evidence that I do not accept is his recollection of being advised by Mr King at the kick-off meetings in February 1997 that "funding for the project was not an issue since all the arrangements had already been put in place (witness statement, paragraph 36 - 1/70 to 71), his further recollection of being told by Mr De Scossa in Mr King's presence that "the money [was] in the bank" (cross-examination, 3rd May 2000 when questioned on paragraph 36 of his witness statement) and his comments on the impression formed during the course of the meetings held at Anaheim in April 1997 (witness statement, second and third sentences of paragraph 50 - 1/72). Whilst I could accept that something of a re-assuring nature may well have been said in relation to the state of negotiations for project funding at one or other or both series of meetings, I do not think it probable that either Mr King or Mr De Scossa would have made categorical false statements on either occasion. Furthermore, had any such categorical statements been made at the February meetings, I would have expected to have found Mr Walters referring back to them during later exchanges on the question of non-payment of invoiced sums; and had an unequivocal commitment to prompt payment been made at the April meetings, I would have expected Mr London to have written in different terms on 28th April 1997 when he said ".....it is our understanding that we can anticipate payment ....in mid May" (3/578); and, perhaps more significantly, I would have expected him to write in different and stronger terms when he specifically addressed the continuing failure to make payments in his letter of 3rd July 1997 (3/782 to 783).

10. In his evidence Mr Walters said that, at or by the time of the kick-off meetings in February 1997, he understood the following matters -

(1) that AHAG was to be the development company for the Hannover Arena;

(2) that "European Arenas Limited", an English company which I will call "EAL", was to be the majority shareholder in AHAG and to be a company which "effectively represented a group of investors put together by Mr King";

(3) that "Arena A.G." a German company which I will call "AAG" and several German partners were the putative minority shareholders in AHAG;

(4) that the rôles of Mr King and Mr Frauenstein were that "Mr King [represented EAL and] was in charge of overall project direction and finance whilst Mr Frauenstein was in charge of project implementation on behalf of AHAG" (witness statement, paragraph 34 - 1/69).

This evidence was, in substance, repeated on a number of occasions during cross-examination. I accept this part of Mr Walters' evidence and also similar evidence given by Mr London as to the understanding which he came to have - which I see no need to quote separately and specifically. In my judgment, neither of these gentlemen had misunderstood the true position. The understanding which Mr Walters and Mr London came to have was an accurate understanding of the position (see further below for my views on Mr King's contrary evidence).

11. I turn to consider the evidence given by Mr King. In their closing submissions counsel for Hok Sport suggested that Mr King was *"a very unimpressive witness...[being] evasive and, whether honest or not, ... totally unreliable."* I do not agree with that suggestion. In my judgment, Mr King falls into the category *"honestly mistaken"* so far as his appreciation of the potential legal consequences of his actions is concerned but I did not find him either *"evasive"* or *"totally unreliable."* He dealt courteously and fairly with almost all of the questions that were put to him and agreed (either expressly or in substance) with many of the points that were put to him. There are two particular aspects of his evidence which do not fit with the impression gained from reading the contemporary record and which, for that reason, I cannot accept. I deal with these matters below but, in my judgment, these do not either cast doubt on his integrity or generally undermine his credibility/reliability as a witness.

12. Mr King is a fellow of the Royal Institute of Chartered Surveyors and Chairman of Widnell (an unlimited English company) which provides, amongst other things, cost consultancy, project management and building surveying services internationally. In 1996 he was a director of and held shares in various Widnell companies including *"Widnell Far East Ltd"*, which I will call *"WFE"*, and *"Widnell Niagra Ltd"*. This company, Widnell Niagra Ltd., changed its name to *"European Arenas Ltd."* by a Special Resolution dated 25th June 1996 (3/817) and, as I have said, I will call it *"EAL"*. It is convenient at this point to deal briefly with Mr King's involvement with each of these companies -

12.1 EAL had begun life as an off-the-shelf company called *"Rapidchart Ltd"*. It had been incorporated in January 1990 (3/819). It was acquired for use as a Widnell company and the name was changed to Widnell Niagra Ltd (3/818). Mr King and Mr Rainbird of Widnell were the only two shareholders from 1990 until 1996. Each of them held one share. In 1996 as part of the general planning for the Hannover Arena Project (and in the hope/expectation that other projects would follow) it was decided that use should be made of this company. Its name was changed (see above) and then later in the year its shareholding was changed. The Widnell shareholders were replaced by two gentlemen who were involved in raising finance for the intended project, Mr

Broughton and Mr De Scossa (see further below). Although he transferred his share and resigned as a director (3/826 and 855), Mr King continued to play a rôle in EAL through a family company called *"Clemduct Ltd"*. The shares in Clemduct Ltd were held by Mr King, his wife and children (3/847). Clemduct Ltd was appointed a director of EAL on 8th November 1996 (3/859) and company secretary of EAL on 18th November 1996 (3/857).

12.2 WFE was the Widnell company through which Mr King was to provide professional services to EAL and to the intended single purpose joint venture vehicle, AHAG. It was a part of Mr King's (factual) case that WFE were formally retained by EAL under the terms of a written agreement dated 25th October 1996 (2/184 to 194) to be in overall control of the costs of the project on behalf of EAL. According to Mr King, that rôle of WFE (and hence his professional rôle) was quite separate from the rôle of EAL (represented by Mr Broughton and/or Mr De Scossa) and this was something understood by Hok Sport in 1996/7; Hok Sport could never have understood that he (Mr King) was a promoter of the Hannover Arena project or a promoter of any corporate vehicle which might be used in that project (1/94). This is the first of the two aspects of Mr King's evidence that I cannot accept. Having reviewed the contemporary documents, in my judgment, Mr King's rôle was not as contained or limited as, with the benefit of hindsight, and in light of the pressures of this litigation, he now wishes it had been. It is plain from the contemporary record that Mr King was one of the significant players actively involved in the Hannover Arena project - to borrow a well-worn phrase, he was himself one of the "movers and shakers"; he was not simply an arm's length adviser "shaken" or called upon from time to time for specific cost control or other professional advice.

13. The second of two aspects of Mr King's evidence that I cannot accept is the suggestion that when he signed letters *" For and on behalf of AHAG Arena Hannover AG (In Formation)"* - see the letter of intent dated 5th February 1997 (2/251) or *"For Arena Hannover GmbH i.Gr"* - the expression *"i. Gr."* being the German abbreviation to indicate a company that was being formed - see letter of 4th April 1997 (2/504), Mr King made two administrative errors. Mr King said that his intention in signing those letters was to signify his agreement, on behalf of WFE as the professional costs consultant, to their contents. He said that with hindsight he had been wrong to sign on behalf of the intended joint venture vehicle. He drew attention to the way in which the letter of 21st January 1997 (2/225 to 226) had been signed and said that on the face of these two letters he should have taken care to have ensured that he signed in the same way. In my judgment, this part of Mr King's evidence is also tainted by the fact that, when looking back over the events of 1996 and 1997 with the benefit of hindsight and in the light of the pressures of this litigation, he recollects his rôle as having been more contained or limited than I find it to have been. In my judgment the suggestion that Mr King acted mistakenly at the time when he signed those letters is not credible. In cross-examination more time was spent dealing with the letter of intent than the letter of 4th April 1997. When asked specifically about the letter of intent at the end of the day's evidence on 3rd May 2000, Mr King said that it had been left to him to decide in what capacity he should sign the letter. He was (and still is) an intelligent businessman; he prepared the draft of the letter of intent; his secretary informed Mr Frauenstein's secretary that he intended to sign on behalf of the intended joint venture vehicle (2/247) and Mr King did not suggest that she had mistaken his instructions to her; Mr King signed the letter of intent first (2/249 to 250) and he did so at a time when the fact that he had previously countersigned the letter of 21st January 1997 (2/225 to 226 - a letter soliciting a revised fee proposal from Hok Sport) in his cost consultancy capacity must have been fresh in his mind. Turning to the later letter of 4th April 1997 (2/504), this was drafted by Mr Frauenstein and submitted to Mr King for comment (2/500). It is clear from Mr Frauenstein's secretary's fax of 3rd April 1997 that tactical considerations in relation to the then ongoing commercial negotiations with Hok Sport were at the forefront of Mr King's mind (2/502 to 503). Had he wished to alter the capacity in which he was to sign the letter Mr King could have done so.

14. I have dealt with the second of the two aspects of Mr King's evidence that I cannot accept with some care because of the emphasis which was given to it in the case. However, before leaving this matter, I should perhaps add that once I had concluded that Mr King was mistaken in recollecting that he had played only a specific and limited rôle in 1996 and 1997 and accepted that Mr Walters (and Mr London) had come to have an accurate understanding of the position, I do not believe that any mistake on Mr King's part (such as he alleged) could have had any possible effect on the result of the preliminary issue.

THE FACTS

A. Uncontentious Background Facts

15. In the early 1990s the Philipp Holtzmann Corporation of Frankfurt Am Main, Germany had set up a 100% owned subsidiary company called "Arena A.G." which, as I have said, I will call "AAG". This company was set up to develop construct and manage arena projects in Germany. Mr Gernot Frauenstein was an officer of AAG. In 1996 AAG had identified potential sites in a number of major German cities (including Hannover) and made commercial arrangements with certain major German corporations who were to manage the new arenas via new local management companies. These arrangements had involved setting up a company called "Arena Management A.G.", which I will call "AMAG", in which Philipp Holtzmann and AAG held 40% of the shares and the other major German corporations held the balance equally.

16. On 25 October 1996 a Memorandum of Understanding was made between AAG and EAL. A draft had been in existence since July 1996 (2/168 to 177). It would appear to have taken some time to finalise. No complete signed version was produced in the litigation but reference was made to it in the later Funding Agreement (1/104.Y to 104.jj at 1/.104.hh). According to the recitals to the Memorandum -

- [EAL was] a specially formed private share holding company registered in London in 1996.
- [EAL was] the focus for international institutional investment funds intended for placement in European Leisure and Arena/Stadium projects.
- EAL [wished] to enter into a Joint Venture Company with AAG for the development, construction and management of Arenas and to provide equity finance for the Arenas.
- AAG [wished] initially to acquire a new Arena Complex in Hannover and [had] approached EAL who [had] agreed to provide the majority of the finance. AAG [agreed] to apply for the building permit in the name of AAG and later transfer this to a company jointly owned with EAL.
- AAG [had] held detailed discussions with the Hannover Authorities who had indicated formally their willingness to contract with AAG for the provision of a new Arena Complex.

It [was] EAL's intention to own a network of Arenas in Europe with a minimum of three in Germany. Should it be successful in acquiring Arena developments in two other European cities, such as Copenhagen and Madrid then it would intend to work further with AGG in Germany in other smaller Arenas subject to further negotiations with the planned operator.

The Memorandum recorded the parties agreement to go ahead with the Hannover project if the necessary funding and permissions could be obtained. In particular, they agreed to form a new company which was therein called "*Hannover Arena Real Estate GmBH*" and which I will call "HARE". This company was initially to be owned as to 26% by AAG and as to 74% by EAL. AAG was to transfer all rights to the Hannover project to it (Clause 2 - 2/171). By Clause 5 of the Memorandum the parties envisaged that HARE would arrange a turnkey contract for the design construction and completion of the project. That was to be done *"in association with [WFE]"*. WFE was to be appointed as financial advisers and their fees were to be paid by EAL or HARE (2/173 to 174). As matters developed, it was AHAG rather than HARE that became the intended single purpose joint venture vehicle.

17. Having outlined the origins of the involvement of AAG (and Mr Frauenstein) and EAL/WFE (and Mr King), it is perhaps convenient to consider the early involvement of Hok Sport in the Hannover project. Discussion of the possibility of Hok Sports providing conceptual design services to AAG for use in connection with marketing and/or soliciting finance for the Hannover project appears to have begun sometime during 1995. The executive who was directly concerned at that stage was Mr Lischer of Hok Sport's London Office. By his letter dated 25th March 1996 (2/122 to 12) Mr Lischer recorded Hok Sport's understanding of the work which it was then undertaking for AAG. Mr. Frauenstein signed a copy of the letter to indicate his acceptance of its contents. The letter stated -

HOK Sport [was to] provide design services for the development of a conceptual design and preparation of documents to be used by AAG for marketing and soliciting finance for the Hannover project. Although intended for construction in Hannover, it [was] understood that the design [would] be utilised by AAG as a prototypical arena of similar size and function for development purposes in other locations.

It [was] agreed that should the Hannover project, or others proceed based on the HOK Sport design, [HOK International Inc. - "HOKI" would] be commissioned to develop its design. The compensation [would] be mutually agreed to upon identification of the scope of work and a contract for professional services [would be] executed between HOKI and AAG.

Scope of Work

HOK Sport [was to] prepare the following work product:

1. A written description of the arena and site requirements.

2. Conceptual design work [of various sorts specifically identified in this and the following numbered paragraphs] .....

Additional work outside of the basic services identified above [was to] be authorised in writing before commencement by HOK Sport.

The above drawings and documents [were to] be prepared for assembly into an A3 brochure. Written text [was to] be in German. One original set, for reproduction, and 4 copies [were to] be provided to AAG.

Schedule

31 January 1996:	Submission of written project description.
07 February 1996:	Submission of conceptual sketches, defining compliance with AAG programme.
09 February 1996:	Confirmation of concept and programme by AAG.
21 February 1996:	Submission of progress drawings to AAG for approval.
22 March 1996:	Submission of final documents, excluding the watercolour renderings and model which are prepared by commissioned artists.
30 March 1996	Colour renderings and model at no additional cost.

Compensation

Compensation for the basic architectural services [was to] be on a flat lump sum basis in an amount of DM120,000. This [included] reimbursables, all direct costs and a reasonable amount of travel by Michael Lischer from London to

Germany. This [excluded] travel from the United States to Germany and sales or other taxes. Additional travel or other unforeseen expenses [were to] be agreed with the Owner in writing prior to undertaking.

A copy of HOK's general conditions [was] attached and made part of this Agreement [HOK Sport was] continuing to develop the design and [would] appreciate acceptance of this Agreement.

18. The preliminary conceptual design work appears to have been satisfactorily completed and the materials were used to promote the intended scheme. By June 1996 Mr. Lischer was considering how best to structure a fee proposal for the next stages of the design process, taking into account the differences between normal German and American project phasing. (2/127 to 138). It would seem that he had been told that AAG intended to appoint "an independent cost consultant or Q.S. to assist in the development of the design budget" (2/127). There was a meeting to discuss the project in Kansas City on 25th and 26th June 1996 after which, on 28th June 1996, HOK Sport made its proposals for further services. The letter dated 28th June 1996, addressed to Mr Frauenstein at Philipp Hotzmann, was signed by Mr James F Walters, Hok Sport's Senior Vice President (2/140 to 160). Three different stages of work were envisaged. First, involvement in conceptual design refinement and pre-project approval processes for which Mr Walters proposed time charging and expenses reimbursement. The second stage of work was detailed design development if the decision was taken that the project should go forward. During this second stage the design would be sufficiently developed to enable application to be made for a building permit. A fee for US$1.64m was proposed for this stage of the work. This was based on the scope of work described in standard American Institute of Architects' ("AIA") Conditions. The third stage of work was monitoring construction and co-ordinating the work of other professionals during construction for which no specific fee proposals were made in the letter. The letter concluded with a declaration that Hok Sport was "... prepared to begin work immediately on this project" followed by an expression of hope that the proposals made were what had been requested.

19. The fee proposal was acknowledged on 8th July 1996 (2/163). So far as Hok Sport was concerned, matters were then effectively put on hold for some months whilst the viability of the project and possible sources of finance were explored by others. It was at this time that negotiations were ongoing between AAG and EAL/WFE which resulted in the Memorandum of Understanding between AAG and EAL and the Agreement between EAL and WFE, both of which were dated 25th October 1996 (see above). It was not until after these arrangements were in place that matters began to move forward. A meeting of all the main players was arranged at Anaheim to view an arena there and to discuss the Hannover project. Those attending included Mr Frauenstein, Mr King and the two new shareholders of EAL. After that meeting, on 16th December 1996 (2/205 to 206), Mr Lischer wrote to Mr King at the offices of the Widnell Group in London. In that letter, he stated that although he did not anticipate any contentious issues delaying the execution of an agreement between Hok Sport and, what he called, "the client group" time was of concern. He invited the submission of a draft agreement by 24th December 1996 in order that it might be reviewed over the holiday period. He put forward the names of possible sub-consultants and concluded with the hope that Hok Sport would be "in a position very early in the New Year to begin work in earnest". Mr King acknowledged that letter on 19th December 1996 (2/207). He suggested that it would be appropriate "to set up a meeting in January to discuss and conclude [Hok Sport's] appointment". He stated that Mr Walters should also be present at that meeting.

B. The Events leading up to the Letter of Intent dated 5th February 1997.

20. Having set out the uncontentious background I now come to deal with the events which happened between 15th January 1997 and 5th February 1997.

21. The starting point is Hok Sport's letter dated 15th January 1997 (2/213 to 217 and further copy with Mr King's manuscript annotations at pages 218 to 221). This letter was addressed to Mr Frauenstein of AAG/Philipp Holtzmann. It was a proposal for the provision of design/supervision services for the Hannover Arena project. The work was divided into five stages but the proposal envisaged continuous, uninterrupted progression of the project. The letter referred to "the client" or "the client group" in terms which made it clear that Hok Sport appreciated that some entity other that AAG or Phillip Holtzmann was anticipated to be the other contracting party. The letter concluded in terms which were very similar to those which Mr Walters had used some six and a half months earlier when the first proposal for the detailed design/supervision had been made. In particular, once again the statement was made that Hok Sport "was prepared to begin work immediately on this Project".

22. Mr Frauenstein and Mr King discussed Hok Sport's proposal. There was a telephone discussion with Mr Lischer on 20th January 1997 which was followed up by a letter dated 21st January 1997 (2/225 to 226) which was sent on the notepaper of "AHAG (in formation)". This letter was signed by both Mr Frauenstein and Mr King. Mr Frauenstein signed expressly on behalf of "AHAG Arena Hannover AG in formation" describing himself as "Director". Mr King signed on behalf of "Widnell Far East Limited" describing himself as "Chairman of the Board". The letter requested the submission of a revised fee proposal. It described what was needed in order to "guarantee" that the documentation required for the building permit could be submitted on 30th June 1997. That, it was stated, would enable the authorities to issue a permit three months after that. The letter referred to approvals being given by or on behalf of the funders (the references to "Ogden") and to the involvement of a "cost controller" who was to safeguard the design in regard to cost in order to avoid overruns of individual budgets. According to Mr King that latter reference was a specific reference to the rôle which WFE was to play in the project and that was his concern.

23. Mr Lischer responded on behalf of Hok Sport on 24th January 1997 (2/227 to 228). He expressed agreement with the strategy but warned of the difficulties that might well be encountered with a requirement for the design to be developed in great detail and in a short timescale, particularly in the light of changes made since the original conceptual designs had been prepared. He concluded the letter -

"The June 30 deadline is achievable assuming we can begin design work immediately. In order to facilitate this, the following would be useful:

1. *Initial indication from Ogden regarding the building design brief.*
2. *Information on the site including topographic and geotechnical surveys.*
3. *Details of the area available for construction of the building, site vehicular and pedestrian circulation and details of surrounding buildings.*
4. *Completion of negotiations and execution of the Architect's Agreement within the next week.*

Please phone me at your earliest convenience so we can progress these matters. We look forward to working with you on this exciting project and have a design team ready to begin."

24. On the same day Mr Frauenstein circulated draft itineraries for a proposed "Kick-Off Meeting" in Kansas City in the week commencing 24th February 1997 and for a proposed "Phase 4 Start-Up-Meeting" in Anaheim in the week commencing 21st April 1997 (2/229 to 232).

25. On 29th January 1997 Mr Frauenstein (Philipp Holzmann) sent to Mr King (WFE) a draft of the proposed contract with Hok Sport. In the covering fax he noted that Mr Lischer was "also waiting (desperately) for the proposal so that he [could] start working on it" (2/233).

26. On 31st January 1997 Shearman & Sterling's Frankfurt office sent to Mr King (of "Widnell") their considered advice that a "GmbH" would be a more appropriate corporate vehicle than an "AG" to carry out the project which had been described to them where only five shareholders were envisaged and where EAL as the majority shareholder wished to be able to exercise direct control over the management of the joint venture vehicle (2/234 to 239). Mr King copied that letter to Mr Broughton and Mr De Scossa. He progressed this aspect of the matter by sending a fax dated 4th February to AAG (Mr.Schulz) in which he indicated what remained to be "finalised between us" so far as the management of the joint venture vehicle was concerned (2/240 to 243). This fax was also copied to Mr Broughton and Mr De Scossa.

27. On 5th February 1997 Mr King responded to Mr Frauenstein's fax of 29th January 1997 concerning the proposed contract with Hok Sport. He suggested that the most appropriate form to use would be a "FIDIC Agreement suitably amended". (2/244). On the same day the letter of intent (2/251) came to be drafted. Mr Burnett submitted that it is the pivotal document in the case. It was signed by Mr King on the 5th or 6th February and by Mr Frauenstein on the 6th or 7th February before being transmitted from Frankfurt to Hok Sport's London office on the morning of 7th February 1997. The letter which was sent on "AHAG (in formation)" notepaper and addressed to Mr Lischer reads -

SUBJECT TO CONTRACT

Dear Mr Lischer

RE: HANOVER ARENA DEVELOPMENT

Following the meeting in Anaheim in November 1996 you are now aware of our interest in this project, together with our joint venture partners Arena AG of Frankfurt/Philipp Holzmann and of our initial discussions with Ogden Entertainments Inc. of New York for the preparation of a Feasibility Study which is due to be delivered to E.A.L. within the next 7 days.

For our part we have seen details of your involvement with the project to date and of course are well aware of the broad experience of H.O.K. in this sector.

We are pleased to confirm that it is our intention to award to HOK the role of Architect in collaboration with the Technical Services Division of Philipp Holzmann.

We propose that the FIDIC Agreement for Consultants be adopted as the basis for the contract with you incorporating the Design Philosophy set out in the AHAG letter to you of 21 January 1997.

The detailed negotiation on your appointment will be carried out on our behalf by Gernor Frauenstein and Geoffrey King during the meetings in Kansas City at the end of February.

(duly signed) (duly signed)

GEOFFREY KING GERNOT FRAUENSTEIN

For and on behalf of For and on behalf of

AHAG Arena Hannover AG AHAG Arena Hannover AG

(in formation) (in formation)

28. That letter came to be written after Mr Frauenstein (Philipp Holzmann) sent a fax to Mr Broughton of EAL at just after 10.00am on 5th February 1997. He headed the fax "Arena Hanover Kick-Off Meeting in Kansas City the week of February 24th" and stated -

"before we can even make concrete plans (itineraries, flights, hotel etc) for the above Kick-Off Meeting, ***it would make sense and is actually necessary to send a Letter of Intent to [Hok Sport] stating that they will be the designated Architects for the Hanover Arena.***

As [Pan Oceanic] /EAL/AHAG will be [Hok Sport's] contractual partners, the letter has to come from [Mr de Scossa] or [Mr King]*. To avoid more slippage in regard to the time schedule, we would like to urge you to act accordingly.*

Please advise when this is done or send us a copy of the LoI, so that we can get the ball rolling. The 24th is not far away....". (emphasis added - 2/245)

There was no written response from Mr Broughton. In cross examination Mr King said that sending a letter of intent was necessary because there were still overtures from other parties and it was necessary to put Hok Sport's mind at rest that they would be chosen as the general architect for the Arena. The response to Mr Frauenstein came from Mr King on Widnell notepaper. Initially he faxed :

"In confirmation of my telephone conversation with Rosemarie [Mr Frauenstein's secretary] today I will issue a qualified Letter of Intent to [Hok Sport] based on the draft prepared in November 1996. This will be addressed to [Hok Sport] in Kansas City with a copy to Michael Lischer in London.

I have agreed with Rosemarie that she will contact [Hok Sport] in Kansas City and ask them to arrange hotel accommodation for us all." (2/246)

This was followed by a draft of the letter of intent (2/248) which Mr King proposed. The text of that draft was identical to that of the letter which was later sent and which I have set out above. In the covering fax (2/247) Sue Cahill (Mr King's secretary) informed Rosemarie that Mr King intended to "put [the draft] on AHAG notepaper and sign the letter "for and on behalf of AHAG (in formation)."

29. On 6th February 1997 Sue Cahill faxed the letter of intent which Mr King had signed to Rosemarie. Mr Frauenstein was invited to sign the letter and to fax it directly to Mr Lischer (2/249 to 250). He did so before, as I have already said, the letter was faxed to Hok Sport on the morning of 7th February 1997.

C. The events after Hok Sport received the Letter of Intent dated 5th February 1997

30. On 6th February 1997 Mr King notified Shearman and Sterling that it had been agreed to proceed with the formation of a "GmbH" rather than an "AG" (2/252).

31. On 7th February 1997 EAL (Mr Broughton) sent a fax to AAG (Mr Schulz) explaining the funding arrangements that EAL was proposing if AAG and the local partners were prepared to agree to them (2/253 to 256). Whilst for present purposes almost all of the detail can be ignored, in the first two paragraphs of the letter Mr Broughton dealt with the "funding agreement that [he and Mr King had] recently signed with the fund managers against the Local Partners Guarantee". This had been done because of the urgency of getting "some funds flowing into the project account".

32. On 10th February 1997 Mr Frauenstein (Philipp Holzmann) faxed a copy of the letter of intent to Hok Sport in the United States. The fax was addressed for the attention of Mr Labinski and Mr Walters. It reads -

"attached please find a copy of the Letter of Intent which was sent to Mike Lischer last week. I would greatly appreciate it if you would give me a call after you get this fax in order to discuss the itinerary for our upcoming meeting in Kansas City on February 24th.

Thanks. Looking forward to hearing from you..." (2/257 to 258)

33. On 11th February 1997I Hok Sport (Mr Walkers) wrote to Mr Frauenstein at Philipp Holzmann concerning the proposed meeting at the end of the month. He included on the list of matters to be considered -

"5. Refine the architectural design services contract for execution and clarify any unresolved issues. As we understand it those unresolved issues are as follows:

a. Scope of work as defined by the FIDIC agreement.

b. Your desire that relates to consultants. [Hok Sport] has proposed that we are able to retain design consultants with arena experience. Please immediately confirm that you want [Hok Sport] to have these consultants at the work session....."

(2/263 to 264)

Mr Frauenstein responded to point 5b. by confirming that Hok Sport should provide the design consultants at the forthcoming work session (2/265). Mr King and Mr De Scossa made provisional arrangements for flights to Kansas City but confirmation of these was not to be made until "financial moves had been completed by Deutsche Bank" (2/267).

34. Internally within Hok Sport, on 14th February 1997, Mr Lischer expressed concern to Mr Walters about "our lack of agreement with [EAL] and the work they hope to achieve (in other words the money we need to spend) at the workshop. Considering this FIDIC agreement may take some time to unravel [Hok Sport needed to table its] standard letter of intent with the standard conditions for execution prior to agreeing to staff up for the workshop" (2/269). Later that day, after he had read a copy of Mr Frauenstein's response to the letter of 11th February 1997, Mr Lischer expressed himself to be "more worried than ever". He noted that no time for contract negotiations had been scheduled during the intended meetings. He repeated the points he had made earlier in the day (2/271).

35. At some time that same day (i.e. 14th February 1997) Mr Lischer faxed Mr De Scossa to express his concern that "no progress had been made on negotiating the [Hok Sport] Agreement" notwithstanding the fact that this was a matter which had been pursued with Mr Frauenstein and Mr King "since last November". He suggested to Mr De

Scossa that the contract "or at least an interim document agreeing fees and scope of services" should be in place before 24th February 1997 (2/270).

36. Thereafter during the course of that day Mr Lischer must have received authority to send a "Letter of Agreement for Professional Services" to Mr Frauenstein (AAG/Philipp Holzmann). The letter was expressed to "act as our agreement to initiate pre-design services" and to be intended to cover the position "until such time as the appropriate form of agreement [should] be entered into." It had attached to it, as exhibit "A", the Hok Sport proposal of 15th January 1997 (see above) and, as exhibit "B" certain General Conditions. The company with whom Mr Lischer envisaged contracting was AHAG. (2/272).

37. Finally, on that same day, Mr Walters responded directly to Mr Frauenstein. He wrote in rather more conciliatory terms, dealing with the contractual issue in this way-

"... I presume that at some point during the day we will be able to discuss in detail our contractual relationship on this project as well as get an understanding of the schedule, project scope of services, and other fundamental project issues." (2/297)

38. Mr Frauenstein reviewed this proposed interim contract. On 16th February he sent a fax to Mr King in which he said -

"attached please find proposal for an interim contract between AHAG and [Hok Sport] for the Kick-Off meeting in Kansas City next week for your review. Please see also Exhibits B. I have already marked some paragraphs with my comments. I need your comments/suggestions back latest this Thursday, Feb, 20th, to avoid "blowing up" the Kick-Off meeting. Your quick reply would be very much appreciated. Thank you.

P.S. Geoff - I would like to propose taking the General Conditions dated March 20, 1996 which were extensively negotiated in lieu of Exhibit B." (2/227 to 290)

Mr King and Mr Frauenstein communicated further about the appropriate response which should be made to Hok Sport (2/300 to 308, 322 to 328 and 330). It is clear from the terms of the covering fax at 2/322 that the need for a positive response prior to the meetings fixed for the next week was realised. On 19th February 1997 a response was sent on the notepaper of "Arena Hannover GmbH (in formation)" which, as I have already said, I shall continue to call "AHAG". That letter reads -

"Following receipt of your letter to [AHAG] (in formation) of 14 February 1997, we have drafted the enclosed Part II - Conditions of Particular Application to be read with the FIDIC - Agreement for Consultants, 2nd Edition 1991 as mentioned in our Letter of Intent dated 5 February 1997.

As you will see, we have referred to the services outlined in our letter of 21 January 1997 and included in Appendix C parts of Exhibit "B" enclosed with your letter.

We agree that work shall be performed on a lump-sum basis linked to a Scope of Services and a Programme.

Regarding the other consultants, structural, mechanical, etc., we conform that we are awaiting your proposals for our consideration.

We look forward to reviewing a Design Programme and the decision-making process in our meetings next week.

Yours sincerely

Arena Hannover GmbH Widnell Far East Limited

(in formation)

(duly signed) (duly signed)

Gernot Frauenstein Geoffrey King

Director Chairman of the Board" (2/331 to 342)

39. On 20th February 1997 Hok Sport (Mr Walters) sent a number of documents to Mr Frauenstein (at Philipp Holzmann) for review prior to the intended Kansas City meetings. Included in the package were proposals from prospective sub-consultants and a "billing schedule...co-ordinated with [Hok Sport's] fee proposal" (see 2/367 to 391 - especially 2/389).

40. The meetings in Kansas City went ahead as planned. Notes of what was said were prepared by Hok Sport and circulated to other attendees for comment (2/392 to 406). The detail can largely be ignored but, the following points should be noted -

(1) it was Mr King who was noted as having "started off [the] meeting by explaining the joint venture which [was] putting [the] arena together" (2/392); and,

(2) the large initial gathering broke up to allow Mr Walters, Mr Frauenstein, Mr King and Mr Lischer to discuss "the contract and fee arrangements for the project" (2/396). In this regard I accept the evidence given by Mr Walters at paragraph 35 of his witness statement -

"During the afternoon session on 25 February 1997 the main meeting broke up to allow myself, Mr Frauenstein, Mr King and Mr Lischer to discuss the contract and fee arrangements on the project. We worked through the documentation including the FIDIC documentation provided under cover of Arena Hannover GmbH's letter of 19 February 1997. The major points, those being scope of work, compensation and schedule appeared to be agreed although there were some minor issues which required further attention. Although by this time [Hok Sport] had carried out work and was continuing to carry out work at the request of those representing AHAG, and although I

had provided a billing schedule under cover of my letter of 20 February 1997, there was no suggestion made at this meeting that [Hok Sport] was at risk as to its fees." (1/69)

41. On 4th March 1997 Mr Walters received advice from Mr Staed (Hok Sport in house counsel) on the proposed FIDIC agreement (3/572 to 573). Although he was satisfied that the FIDIC agreement would be "an appropriate vehicle for use on this project", he had a number of detailed queries on the submitted draft and he was concerned about the proposal made concerning ownership of the copyright to design documents. On 6th March 1997 Mr Walters and Mr King met at the offices of Ogden Entertainment Inc. (the intended operators of the arena) in New York. During the course of that meeting Mr Walters had a "brief conversation with Mr King regarding certain minor contractual issues" (Mr Walters' witness statement, paragraph 37 - 1/70). On 7th March 1997 Hok Sport (Mr Walters) faxed comments on the proposed contractual documents which had been submitted by AHAG on 19th February 1997 (see above). He addressed the comments to Mr King at "Widnell" (and copied them to Mr Frauenstein. (2/422 to 432). He did not take up the copyright point which Mr Staed had raised. The material part of the text of the covering faxed letter reads -

"We have internally reviewed the proposed contractual documents proposed for the Hannover Arena and, as I explained to you in New York, we have some minor clarification and modifications that we propose for consideration.

We agree the major points, those being scope of work, compensation and schedule. We forward the enclosed documents for your review that we might be able to discuss them in Germany the week of March 11.

The following comments follow the format of the document you proposed:

[various minor clarifications and comments stated] .....

I hope you agree that the issues presented here are not major in nature. I will discuss these issues with you in Germany next week. Thank you for your consideration of these issues." (2/422 to 423).

Mr Frauenstein sent his comments on that fax to Mr King (2/446 to 451). At the same time Philipp Holtzmann Planungsgesellschaft GmbH the design and engineering subsidiary of Philip Holzmann, which I will call "PHP", wrote to Hok Sport offering to participate in the "design effort" for a fixed lump sum price of DM240,000, (2/452 to 457).

42. On 17th March 1997 Hok Sport submitted an Invoice for US$100,000 to AHAG as its February billing (2/474). This amount was in line with the billing schedule which had formed part of the package of documents sent on 25th February 1997 (see above - 2/389). The Invoice was forwarded to Mr Frauenstein who asked Mr King how he should proceed (2/475). Mr King's note on the fax cover sheet indicates that he spoke to Mr Wayne London of Hok Sport. He (Mr King) told Mr London that the arrangements between Philipp Holzmann and Hok Sport were not finalised, that Mr Frauenstein was pushing to conclude matters and that Hok Sport was required to "re-date the invoice mid next week once all matters including [Hok Sport's] total fee and all words [were] agreed." Mr King then wrote to Mr Walters in Kansas City concerning the invoice. He wrote on "Widnell" notepaper. He said -

"I have received a copy of your fee account dated 17 March 1997 via Gernot Frauenstein.

You were away last week but I spoke to [Mr London] and expressed surprise at receiving this as we have not yet agreed the level of your fees pending clarification of the German arrangements.

I suggested to [Mr London] that we clarify this position early this week and that you re-date your invoice to this week to avoid incorrect deadlines.

I look forward to hearing from you." (2/478)

Although the language used was less direct than the manuscript note of the discussion with Mr London, in my view, the commercial meaning/effect was no different . In oral evidence Mr King stated that the "clarification of the German arrangements" was a reference to the proposed involvement of PHP. Mr Walters said that he had no recollection of receiving this fax (witness statement, paragraph 42 - 1/71) but in cross-examination he readily accepted that, in the context, it contained nothing that was in any sense surprising. I am satisfied that it was sent and that, in all probability, it was received.

43. On 25th March 1997 Hok Sport (Mr London) wrote to WFE (Mr King) concerning the proposals submitted by PHP. He was concerned to ensure that arrangements between AHAG and Hok Sport on the one hand and Hok Sport and PHP on the other hand might be sensibly aligned. (2/481). Mr King responded on 2nd April 1997 to indicate that Mr Frauenstein had held discussions with PHP who would be submitting revised proposals to Hok Sport. The letter included the statement that he and Mr Frauenstein would be reviewing "*the new overall package of [Hok Sport's] over the next few days ...*" (2/492). Mr London replied the same day. In the course of his fax he referred to the need "*to get the final contract in place in order to prevent an interruption in the progress of the work* (2/494).

44. On 4th April 1997 Mr Frauenstein and Mr King sent a fax to Hok Sport (Mr London). The purpose of the fax was to "ensure that we all have the same understanding of your contractual obligations" (see below). This fax was drafted by Mr Frauenstein (2/500 to 503) who used Philipp Holtzmann notepaper but, under each of the proposed signatures was stated "for Arena Hannover GmbH i. Gr." That fax reads -

"In all your documents you stress very clearly that you regard your work as completed with the submittal of the building approval documents.

Basically we confirm that this was discussed and agreed.

"Completion" however, is contingent upon whether all the documents prepared by you are approved in respect to German Codes and German Building Regulations and whether they fulfil the requirements of the Zoning Plan. All

necessary changes requested by the approving authorities which will enable them to approve the documents are part of the above-mentioned contract.

The payments to you are subject to the fulfilment of these requirements and the final approval of the documents.

If PHP is contracted by EAL during the approval procedure, after June 30, 1997, they will be remunerated under a separate contract with EAL.

Please ensure that we all have the same understanding of your contractual obligations.

Thanks.

Best Regards,

(duly signed) (duly signed)

Gernot Frauenstein Geoffrey King

For Arena Hannover GmbH i.Gr for Arena Hannover GmbH i.Gr" (2/504)

45. On 7th April 1997 Hok Sport (Mr London) resubmitted the invoice for US$100,000 in respect of the February billing (3/506). He also submitted a second invoice for US$249,361.11 which was made up of US$212,000 in respect of the March billing (the amount being in line with the billing schedule - see again 2/389), US$23,227 in respect of the fees and expenses of the M & E sub-consultant and US$14,134.11 in respect of Hok Sport's own reimbursable expenses (3/508 and various back-up documentation from 3/509 to 546).

46. Drawings prepared by Hok Sport were reviewed and other practical issues were discussed at meetings held in New York on 9th and 10th April 1997 (3/549 to 553). A further series of meetings was planned to take place in Anaheim in the week commencing 21 April 1997 (3/563). On 14th April 1997 Mr King wrote to Mr Frauenstein on the subject of Hok Sport's re-submitted fee account. He wrote on EAL notepaper. The letter reads -

"I have received a copy of the re-submitted fee account of [Hok Sport] dated 7 April 1997.

I see that the cash flow commences in February and includes reimbursable items. I believe we will negotiate an 'all in' fee including reimbursables and commencing 24 February with a small invoice only for that month and then increasing to match their effort.

In addition have we received formal agreement to the contract wording ?" (3/556)

47. The meetings at Anaheim took place on 22nd and 23rd April 1997. Mr London's notes were circulated (3/564 to 566). Mr London recorded that "several administration issues" had been reviewed by Mr King, Mr Walters and himself. Mr London's fax to Mr King dated 25th April 1997 indicates that the copyright issue (something which Mr Staed had addressed in the advice given on 4th March 1997 - see above) was discussed and Mr Walters/Mr London were to consider this further with Hok Sport's in house counsel. The fax continued -

"... in the meantime, I am in the process of revising the contract to reflect those issues we discussed and jointly agreed to on Wednesday, including the revised payment schedule. When complete, I will forward to you a draft of the revised contract with the revisions marked on your review. I would appreciate your immediate review and response." (3/577)

So far as the "revised payment schedule" was concerned two relevant contemporaneous manuscript notes were made during the course of the discussions. Mr King's manuscript note at page 3/567 indicates that the subject of Hok Sport's fees was discussed. His note refers to work Phases 2b, 3 and 4. A fee of 100,000 is attributed to Phase 2b with the comment "outstanding" and a fee of 286,000 is attributed to Phase 3 with the comment "75% bill now." Other matters mentioned in the note included "travel and expenses within USA" and "PHP fees paid direct". Mr Walter's manuscript note at page 3/568 mentions the figure 100,000 and 286,000 and alongside the word "current" he wrote "100,000" and "75% of 286 - 212,000." Underneath that he wrote "remainder in 2 weeks."

48. I accept the evidence given by Mr Walters concerning what was said about fees during the discussions which took place at Anaheim (witness statement, paragraphs 46 to 49 and first sentence of paragraph 50 - 1/71 to 72) and about the preparation of his manuscript note (witness statement, paragraph 51 - 1/72). However, I think it probable that Mr King chose his words with some care when holding out an expectation that payment could be expected by the middle of May. I think that Mr King wished to convey sufficient hope (to keep Hok Sport committed) whilst avoiding giving an absolute assurance or guarantee and the terms of the relevant paragraphs of Mr London's letters of 28th April 1997 and 3rd July 1997 (see below) where he refers to **anticipating** payment being made in May 1997 are consistent with that view. When he was asked about the discussions in Anaheim and, specifically about his manuscript note, Mr King said that the work which Hok Sport had carried out was commensurate with the [noted] items and that at the time when funds were available and the contract was signed those sums would have been paid.

49. On 28th April 1997 Mr London wrote a letter addressed to Mr King (at Widnell) on the subject of invoicing. The letter reads -

"Enclosed please find our revised invoice for work on the Schematic Design Phase, as per our discussions in Anaheim. The total amount due for the phases has been revised and we are billing on the agreed amount of 75% of what was referred to as Phase 3 in your hand written note. As agreed, the first invoice in the amount of US$100,000 is acceptable and, when added to the current invoice of US$214,500, the total amount now due is US$314,500 plus consultant invoices and reimbursable expenses incurred to date.

I have not made another copy of all the back-up material to the invoice relative to consultant fees and reimbursable expenses since you have already have all the information in your file. I hope this is acceptable to you. If you have any questions with regards to the enclosed, please call. It is our understanding that we can anticipate payment of the enclosed in mid May." (3/578, 594 and 596)

The enclosed revised invoice was dated 23rd April 1997. It was addressed to "Mr Gernot Frauenstein, Arena Hannover GmbH i. Gr." The sums described on the face of the document were US$100,000 for phase 2b which was ascribed to "previous billing" and three items which together made up a "current billing" of US$251,861.11. Two of those three items were the same sub-consultancy and expenses figures that had previously been included in the second invoice dated 7th April 1997 (viz US$23,227 and 14,134.11). The figure that was different was the figure of US$214,500 for Phase 3 which was said to be 75% of US$286,000. Although the covering letter was addressed to Mr King it was transmitted to Mr Frauenstein together with the invoice on 28th April 1997 (3/593 to 596). When asked about the letter and invoice in cross examination Mr King said that he did not think that he raised any questions with Mr London. He said that he would have recognised that the amount of work done correlated with [the invoiced] figure and that when the contract was signed and funds were available [Hok Sport] would be paid (evidence 4th May 2000).

50. Also, on 28th April 1997 Mr King wrote on Widnell notepaper to Hok Sport (Mr London). This was a very short letter. It reads -

"Thanks for our very helpful meeting and I look forward to receiving the draft revised contract including the revised payment schedule when this has been completed." (3/580)

51. On 29th April 1997 Hok Sport (Mr London) sent to Mr King at Widnell what was described as "proposed revisions to the contract as per our discussion in Anaheim." (3/600 to 610). The covering letter reads -

*"Enclosed please find the proposed revisions to the contract as per our discussions in Anaheim. I have used **bold type** to indicate any item or portion thereof that has been revised. The revisions are as follows:*

PART II

APPENDIX C

REMUNERATION AND PAYMENT

Schedule of Compensation in US dollars: The Schedule has been revised to reflect the new fee breakdown between phases with a minor revision to the total fee due to [Hok Sport].

A line indicating the amount agreed upon to be held as retainage until issuance of the building permit has been added to the schedule. A sentence clarifying when the retainage is due has been added at the end of the schedule.

The fees due to Geiger Engineers, M/E Engineers, and WJHW have been revised to reflect their latest proposals based on the current scope of work.

Based on your comment that you may wish to pay Philipp Holzmann directly for the translation of the documents, I have added a paragraph to clarify how this can be done and the effect on the contract amount.

Exhibit C1, the cash flow has been revised with a new date of April 25, 1997.

1. *REIMBURSABLE EXPENSES This paragraph has been revised to reflect our discussions in Anaheim. Basically, all normal reimbursable expenses through April 23rd as delineated in the previous contract under consideration will be paid. Starting with April 24th, only a portion of our expenses will be reimbursable as delineated in the revised paragraph.*

1. *You asked Jim Walters to review the copyright with our counsel. I have inserted his wording for your review.*

EXHIBIT C1 PROJECTED CASH FLOW

The Projected Cash Flow spread sheet has been revises to reflect the revisions in the payment schedule in the first item above.

Please review at your earliest convenience and return your comments to either [Mr Walters] or myself." (3/600 to 601)

Mr King acknowledged receipt of these proposals and informed Mr London that he had forwarded copies to Mr Frauenstein and that he hoped to be able to respond in the early part of the next week (3/616).

52. So far as progress with the design work itself was concerned, this was underway and a schematic design package approval meeting was planned to take place in Germany in the week commencing 12th May 1997 (3/624 to 626). Discussion of the terms on which Hok Sport was to be engaged appear to have taken place during that week with minor revisions to the drafts being suggested by Hok Sport in Mr London's fax dated 15th May 1997 (3/627 to 628, 631 to 640).

53. On 16th May 1997 Hok Sport (Mr London) forwarded a further invoice to Mr King at Widnell. This was said to relate to professional services of sub-consultants and reimbursable expenses. The sum invoiced was US$90,648.20. There was no claim for any further fee for Hok Sport itself. (3/641 to 645).

54. On 22nd May 1997 Mr King wrote on EAL notepaper to Hok Sport (Mr London). The letter reads -

"Following our telephone conversation on 16th May I have agreed with [Mr Frauenstein] the final amendments to the [Hok Sport] Agreement as set out in your fax of 15.5.97.

All is now OK.

Please finalise the original."

(3/650)

The letter was copied to Mr Frauenstein (3/651).

55. Further project review meetings took place in Kansas City on 22nd and 23rd May 1997 (3/652 and 659 to 660). During the course of those meetings Mr Frauenstein discussed and agreed an amendment to the final version of the contract which had been negotiated with Hok Sport. The amendment extended the time by one month (see 3/703). It was something that Mr Frauenstein regarded as advantageous. He wrote to Mr King (at Widnell) on 26th May 1997 in the following terms -

"Please find attached the final version of the contract of HOK as general planner with a little amendment initialled by me during my visit (see 652) in Kanas City. This one month of additional time gives us only advantages as we can refine the design during July 1997 whilst the building permitting documents are already in the pipeline."

(3/666)

and Mr King responded to him (at Philipp Holzmann) on 3rd June 1997 -

"Many thanks for the final version of the [Hok Sport] Contract.

I have just spoken with Wayne London who is today forwarding the completed documentation for signature."

(3/671)

56. On 5th June 1997 Hok Sport (Mr London) wrote to Mr King at EAL with two queries on the contract documentation. The letter reads -

"After we spoke on Tuesday [Mr Walters] and I were conducting a final review of the contract prior to signing it and sending you copies for signature. During our conversation, two items were discussed that I need to speak to you about as soon as possible. I have telephoned you on both June 4th and 5th not knowing you were out of the office for both days. The first item we need to discuss is the client name. The draft contract was prepared using the name of Arena Hannover GmbH as the clients name. Your last correspondence to me, in which you approved the final revisions to the contract, was on a European Arenas Limited letterhead. What name is to be used on the contract?

The second item that [Mr Walters] and I discussed is the specific reference to Philipp Holzmann as the firm to Germanize the documents for the project. I would like to discuss their involvement since we do not have an approved proposal from PHP. I believe there are a couple of options available to us that might benefit the project.

Please call either [Mr Walters or me] upon your return so we can discuss these last two items prior to me sending you the contract for signature."

(3/673)

Mr King responded on 6th June (3/676). He confirmed that the client name was "Arena Hannover GmbH" and queried the position with PHP. Mr London responded, stating that the PHP position had been dealt with in direct negotiations between it and Mr Frauenstein. PHP's fee for translating the documents was understood to be US$88,500. Hok Sport proposed to reduce its total fee by that amount to enable Mr Frauenstein to resolve this directly with PHP (3/677).

57. On 9th June 1997 Hok Sport (Mr London) forwarded three typed copies of the revised client/consultant agreement to Mr King at EAL (3/679 to 736). He noted the reduction in the fee of US$88,500. He invited execution of all copies and the return of two copies to him. The letter was copied to Mr Frauenstein together with a copy of the contract (3/737).

58. On 16th June 1997 Mr London prepared Hok Sport's invoice for services rendered up to 13th June 1997. He invoiced Hok Sport's own fees of US$71,500 (being 25% of the sum of US$286,000 which had been mentioned at the Anaheim meetings on 22nd/23rd April 1997), sub-consultant's fees of US$53,024.46 and reimbursable expenses of US$26,594.56. The total invoiced was US$151,119.02. This sum plus the sums covered by the three earlier invoices makes up the total of US$593,628.33 which is what Hok Sport claims in these proceedings (3/746 to 749).

59. Progress with the schematic design package had continued. This part of the works had been called "Phase 1" or "Stage 1" in the contract documents - see 3/703 and 736. A further review meeting was planned to take place in New York on 18th and 19th June 1997. According to Mr London's correspondence the package had been completed on 13th June 1997 but Hok Sport had decided that, although it was prepared to go ahead with the New York meetings, "copies of the documents would not be provided to [AHAG] until [Hok Sport had] received

payment for all outstanding invoices as agreed upon during our meeting with you in Anaheim". He told Mr King this in a letter dated 17th June 1993 (3/751).

60. The New York meetings went ahead. Thereafter, by letter dated 23rd June 1997 (3/753 to 754) Hok Sport (Mr London) enquired of AHAG (Mr Frauenstein) whether approval was to be given to proceed to the design development phase of document preparation - this part of the works was called "Phase 2" or "Stage 2" in the contract documents and client/operator approval for its commencement was required after Phase 1 had been completed (see 3/703 and 736).

61. On 25th June 1997 Hok Sport (Mr London) notified Mr King (at EAL) that it had received signed plans from Ogden Entertainment (who were, as I have already said, the intended operators of the arena) approving the schematic design. He told Mr King that a copy of "the signature set" would be forwarded "upon resolution of the current payment situation" (3/762).

62. At the end of June 1997 Mr Frauenstein, writing on Philipp Holtzmann notepaper, notified Hok Sport (Mr London) of the views of the Expo Design Review Board on the proposed external elevations of the arena. It would seem that the Review Board was looking for something different and be significantly more expensive. All work on the project was immediately suspended (3/772 to 778).

63. On 2nd July 1997 Mr King, writing on EAL notepaper, commented on "the general impact of the interference that we are now receiving from the Expo Review Board". In the course of his letter Mr King also made what can, I think, fairly be described as "hopeful" or "positive" comments on the financial position. What he said in that regard was -

"Regarding the financial meetings on last Thursday, these went well. At long last we have an agreed Escrow Agreement with the Local Partners and the mechanism for holding the Guarantee has also at long last been agreed. This is in the form of a Joint Account in London with Widnell and Arena AG each representing the respective several parties on each side."

(3/779 to 780)

64. On 3rd July 1997 Hok Sport (Mr London) wrote to Mr King at EAL in regard to what he called "unresolved issues". What he said was -

"We at [Hok Sport] were glad to hear that your internal meetings went well last week. [Mr Walters, Mr Carver] and I attempted to call you on both Wednesday and Thursday to discuss your letter as well as the letter written by [Mr. Frauenstein] to you, a copy of which was faxed to us. While your meetings of last week did apparently resolve several internal issues, there are still three major outstanding issues between Arena Hannover GmbH and [Hok Sport] that must be resolved to avoid further delays in the project. Two of these issues must be resolved prior to our releasing the documents to [Mr Frauenstein] for the building permit application as per his request.

You have on two separate occasions, told me that the current form of the contract between Arena Hannover GmbH and [Hok Sport] is acceptable and no further revisions would be required. Since the contract is acceptable, and the signed version was forwarded to you on June 9th for your signature, it must be executed and returned to [Hok Sport] prior to the release of the documents for the building permit.

The second issue, is your failure to process outstanding invoices totalling, as of June 13th, $593,628.33. **On April 23rd, while in Anaheim, you approved our original invoice in the amount of $100,000 as well as 75% of the Schematic Design Phase fee. You informed [Mr Walters] and I that we could anticipate payment between the 1st and 15th of May** and that the remainder of the Schematic Design Phase fee would be accepted as soon as the documents were revised. Two months have passed since your commitment to process our initial invoices, during which time [Hok Sport] has continued to work in a good faith effort to avoid delaying the project. However, with the Schematic Design phase now complete, receipt of payment, per my letter of June 17th is a prerequisite for release of the drawings.

Issue three, the exterior appearance of the building, is totally separate and is not a condition for release of the documents....."

(emphasis added - 3/782 to 783).

65. On 7th July 1997 Mr Frauenstein wrote to Hok Sport on "Arena Hannover GmbH (i. Gr.)" notepaper querying the last of the invoices which had been submitted. The telefax, which he copied to Mr King, reads -

"Thank you for your invoice no.40403 for professional services for the period ending June 13 1997.

Without any precedence, we checked your invoice, disregarding the payment problems with EAL.

In our view the total fee (excluding reimbursables) to [Hok Sport] is <u>not</u> in accordance with the contract that was sent to Mr Frauenstein on June 9, 1997.

Part II, appendix C, Remuneration and Payment, and Exhibit C show a total compensation to HOK of $877,500 -, whereas

Phase 2b + 3 is o.k. and

Phase 4 is $422,000 - (not $522,000-) and

Retainage is $49,500 - (not $58,000. -).

We hereby kindly ask you to send us a revised invoice as stipulated in the contract.

(3/784)

The points made in the telefax concerning the discrepancy in the figures stated for "Phase 4" and "Retainage" can be seen to be valid when the contents of pages 3/707 (Contract) and 3/747 (Invoice) are compared. However, it is apparent that no question was being raised in relation to any of the sums actually invoiced as opposed to the background/for information figures which had also been stated on the face of this latest invoice. In response Mr London explained the discrepancy and, as requested, submitted a revised invoice (3/785 to 788).

66. At the beginning of August 1997 Mr Frauenstein spoke to Mr London. It would seem that he attempted to persuade Hok Sport to release the drawings so that a building permit submittal might be prepared. At that stage it would seem that Mr Frauenstein was offering to send a letter of commitment from EAL naming Hok Sport as the project architect for a forthcoming project in Hamburg. Mr London's response stated that the release of drawings depended (inter alia) on -

"2. The signed contract for Arena Hannover which Geoffrey King has already verbally approved.

3. Payment of all outstanding invoices on Arena Hannover by the end of August."

He invited Mr Frauenstein to discuss those matters with Mr King and to give him a call (3/791). Mr Frauentstein responded on 12th August 1997 stating that he felt "it would be expedient to place the conditions stated in your fax 'on hold' for the time being and to address them at a date in the near future" (3/792). He copied that response to Mr King. In a telephone conversation on 14th August 1997 it would seem that Mr Frauenstein told Mr London that no monies had yet been transferred into an account from which invoices might be paid (see 3/794 for Mr London's internal reporting of the conversation).

67. On 24th September 1997 Mr Frauenstein, writing on Philipp Holzmann notepaper, informed Hok Sport (Mr London) that "September was almost over and the funds are not yet cleared." He hoped funds would be in place "next week" and indicated that alternative financing possibilities were being explored (3/795).

68. By mid-December 1997 Hok Sport had been given indications that the project continued to be delayed and that it might not proceed. Immediate payment of the outstanding invoices was requested in a letter addressed to Mr King - "AHAG c/o Widnell" which was copied to Mr Frauenstein - "Arena Hannover GmbH i. Gr." According to Mr King's witness statement (paragraph 28 - 1/102) it was in December 1997 that the project was abandoned.

69. No "Arena Hannover" company was ever formed. According to Mr King's witness statement (paragraph 28 - 1102) WFE was paid various expenses during the project but "found itself in a similar position to [Hok Sport] since its fees were also unpaid. [EAL] was unable to meet its debts ....". EAL was ordered to be wound up by an order of the High Court dated 14th July 1999. (3/811).

70. To conclude, so far as the facts are concerned, towards the end of his cross examination on the afternoon of 4th May 2000, Mr King was asked the series of questions and he readily agreed with the propositions which were put to him -

(1) During February 1997 you prepared a FIDIC contract which, ultimately, was accepted by [Hok Sport] ?

Agreed

(2) You tried your best to reach agreement on that contract ?

Agreed

(3) Hok Sport also tried their best to reach agreement on that contract ?

Agreed

(4) **At the end of the day you did reach agreement but [the contract] was never signed ?**

Agreed

(5) At the end of the day you were still involved ?

Yes, when the project collapsed I was still involved but not closely involved with the negotiations with the institutions.

(6) It looks as if the only problem was the funding ?

Agreed.

(emphasis added).

SUBMISSIONS, LAW AND CONCLUSIONS

71. I have already referred to the basis, or rather the alternative bases of the claim, and to the broad outline of the defence in the introductory section of this judgment but it is perhaps appropriate at this point to put a little more flesh on the bones.

72. Hok Sport's contractual claim was pleaded in five alternative ways. Four of the alternatives relied on the letter of intent dated 5th February 1997. One of these alternatives (see paragraph 2A of the Re-Amended Statement of

Claim - 1/6B) alleged "an agreement to agree" upon a FIDIC contract. This was not pursued and I need say nothing further about it. The alternatives which were maintained in argument by Mr Burnett Q.C. and Mr Kurrein were -

(1) The letter of intent itself constituted a contract by which Mr King and Mr Frauenstein agreed to pay for any work carried out by Hok Sport pursuant thereto (paragraph 2C of the Re-Amended Statement of Claim - 1/6C).

(2) The letter of intent was an offer to pay for work carried out by Hok Sport pursuant thereto which Hok Sport accepted by acting upon it in the way that it was intended that it (Hok Sport) should. (This is a variant of (1) also found in paragraph 2C of the Re-Amended Statement of Claim).

(3) The letter of intent was an offer by Mr King and Mr Frauenstein, acting or purporting to act on behalf of AHAG, to use their best endeavours to negotiate the terms of a FIDIC agreement with Hok Sport and if and when agreement was reached as to the said terms to execute the same. This offer was accepted by Hok Sport when it commenced the design works (paragraph 2B of the Re-Amended Statement of Claim - 1/6B). It was an implied term of this agreement that Hok Sport would be paid for such work as it carried out during the course of such negotiations (paragraph 2D of the Re-Amended Statement of Claim - 1/6C).

(4) The terms of the FIDIC Agreement covering the design works which Hok Sport was to undertake were agreed by 22nd May 1997. Completed contract documentation was forwarded by Hok Sport for signature on 9th June 1997. That documentation was neither signed nor returned but Hok Sport was entitled to payment "pursuant to the revised FIDIC agreement" (paragraphs 3 to 6, 7A and 9c of the Re-Amended Statement of Claim - 1/6C to 6E).

73. In the alternative Hok Sport pleaded that, as it had carried out planning or design works in reliance on the letter of intent, the agreement to enter into a FIDIC agreement, the revised FIDIC agreement and "the numerous requests of the Defendants that [Hok Sport] should commence work", it was entitled to payment for the work that it had carried out "as a quantum meruit" and/or "in quasi contract" (see paragraphs 8 and 9a. and b. of the Re-Amended Statement of Claim at 1/6E). A lengthy section of the written closing submissions (paragraph 35ff) was devoted to what was entitled "quasi-contract".

74. Responding on behalf of Mr King, Mr Brook Smith submitted that there was no legal justification for imposing any personal liability on Mr King. Hok Sport had "latched on to a subject to contract letter of intent which [Mr King] made the mistake of signing on behalf of the company in formation". Mr King had not requested Hok Sport to carry out any work. Hok Sport had been prepared to embark on work in the hope that "substantial profits from substantial arena developments" would follow; it had been prepared to take "the commercial risk of things not working out". The letter of intent was not a binding contract; it was not an offer capable of acceptance; nor did any event which followed the letter of intent constitute a binding contract between the parties. The words "subject to contract" meant no legal obligation by either party unless and until a formal contract was entered into and none had been.

75. In response to the quasi-contractual or quantum meruit claim Mr Brook Smith submitted that "it [would] not run" for three reasons. First, the payment which Hok Sport was anticipating receiving was by reference to a contract under negotiation (therefore unless a binding contract came into existence they would be unpaid). Secondly, a benefit had to be conferred upon a party sought to be made liable for a quantum meruit and none was conferred on Mr King. Thirdly, in this case, Hok Sport had benefited from the terms of the settlement agreement with Mr Frauenstein in that it had received DM 350,000 and an acknowledgement that it had all the intellectual property rights in the drawings etc. which had been prepared.

76. These submissions were developed in detail in the written closing argument where Mr Brook Smith answered both the "contractual" and the "restitutionary" claims.

77. Having summarised the parties' respective submissions I think it convenient to state the main legal principles which, I believe, need to borne in mind in this case before proceeding to state my conclusions.

78. The letter of intent dated 5th February 1997 was headed "Subject to Contract". It was written in a commercial context and it falls to be objectively construed. It was addressed to the London office of an American Corporation. The fact that its US based senior vice-president (Mr Walters) had never previously met the expression is, to my mind, wholly irrelevant. The heading was not used in a conveyancing context where it would be taken to indicate that neither party was to be bound unless and until contracts were not simply agreed and signed but formally exchanged. The heading was used in a letter sent to indicate an intention to undertake serious negotiations with a view to concluding a contract based upon a stated standard form and an identified design philosophy. The heading made clear that the letter was a negotiating document; it was not itself a contractual offer or a draft contract.

79. When work is done or services are performed whilst contractual negotiations are ongoing, there is no hard and fast answer to the question whether payment can properly be claimed for that work or those services. If, as anticipated, a contract is concluded its terms will usually make clear whether, and if so on what basis, such works or services qualify for payment. But if no contract is concluded, all depends on the circumstances of the particular case. In some cases, the work is done or the services are performed on a gratuitous or speculative basis - viz. the hope or expectation of payment if the negotiations succeed being coupled with an understanding that no

payment will be due if they do not. In other cases, there may be an express interim agreement covering payment for the work or services or it may be appropriate to infer agreement that a reasonable remuneration should be paid for the work or services.

80. In **British Steel Corporation v. Cleveland Bridge & Engineering Co. Ltd.** [1984] 1 AER 504; 24 BLR 94, Robert Goff J. said -

"..... the question whether... any contract has come into existence must depend on a true construction of the relevant communications which have passed between the parties and the effect (if any) of their actions pursuant to those communications. There can be no hard and fast answer to the question whether a letter of intent will give rise to a binding agreement; everything must depend on the circumstances of the particular case. In most cases where work is done pursuant to a request contained in a letter of intent, it will not matter whether a contract did or did not come into existence; because if the party who has acted on the request is simply claiming payment, his claim will usually be based upon a quantum meruit, and it will make no difference whether that claim is contractual or quasi-contractual. Of course, a quantum meruit claim (like the old actions for money had and received and for money paid) straddles the boundaries of what we now call contract and restitution; so the mere framing of a claim as a quantum meruit claim, or a claim for a reasonable sum, does not assist in classifying the claim as contractual or quasi-contractual. .....

As a matter of analysis the contract (if any) which may come into existence following a letter of intent may take one of two forms: either there may be an ordinary executory contract, under which each party assumes reciprocal obligations to the other; or there may be what is sometimes called an "if" contract, ie a contract under which A requests B to carry out a certain performance and promises B that, if he does so, he will receive a certain performance in return, usual remuneration for his performance. The latter transaction is really no more than a standing offer which, if acted upon before it lapses or is lawfully withdrawn, will result in a binding contract.

The former type of contract was held to exist by Judge Fay QC in Turriff Construction Ltd. v. Regalia Knitting Mills Ltd (1971) 9 BLR 20; and it is the type of contract for which [Counsel for CBE] contended in the present case. Of course, as I have already said, everything must depend on the facts of the particular case; but certainly, on the facts of the present case - and, as I imagine, on the facts of most cases - this must be a very difficult submission to maintain. ....."

([1984] 1AER at pp 509-510; 24BLR at pp 119-120)

Having considered the facts of the case and concluded that neither an "executory contract" nor an "if contract" came into existence following the letter of intent that Cleveland Bridge had issued to British Steel, the learned judge continued -

"..... In my judgment, the true analysis of the situation is this. Both parties confidently expected a formal contract to eventuate. In these circumstances, to expedite performance under that anticipated contract, one requested the other to commence the contract work, and the other complied with that request. If thereafter - as anticipated - a contract was entered into, the work done as requested will be treated as having been performed under that contract; if, contrary to their expectation, no contract was entered into, then the performance of the work is not referable to any contract of which the terms can be ascertained, and the law simply imposes an obligation on the party who made the request to pay a reasonable sum for such work as has been done pursuant to that request, such an obligation sounding in quasi-contract or, as we now say, in restitution. ..... ."

([1954] 1 AER at p. 511; 24 BLR at pp. 121 - 122)

81. Although, as Robert Goff J. stated in the first of the two passages cited above, "in most cases where work is done pursuant to a request contained in a letter of intent, it will not matter whether a contract did or did not come into existence ..... it will make no difference whether [the claim for payment for the work done] is contractual or quasi-contractual ...", might it matter in this case ? I pose the question because the claim that Mr King is personally liable depends on Section 36C of the Companies Act 1985 which provides a remedy where "a contract .... purports to be made by or on behalf of a company at a time when the company has not been formed ....".

82. If, assuming AHAG to have been in existence, a contract would have been concluded with Hok Sport there would appear to be no doubt that Section 36C of the Companies Act 1985 would be applicable. But, does the word "contract" as used in Section 36C also encompass a liability to pay for work done for and at the request of another which, traditionally, English law has classified as being "quasi-contractual" ? In this context two matters seem to me of significance -

(1) It is well established that if the circumstances show that work has been done or services have been performed **and** that the work was not or those services were not to be done gratuitously, in the absence of any express contract the Court will infer a contract with an implied term that reasonable remuneration is to be paid (see **Chitty on Contracts**, 28th Edition, Volume 1, paragraph 30-185 at page 1563 and the cases there cited including **William Lacey (Hounslow) Ltd. v. Davis** [1957] 1 WLR 932 at 938 to 940 and **Upton-on-Severn RDC v. Powell** [1942] 1 AER 220 (cited at pages 938 - 939 in the **William Lacey** case).

The learned editors of **Chitty** opine that "... this principle **may extend** to services performed in anticipation that negotiations will lead to the conclusion of a contract, provided that the services were requested or acquiesced in by the recipient" (my emphasis). That is a view which I would respectfully endorse. Depending on the circumstances of the particular case, a (simple) interim contract or, to use Robert Goff J's terminology, an "If Contract" may be

formed to cover work or services performed whilst the terms of a (complicated) contract intended to deal comprehensively with the entirety of the project are negotiated. This may well be the appropriate finding if a basis for payment for initial works/services is agreed. However if, although no basis for payment for initial works/services has been agreed, it is clear that they were not being undertaken on a gratuitous or speculative basis, it may well be appropriate to infer an interim agreement that a reasonable remuneration should be paid. If, in due course, the contract under negotiation whilst those initial works/services are being performed is concluded, it is likely to be applicable retrospectively - subsuming any "If Contract" or superceding any inferred agreement. However, if contract negotiations are terminated or if negotiations are protracted and do not end with the (complicated) contract being made, the interim "If Contract" or inferred agreement may prove to be the enduring basis pursuant to which works/services were undertaken. In some cases, extensive works may be carried out or extensive services may be provided over a lengthy period without the intended (complicated) contract being concluded.

[In such circumstances, in my view, and contrary to the views of the learned editors of **Chitty**, in appropriate circumstances the amount of the remuneration to be paid might be influenced by "contractual defences" such as lateness in performance - this was a matter adverted to by the Court of Appeal, Slade and Bingham L.JJ in **Crown House Engineering v. Amec Projects Limited** (1989) 48 BLR 37 at pp. 54 and 57/8. However, that is not something which needs to be considered in the present case because no criticism of Hok Sport's performance has ever been made.]

If, in the circumstances, it is right to infer a contract with an implied term that a reasonable remuneration would be paid then if, subsequently the parties themselves agree on a definite sum that may fix the amount which can be recovered - see **Chitty**, paragraphs 3-028 and 30-185 (footnote 55) on pages 183 and 1563.

(2) Section 36C of the Companies Act 1985 was enacted to give effect to Article 7 of the EC Directive 68/151. At paragraph 9.24 of his closing submissions Mr Brook Smith helpfully set out the terms of Article 7. It reads -

"If, before a company being formed has acquired legal personality, action has been carried out in its name and the company does not assume the obligations arising from such action, the persons who acted shall, without limit, be jointly and severally liable therefor, unless otherwise agreed."

The Directive bound the member states of the European Union (as it is now called) to make their laws, if not already conforming, conform. Parliament elected to use different words when legislating in 1972 (and again in 1985 and 1989). I must construe Section 6C of the 1985 Act as it stands but regard may be had to Article 7 in order to clarify any ambiguities in the statute. In my judgment, if a claim for remuneration can succeed on the basis of an inferred agreement that a reasonable remuneration should be paid, that would be a sufficiently contractual type of claim (even if commonly called "quasi-contractual") to fall within the term "contract" as used in Section 36C; to my mind it comes well within the mischief at which that Section is aimed.

83. I now move from considering general legal principles, to state my conclusions.

84. In my judgment, the allegation that the letter of intent itself constituted a contract is misconceived. As a matter of construction the letter of intent dated 5th February 1997 did not constitute a contract; it indicated an intention to "award to [Hok Sport] the rôle of Architect". A proposed contractual basis for the intended award was stated viz. the FIDIC Agreement for Consultants plus the Design Philosophy set out in the AHAG letter of 21st January 1997; detailed negotiations were to be carried out by Mr Frauenstein and Mr King on behalf on AHAG (in formation) during the meetings in Kansas City at the end of February 1997. On its face this letter did no more than indicate an intention to conduct serious (exclusive) negotiations with Hok Sport with a view to placing a contract on terms to be negotiated and agreed. Mr Lischer's reaction on 14th February 1997 (2/269 and 271) to the letter of intent itself and to Mr Frauenstein's letter of 11th February 1997 (2/265) was understandable and, to my mind, entirely logical. He rightly considered that no binding commitment had been given to Hok Sport and he thought it advisable that something further should be put in place in advance of the Kansas City meetings.

85. In my judgment, the allegation that the letter of intent was an offer to pay for work carried out by Hok Sport pursuant thereto which Hok Sport accepted by acting upon it in the way in which it was intended it should is also misconceived. The letter of intent did not expressly offer anything over and above participation in serious (exclusive) negotiations at the meetings which were then planned for the end of the month. Later statements and/or conduct on the part of Mr Frauenstein and/or Mr King could be examined to ascertain whether there was an express offer to pay for work requested to be undertaken prior to the conclusion of contractual negotiations or whether such an offer should be implied, but that is not what was pleaded by way of a re-amendment for which leave was sought at the beginning of the trial.

86. The third alternative way in which the claim was put was that the letter of intent was an offer to use best endeavours to negotiate the terms of a FIDIC agreement and, if agreement was reached, to execute the same. It was said that, by implication, it was a term of this alleged agreement that Hok Sport would be paid for such work as it carried out during the negotiations. In my judgment, it is well established that agreements to negotiate a contract cannot themselves be considered contracts - see **Chitty**, paragraphs 2-126 and 127 on pages 145 to 147 and, in particular the observations of Lord Akner in ***Walford v. Miles*** [1992] 2 AC 128 there cited and discussed. If negotiations are conducted and, in due course, a contract is concluded then, as Robert Goff J. said in the second of the two passages from ***British Steel Corporation v. Cleveland Bridge Engineering Co. Ltd.*** which I have cited above, in general work done or services performed by one party at the request of the other whilst the

negotiations were ongoing fall to be treated as having been performed under that contract. But, if negotiations are conducted with work being done or services being performed by one party in anticipation that a contract will be concluded but none is, it becomes necessary to consider the circumstances in which the work was or the services were performed with care. In some cases the work or services may have been performed on a speculative basis and no payment will be due; in others it may have been expressly agreed, or the proper inference to draw will be, that payment should be made for the work or services. In those latter cases, payment becomes due on one or other of the bases outlined in sub-paragraph (1) of paragraph 82 above rather than that pleaded at paragraphs 2B and 2D of the Re-Amended Statement of Claim (1/6B and 1/6C).

87. I turn to the fourth of the maintained alternative ways in which Hok Sport's contractual claim was put. This does not depend on the effect of the letter of intent, save insofar as it can be said to have initiated the commencement of contractual negotiations; it depends instead on the parties having conducted negotiations which resulted in agreement. In my judgment, the contemporary documents and the passages from Mr Walters' witness statement to which I have referred show that Mr King and Mr Frauenstein negotiated the terms of a FIDIC Agreement on behalf of AHAG (in formation) with Hok Sport. Substantial agreement was reached by 22nd May 1997 (see Mr King's letter dated 22nd May 1997 at 3/650); an amendment to the timing for completion of the then on-going phase was agreed in Kansas City on 22nd or 23rd May 1997 (see Mr Frauenstein's letter dated 26th May 1997 at 3/666 and see 3/703 for the amendment itself); Mr King confirmed this change with Mr London who was to forward *"the completed documentation for signature"* (see Mr King's letter dated 3rd June 1997 at 3/671; Mr London raised two queries on the contract documentation with Mr King on 5th June 1997 (see 3/673); these were promptly and simply resolved (see 3/676 and 677) before, on 9th June 1997, Mr London forwarded three copies of the revised client consultant agreement to Mr King for signature (see 3/679 to 736). Mr London sent a copy of that letter together with a copy of the contract to Mr Frauenstein (see 3/737). The documents were not signed and returned but, in the circumstances, that does not matter - all terms were agreed and signature should have been a formality. Mr King is personally liable on the "contract" because he was a person *"purporting to act for the company or as agent for it";* because the company had not been formed at the time; and because there was no agreement to the contrary. Section 36C applies. The *"contract",* once agreed, operated retrospectively and, accordingly the plea at paragraphs 3 to 6, 7A and 9c of the Re-Amended Statement of Claim (1/6C to 6E) can be sustained.

[A complete list of the contemporary documents and the passages of Mr Walters' evidence which, to my mind, show the course of negotiations and demonstrate the fact that agreement was reached between *"AHAG (in Formation)"* and Hok Sport on the terms of a FIDIC Agreement is given below. Since I have already referred to the contents of the documents and to the substance of the evidence when finding the facts I do no more at this stage than give dates and references for relevant documents and paragraph numbers and references for Mr Walters' evidence -

19th February 1997 - 2/231 to 242, paragraphs 35 to 37 of Mr Walters' witness statement - 1/69 to 1/70, 7th March 1997 - 2/422 to 432, 25th March 1997 - 2/481, 2nd April 1997 - 2/492, 4th April 1997 - 2/504, paragraphs 46 to 49 and the first sentence of paragraph 50 of Mr Walters' witness statement - 1/71 to 72, 28th April 1997 - 3/580, 29th April 1997 - 3/600 to 610, 15th May 1997 - 3/627 to 628, 631 to 640, 22nd May 1997 - 3/650, 26th May 1997 - 3/666, 3rd June 1997 - 3/671, 5th June 1997 - 3/673, 6th June 1997 - 3/676 and 677, 9th June 1997 - 3/679 to 736 and 737, 3rd July 1997 - 3/782 to 783, 7th July 1997 - 3/784 and 785 to 788.]

88. If, for whatever reason, Hok Sport's claim cannot be sustained on the simple and straightforward basis indicated above then, in my judgment, there is no doubt that Hok Sport made it plain that it was not prepared to carry out services gratuitously or speculatively whilst contract terms were being negotiated. Mr Frauenstein and Mr King both realised this was so. They realised that the letter of intent dated 5th February 1997 was not regarded by Hok Sport as a sufficient basis for going forward. They took care to ensure that a draft contract was in Hok Sport's possession prior to the Kansas City meetings (see Mr Frauenstein's fax to Mr King of 16th February 1997 at 2/227 and the letter of 19th February 1997 at 2/331) and by the time of the meetings, they also had Hok Sport's further proposals of 20th February 1997 which included the proposed building schedule which suggested lump sum fees including a fee of $412,500 for Phase 1 (2/366 to 392 and particularly 2/389). The proposed contract was discussed and its terms were largely agreed on 25th February 1997 in Kansas City (Mr Walters' evidence at 1/69). There is no suggestion in any contemporary document that there was an understanding or belief that Hok Sport was operating on a speculative basis pending agreement to final contract terms and/or execution of contract documents. After 25th February 1997 there were negotiations on matters of detail (which I have already sufficiently dealt with above) and, in due course, details were agreed. At the same time, whilst the detailed negotiations continued, Hok Sport submitted invoices for its work and these were discussed. None of the documents from 17th March 1997 onwards show any hostility on the part of either Mr Frauenstein or Mr King to the principle of payment but they do show what I would call "intelligent procrastination" whilst attempts to put funding in place were continuing. The amount to be invoiced in respect of Hok Sport's services during the then current phase of work was further discussed at the Anaheim meetings in April 1997. At that time either an earlier agreement on the amount which was to be paid was varied or, for the first time, agreement on amounts was reached (albeit no guarantee in respect of the timing of payment was then given). The services carried out between February and June or very early July 1997 were quite clearly carried out by Hok Sport for and at the request of the management of "AHAG (in formation)".

89. In these circumstances I would have been prepared to find Mr King personally liable on the basis of an *"If Contract"* - such contract having been made on the basis of the letter of intent dated 5th February 1997 as supplemented by the letter (enclosing the draft contract) of 19th February 1997 and the further letter from Hok Sport of 20th February 1997. Agreement was reached at the meeting on 25th February 1997 and/or at that meeting an offer was made which Hok Sport accepted, by its performance or continued performance of professional services. However, if it were to be concluded that there was no sufficient agreement on the basis of remuneration to support such an *"If Contract"* then, in the alternative, in these circumstances, I would have been prepared to find on the quasi-contractual basis outlined at paragraph 82 above. In my judgment, in the absence of any express contract, it would be right to infer a contractual basis for payment (with an implied term that a reasonable remuneration would be paid) and to note that the main part of the remuneration for the particular phase (viz. Hok Sport's own fees but not the amounts for disbursements and expenses) had subsequently been expressly agreed. On either basis, because AHAG was not formed personal liability would have fallen (inter alia) on Mr King by virtue of Section 36C.

90. The project did not go ahead. It would seem that the only reason was that the potential funders were unwilling to provide the funds required for it to go ahead. Whether their unwillingness was simply linked to the apparent reluctance of the Expo Design Review Board to approve part of Hok Sport's schematic design or whether they took into account wider commercial factors is not clear. However, so far as the trial of the preliminary issue is concerned, I do not think their motivation matters. No claim is made in respect of the *"Phase 2"* or *"Stage 2"* works which were not commenced by Hok Sport. The only claim made in these proceedings by Hok Sport is in respect of "Phase 1" or "Stage 1" works which were carried out between about February and June 1997. In my judgment, had AHAG been formed, whether or not the contract documents came to be duly signed, there can be no doubt that terms, which would have been retrospectively applicable, had been agreed and Hok Sport would have been entitled to claim the appropriate remuneration for the work that it had carried out. Since AHAG was not formed, persons purporting to act "for AHAG (in formation)" or *"as agents for AHAG (in formation)" are potentially personally liable to the other contracting party. In my judgment, if the issue is now stated to refer only to Mr King -* ***"Is [Mr King] personally liable to pay [Hok Sport] for the works it carried out for the Hannover Arena project?"*** the answer to be given is "yes".

Mr Harold Burnett Q.C. and Mr Martin Kurrein appeared for the Claimant instructed by Bracher Rawlins
Mr. Phillip Brook Smith appeared for the First Defendant instructed by Stitt & Co