**JUDGMENT HIS HONOUR JUDGE HUMPHREY LLOYD QC** : TCC. 12 February 1999

1. The plaintiff carried out for the defendant some of the work required for the construction of luxury apartments at Adventurers' Quay, Cardiff Bay. By a writ issued on 8 September 1998 and a statement of claim served on 12 October 1998 the plaintiff seeks to recover payment for that work upon a quantum meruit. The plaintiff considers that the work was done on the strength of a letter or letters of intent or other requests of the defendant for, although there were extensive negotiations, no contract was actually made.

2. The defendant takes a different view. It says that there was a contract and that since it incorporated the JCT Conditions of Contract, With Quantities, 1980 Edition, it contained an arbitration agreement. Accordingly the defendant, relying on Section 9 of the Arbitration Act 1996, issued a summons on 21 October 1998 for the stay of these proceedings. In its arbitration application the defendant said that the arbitration agreement was *"made and/or confirmed*
*(a) on 2 July 1997; alternatively*
*(b) by the conduct of the plaintiff after 2 July 1997; alternatively*
*(c) on 18 July 1997*
*but in any event thereby having agreed to refer to arbitration any dispute or difference as to the construction of the contract or any matter or thing of whatsoever nature arising thereunder or in connection therewith."*

3. It is common ground that the following courses are open to me:
   1. To determine, on the affidavit evidence that has been filed, that an arbitration agreement was made between the parties, in which case the proceedings will be stayed in accordance with section 9 of the 1996 Act since article 5 and clause 41 of the JCT Conditions contain an arbitration agreement;

   2. To stay the proceedings but on the basis that the arbitrator will decide the question of whether or not there is an arbitration agreement since section 30 of the Arbitration Act 1996 provides:-
   *"(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to -*
   *(a) whether there is a valid arbitration agreement, ...*
   *(c) what matters have been submitted to arbitration in accordance with the arbitration agreement.*
   *(2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part."*

   Sub section (2) is a reference to provisions such as section 67 which states:-
   *"(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court -*
   *(a) challenging any award or the arbitral tribunal as to its substantive jurisdiction; ..."*

   3. Not to decide the question immediately but to order an issue to be tried. RSC Order 73, rule 6(2) provides:- *"Where a question arises as to whether an arbitration agreement has been concluded or as to whether the dispute which is the subject matter of the proceedings falls within the terms of such agreement, the court may determine that question or give directions for its determination, in which case it may order the proceedings to be stayed pending the determination of that question."*

   4. To decide that there is no arbitration agreement and to dismiss the application to stay.

4. Mr Darling for the plaintiff contended that there should be no stay of the proceedings unless the court was satisfied that there was clearly an arbitration agreement. I do not consider that the position is that clear cut. The circumstances of the application must be taken into account. I accept that if it is clear on the evidence that a contract did or did not exist then the court should so decide for it cannot be right either to direct an issue pursuant to Order 73, rule 6(2) or to leave the "dispute" to be determined by an arbitral tribunal. The dominant factors must be the interests of the parties and the avoidance of unnecessary delay or expense. Where the rights and obligations of the parties are clear the court should enforce them. Unless the parties otherwise agree section 30 of the Arbitration Act 1996 now permits an arbitral tribunal to decide questions of jurisdiction where it might not previously have been competent to do so. It is not mandatory and, contrary to a suggestion made by Mr Palmer, the existence of this power does not mean that a court must always refer a dispute about whether or not

an arbitration agreement exists to the tribunal whose competence to do so is itself disputed. The Act does not require a party who maintains that there is no arbitration agreement to have that question decided by an arbitral tribunal. Indeed RSC Order 73, rule 6 in making express provision for a decision as to whether there is an arbitration agreement suggests that normally a court would first have to be satisfied that there is an arbitration agreement before acting under section 9 (and that a dispute about such a matter falls outside section 9). There will however be cases where which it would be right to defer the decision particularly, for example, if the determination of whether or not a contract was made also embraces the determination of the scope of the contract and its ingredients. In some cases it would be better for the court to act under Order 73 rule 6; in other cases it may be appropriate to leave the matter to be decided by an arbitrator. The latter course is likely to be adopted only where the court considers that it is virtually certain that there is an arbitration agreement or if there is only a dispute about the ambit or scope of the arbitration agreement. One of the matters that a court is bound to take into account is the likelihood of the challenge to an award on jurisdiction under section 67 or, under section 69, on some important point of law connected to the existence of the agreement for which leave to appeal might be given (if it is plainly discernible at that early stage), eg its proper law, since it cannot be in the interests of the parties to have to return to the court to get a definitive answer to a question which could and should be decided by the court before the arbitrator embarks upon the meat of the reference. Such a course would mean that the arbitral proceedings would not be conducted without unnecessary delay or expense. On the other hand the court must bear in mind that it must not act so as to deprive the party of the benefit of the contract that it has made whereby disputes are to be referred to arbitration. The recent case of **Azov Shipping Co v Baltic Shipping Co [**1999] 1 Lloyd's Rep 68 (which was not cited to me) supports the approach that the court ought to decide questions relating to the existence or the terms of the arbitration agreement for there may otherwise be a real danger that there will two hearings: the first before the arbitrator under section 30 of the Arbitration Act 1996 and the second before the court on a challenge under section 67.

5. Mr Palmer referred to a decision of His Honour Judge Bowsher QC: **Ahmad Al Naimi v Islamic Press Agency,** 2 October 1998, unreported, in the course of his argument that it was unnecessary for the court under section 9 to determine whether there was in fact an agreement between the parties. Mr Darling invited me not to follow it on the grounds that it turned on its facts since there were two contracts: the first contained an arbitration clause but the second (about which the dispute had arisen) did not. It was argued that the dispute was thus not subject to the arbitration agreement in the first contract. Judge Bowsher QC had stayed the proceedings on the basis that the contracts were connected and that the arbitrator could decide whether the disputes about the second contract fell within the arbitration agreement of the first contract. I agree with Mr Darling that the case is primarily an exercise of discretion and distinguishable since in that case there was both an undoubted arbitration agreement and a close relationship between the second contract and the first contract so that on the facts it was sensible to leave the arbitrator to decide the issue.

6. I turn now to the facts before me as set out in the affidavits and the documents exhibited to them. The defendant tendered affidavits from Mr Roger Brennan, a Special Project Manager for St David Ltd and Beaufort Western Limited. Both companies are trading names of Beaufort Homes Development Group plc, the former undertaking projects in Wales and the latter in the south west of England. He was present at most of the meetings when he dealt with Mr Pickford and Mr Vince Goff of the plaintiff. The defendant also filed an affidavit for Mr David Daniel. The plaintiff filed affidavits from Mr C M Cooper, Mr P Johnson, and Mr R A Heath. Mr Cooper was the plaintiff's Project Manager and also attended a number of the meetings. Mr Johnson was an Area Business Leader but his role was largely in the latter part of 1997. Mr Heath is a Regional Director of the plaintiff who took part in a few of the meetings.

7. It had been the defendant's intention that there should be a partnering arrangement with the plaintiff (and other members of the project team). This is described in Mr Brennan's report of 16 May 1997. In reality the relationship between the parties was to be based upon the JCT Standard Form of Building Contract 1980 Edition Private without Quantities, in accordance with the plaintiff's proposal made at a meeting of 12 May 1997. Nevertheless the concept of partnering continued to be observed. First, the

parties agreed on an elaborate financial arrangement which was to take the place of the simple contract sum under the JCT form and also on a consequential replacement for clause 30 of that form. Secondly, a Charter was drawn up and signed by the parties and others at a "**Team Building Seminar**" on 5 June 1997. It read:-

*"**Adventurers Quay, Cardiff Bay CHARTER***
*To produce an exceptional quality development within the agreed time frame, at least cost, enhancing our reputations through mutual co-operation and trust.*

***Quality***
*- To inspire, design and construct an award winning flagship development To enhance the reputation of the Team*
*- To work towards zero defects*

***Time***
*- To complete all aspects of the scheme within the agreed programme*

***Commercial***
*- To maximise profit for all parties*
*- To preserve the budget, minimise waste, promote buildability and economic design*

***Relationships***
*- To promote an environment of trust, integrity, honesty and openness*
*- To enrol subcontractors, suppliers and specialists into the Team ethos*
*- To promote clear and effective communication*

***Safety***
*- To work to the agreed safety plan*
*- To work within the safety policy of the Principal Contractor*

***General***
*- To build within legal and statutory obligations*
*- To provide a bespoke service to purchasers*
*- To complete the entire project by mutual support*
*- To enhance the ethos of Partnering*
*- To build long term profitable relationships with all parties"*

8. Mr Brennan's report summarised the position in mid May 1997. Before that time, the plaintiff had received a letter of intent from Beaufort Western Limited. Financial issues had been discussed at a meeting on 18 April 1997. On 1 May 1997 there had been a meeting at which it was agreed that the plaintiff and the defendant would *"draw up construction programme as previously minuted by Tuesday 6/5/97 initially. By Friday 9/5/97 a schedule of prelims shall be established for review by RB [Mr Brennan]."*

   In the meantime progress continued on site, eg piling was carried out. A construction programme was duly tabled at a meeting of 8 May 1997 at which it was agreed that *this "initial draft programme is to be firmed up".*

9. On 12 May 1997 two meetings were held. The first was between Mr Brennan and Mr Goff and concerned the partnering arrangements. Mr Goff set out *"sliding scale gain share calculations"* and the plaintiff's preliminary costs as a percentage of construction costs. There was a discussion about cost. Mr Goff, according to Mr Brennan, suggested that a JCT form of contract should be used as it was apparently similar to that being used by the plaintiff on another project for Asda under a partnership form of agreement. At the second meeting Mr Brennan and Mr Goff were joined by Mr Lavell of the defendant and Mr Heath. This meeting was minuted. Its purpose was *"to discuss financial matters ... to enable contract particulars to be agreed". The final minute was "the following was discussed as a programme of information exchanged to enable a definitive financial basis to be achieved for a contract to be drawn.*

   *14/5/97 - preliminary costs, programmes, contracts, contract comments, insurance clarifications.*

   *15/5/97 - RB to table information obtained from 14/5/97.*

*16/5/97 - Heads of terms to be established by St David for Beaufort's comments/acceptance."*

10. Mr Brennan's report on the terms was prepared by him in consultation with Mr Goff at a meeting on 16 May 1997. Mr Goff took a copy away for discussion with Mr Heath. At a design development meeting on 29 May 1997 the overall contract period of 102 weeks was agreed and the plaintiff undertook to produce a contract programme for comment by St David (see paragraph 6.3). On 5 June 1997 the *"Team Building Seminar"* took place at which the Charter was agreed and signed by the principal participants. Mr Brennan said in his affidavit that he believed that the seminar *"indicated once more that all the representatives of Birse and St David regarded the conclusion of the contract as being imminent. I would add that it was St David's style of business, and indeed my role as special projects manager to ensure that the contractual documentation for projects was in place before construction work commenced. Meetings in May and June 1997 with Birse took place to ensure that this was the case on the Adventurer's Quay project."*

    Mr Heath, who also attended the seminar said in his affidavit that: *"I would certainly accept that by that stage all parties were optimistic that a contract would soon be concluded, but I also believed that nobody was under the impression that at that stage a contract had in fact been entered into by the parties."*

    The events that followed are the most important.

11. First, on 9 June 1997 a meeting took place between Mr Brennan and Mr Goff (accompanied by Mr Daniel and Mr Hurst). In his affidavit Mr Brennan said that the contents of the articles of agreement and preliminary costs and all other items in the report which had been issued earlier were then discussed and agreed. It was agreed that his report would remain unaltered and it and its terms would be incorporated in the contract. Mr Brennan said that he ran through each point in the sectional completion supplement to the JCT form and agreed the necessary insertions. He went on to say that he thought that the blanks were filled in by Mr Goff in manuscript and later typed in by the defendant. In his affidavit Mr Heath agreed that account of the meeting. However he was not present at the meeting so I infer that Mr Goff's report to him of the meeting must have matched Mr Brennan's account.

12. After the meeting Mr Hurst set out the contract completion dates which had been agreed with Mr Cooper. It appears that by this stage it was envisaged that there would be three key stages for completion in each of the two phases which were within this part of the project: fit out access, watertight, and completion including externals. Since the plaintiff's work was confined to completing the shell, the first two stages enabled the defendant to regain possession and to carry on the further work necessary to make the buildings habitable. For these phases the dates given by Mr Hurst were:

| Phase | Fitout Access | Watertight completion | Including Externals |
|---|---|---|---|
| 1A | 27 Oct 1997 | 1 Dec 1997 | 25 Jan 1998 |
| 1B | 2 Feb 1998 | 12 Apr 1998 | 28 June 1998 |

    (In the case of Phase 1B a later date of 10 May 1998 was given for the windows under the heading "watertight" but this date did not appear in the marked up programme then being used and since it did not reappear it may be disregarded.)

13. It seems that these dates were discussed at a progress meeting held on 10 June 1997, attended amongst others by Mr Brennan, Mr Hurst and Mr Daniel for the defendant and Mr Cooper (and two others) for the plaintiff. The Minutes record*: "Contract programme to be issued following meeting with the proposed pre-cast supplier for 1B structure"*. Apparently, Mr Cooper stated that the dates for Phase 1B were subject to confirmation by the plaintiff as they were dependant upon the supplier of the precast concrete unit agreeing to deliver them on time to meet the plaintiff's requirements.

14. A draft "contract letter" was issued on 13 June 1997 and followed up by a letter from Mr Brennan to Mr Goff dated 2 July 1997: *"Please find attached the articles of agreement and sectional completion supplement, to be read in conjunction with the Contract JCT 80 Private Edition without Quantities, which shall form the basis of our agreement for commencing and completing the work for the above project.*

*We look forward to working with yourselves on what will no doubt be a very successful contract project for all concerned."*

The documents accompanying this letter included the articles of agreement (aptly described as "home made", although they are entirely serviceable as a contractual document and were subsequently so treated by the parties) which specified the amounts of liquidated damages payable for late completion of any of the three stages of fit-out access, watertight and completion and which also covered the matters needed to complete the appendix to those articles for use with the JCT form, an amended clause 30 to reflect the special financial arrangements made between the parties, other standard forms and a completed sectional completion supplement. The sectional completion appendix said that the dates for completion of phases 1A and 1B were "as programme No 1289 Revision 6" and for the rate of liquidated damages "see section 6 of articles of agreement".

15. On 17 July 1997 a progress meeting took place attended, once again, by Mr Brennan, Mr Hurst and Mr Daniel for the defendant and Mr Cooper (accompanied by Mr Emerson) for the plaintiff. The minutes record that the contract programme was issued and that the transfer slab and pre-cast super structure programmes were confirmed. Mr Cooper thought that the programme was tight but that it maintained access and watertight dates. This programme was revision 6 of the plaintiff's construction programme. The copy exhibited to Mr Brennan's affidavit is actually dated 18 July 1997 but I am sure this is merely a reference to the time when this copy was generated. The programme (C.1289) was in simple bar chart form. The key milestone dates for access, watertight and completion for both phases 1A and 1B were denoted by a lozenge:. Thus for phase 1A handover/completion, (activity 1) was shown at 25 January 1998; watertight (activity 13) was shown at 1 December 1997 and access (fit out - activity 21) was shown at 27 October 1997. The dates for phase 1B were similarly indicated.

16. Thereafter progress meetings took place at which the plaintiff's progress was reported against the programme C.1289 rev 6. The documents sent by the defendant to the plaintiff on 2 July 1997 were not however signed and returned. Mr Heath said in his affidavit that he had made investigations and that there was no record of the documents having been received on site by Mr Goff or elsewhere, eg at the plaintiff's Swindon offices. However at a meeting held 31 October 1997 there was discussion about the contract documents at which it was recorded *"The contract remains unsigned by Birse Construction"*. The meeting was called to deal with a list of *"items for discussion"* which had been prepared by the plaintiff and which were annexed to the minutes of the meeting. (By this time the defendant was unhappy with the plaintiff's performance and had decided not to give it much of the work in the remaining phases.) These minutes record that the agenda *"was to follow the articles of agreement as set out in the contract between St David and Birse Construction"*. The discussion covered a number of points both technical and contractual. Under the head "section 7 - Liquidated and ascertained damages" the minutes read:-

*"7.1 Fit out access at present is overrun by one week. Both parties shall endeavour to wrap up the costs of these damages in an agreement to proceed with the following phases."*

For its part the defendant wanted to deal with some ambiguities in the contract which had been highlighted by their solicitors. There was discussion at a meeting on 14 November 1997 when both parties then agreed *"there is a common aim to sign the contract prior to the Christmas break."* On 2 February 1998 a further set of contract documents was given to the plaintiff for execution, with a request in Mr Brennan's covering letter that they should be signed and sealed and returned to the defendant. The letter also enclosed a *"main contractor warranty dated 19 December 1997"* which the defendant required to be executed. This was a new requirement. On 5 March 1998 the defendant notified the plaintiff that it intended to deduct liquidated and ascertained damages. On 6 May 1998 the plaintiff informed the defendant that it was unable to complete the contract documents for various reasons. A meeting was held on 22 May 1998 to find out what contract documents the plaintiff had got. A further set of all the documents were sent to the plaintiff on 15 June 1998. Mr Heath said that by 29 June 1998 he had signed the contract documents but that he had given express instructions that they were not to be returned to the defendant until "*the essential matter of programme (and therefore the dates of the sectional completions) were reviewed and dealt with satisfactorily"* (see paragraph 31 of his affidavit).

17. Practical completion of Phase 1A was certified on 1 July 1998. The plaintiff left site on 11 August 1998 maintaining that no contract existed between it and the defendant. On the next day the defendant treated the plaintiff's action as an abandonment and constituting a specified default, as referred to in clause 27 of the JCT Conditions. It is clear that a decision as to whether or not there was an arbitration agreement between the parties will inevitably resolve the dispute as to whether or not there was any contract between the parties, the outcome of which may determine whether the plaintiff was entitled to leave the site in August 1998, and that the issue about the formation of a contract cannot be divorced from a consideration of the principal terms of any contract that may be found to have existed.

18. For the defendant, Mr Palmer referred to a number of authorities (including **Pagnan S p A v Feed Products Ltd** [1987] 2 Lloyd's Rep. 601 for the principles set out by Lloyd LJ at page 619; **Smith v Hughes** (1871) LR 6 QB 597, and **G Percy Trentham Ltd v Archital Luxfer Ltd** (1992) 63 BLR 44) in support of his argument that it was permissible to conclude that the terms of the contract were agreed between the parties either expressly or by the conduct of the plaintiff in carrying out the work and that there were no essential terms which had been left unagreed. Mr Palmer submitted that complete agreement and a binding contract could be inferred on or by 9 June 1997 albeit that the plaintiff had a licence, as it were, to alter the programme to provide revision 6. This was done and revision 6 was confirmed by 2 July 1997 when the documents were sent to the plaintiff. Alternatively he submitted that the contract was concluded when the programme was produced or at the meeting held on 17 July 1997 when the only outstanding term that then remained open - namely, confirmation by the plaintiff of the dates of the three key stages - was agreed. Mr Palmer submitted that there was no question of the agreements being *"subject to contract"*. He also relied on the dicta of Lord Denning MR in **Sykes (Wessex) Ltd v Fine Fare Ltd** [1967] 1 Lloyd's Rep 53 at page 57: *"In a commercial agreement the further the parties have gone on with their contract the more ready are the courts to imply any reasonable terms so as to give effect to their intention. When much has been done the courts will do their best not to destroy the bargain. ..."*

19. Mr Darling for the plaintiff accepted the principles set out by Mr Palmer but he also relied on ***Keating on Building Contracts*** 6th ed. at page 20: *"It is sometimes difficult to determine whether a concluded contract has come into existence when there have been lengthy negotiations between the parties but no formal contract has ever been signed. It is suggested that the useful approach is to ask whether the following can be answered in the affirmative:*

    *(a) in the relevant period of negotiation did the parties intend to contract?*

    *(b) at the time when they are alleged to have contracted, had they agreed with sufficient certainty upon the terms which they then regarded as being required in order that a contract should come into existence?*

    *(c) did those terms include all the terms which, even though the parties did not realise it, were in fact essential to be agreed if the contract was to be legally enforceable and commercially workable?*

    *(d) was there a sufficient indication of acceptance by the offeree of the offer as then made to comply with any stipulation in the offer itself as to the manner of acceptance?"*

20. Mr Darling submitted that the court had to be satisfied that a contract had come into existence by the acceptance of a definite offer or, if it were permissible to infer an agreement from looking at correspondence, to be satisfied that at a given time the parties must be taken to have agreed all the matters which they then thought necessary to form a contract. He submitted that there never was a time when there was either such event. The meetings on 9 and 10 June 1997 were not a formal meeting. Mr Goff did not have the authority to conclude a contract. The discussions were merely part of the negotiations. At that stage the plaintiff had not agreed completion dates for the three key stages and was investigating whether it was in a position to do so. When they did obtain confirmation from the pre-cast concrete supplier Mr Cooper made it clear that the programme was still tight. There was then no clear agreement upon the terms of the contract since many of the key terms were embodied in what was called the *"home made"* articles of agreement. The defendant's letter of 2 July 1997 only sent documents which were to "*form the basis of our agreement"*. They looked forward to that event and did not purport to record an existing agreement. The documents then sent were incomplete and required at least one further addendum. Work was proceeding under a letter of intent so there was already a

contractual umbrella pending for the conclusion of a formal contract. The documents themselves did not name the architect which might not in itself be enough to prevent a contract from coming into existence but indicated a further lack of precision. After programme revision 6 came into existence there was no apparent acceptance of it by the defendant and nothing more happened for many weeks or months. It was clear that by the autumn the parties were not taking the position that they were already bound to each other and they saw that further matters, albeit minor ones, remained to be settled before the contract documents could be prepared. In December the defendant introduced a new term by requiring a main contractor's warranty. There was no acceptance by the plaintiff of that requirement or of the package then being sought by the defendant. In these circumstances it was not sufficient to rely upon simply a course of correspondence and negotiations. The ordinary canons of offer and acceptance needed to be satisfied.

**Decision**

21. The principles of law relating to the formation of a contract ordinarily require decisions on whether an offer was made and, if so, whether it was accepted. In **G. Percy Trentham v Archital Luxfer** Steyn LJ however said (at page 52): *"Secondly, it is true that the coincidence of offer and acceptance will in the vast majority of cases represent the mechanism of contract formation. It is so in the case of a contract alleged to have been made by an exchange of correspondence. But it is not necessarily so in the case of a contract alleged to have come into existence during and as result of performance."*

    He also said a little later: *"The third matter is the impact of the fact that the transaction is executed rather than executory. It is a consideration of the first importance on a number of levels. ..... [I]t may make it possible to treat a matter not finalised in negotiations as inessential. Clearly, similar considerations may sometimes be relevant in partly executed transactions. Fourthly, if a contract only comes into existence during and as a result of performance of the transaction it will frequently be possible to hold that the contract impliedly and retrospectively covers pre-contractual performance. See* ***Trollope & Colls Ltd v Atomic Power Construction Ltd*** *[1963] 1 WLR 333."*

    In so far as the formation of a contract may depend on the identification of terms which may or may not be essential the judgment of Lloyd LJ in **Pagnan** makes it clear (a) that a failure to agree on a term may not invalidate an existing contract (by which further terms are to be agreed) unless thereby the contract becomes unworkable and (b) that the question of whether a term is so necessary as to be essential whereby failure to agree on it precludes an agreement binding in law or makes a contract unworkable is for the parties to decide (see propositions (4) - (6) at page 619). The statements of the distinguished editor of ***Keating on Building Contracts***, 6th ed., at page 20 also correctly summarise the law. In most situations it will be clear that by the canons of offer and acceptance the parties must be taken to have reached an agreement and that it covered all the matters which they thought necessary so that they made a contract in law. Occasionally where it proves impossible to discern a clear offer or a clear acceptance of an offer the judgment of Steyn LJ in **G Percy Trentham** shows that objectively a contract may still be found to have been made since the canons of offer and acceptance are not the last word and may be incapable of precise application. The decision is a mixed question of fact and law; whether there was an agreement is primarily a question of fact. Furthermore, as many cases show (including the dicta of Lord Denning MR in **Sykes v Fine Fare**) where work is already being carried out, a contract is more readily found unless there are clear indicia that, for example, by the use of the term "subject to contract", the parties did not intend to (and did not) enter into a binding legal relationship. Where, as here, the immediate question is whether the parties entered into an arbitration agreement which must be in writing (see section 5(1) of the Arbitration Act 1996) the extremely wide terms of section 5(3) (4) and (5) will undoubtedly help.

22. I return to the facts. As a preliminary I observe that the plaintiff's evidence did not suggest that there was any further material evidence. For example, although no affidavit by Mr Goff was served, Mr Heath said that he had been contacted by the plaintiff's solicitors. It appears therefore that I have all the evidence needed to decide whether or not there is or may be an arbitration agreement. In my judgment it is clear that by 9 June 1997 negotiations were at a very advanced stage. On 16 May 1997 Mr Brennan and Mr Goff had worked to produce an agreed report which was to set out, and did set

out, the essential terms of the contractual relationship to be formed between the plaintiff and the defendant. Mr Goff took it away to get Mr Heath's approval. It is clear from the evidence of Mr Heath that he accepted that report. Thus by 9 June the work for the phases 1A and 1B was agreed; the JCT conditions applicable to the work and the special terms upon which the plaintiff was to be paid were agreed; on 29 May the overall contract period had been agreed; the damages payable for late completion of each section were agreed; all that remained to be agreed were the completion dates for each section of the two phases. It is equally clear that the "hand made" terms, subsequently prepared and sent with the letter of 2 July 1997, when read together with the other documents, recorded with no material deviations that which had been agreed in the report and at the meeting of 9 June 1997, as set out by Mr Brennan in paragraphs 38 and 39 of his affidavit. Any ambiguities or infelicities in them do not in my judgment cause difficulties nor did the parties at any later stage treat them as causing insuperable problems and indeed they overcame any difficulties presented by the language of those terms. It is said that Mr Goff did not then have authority to bind the plaintiff. If it were necessary to decide the point I would unhesitatingly hold that he had ostensible authority to do so since there is no evidence from the plaintiff that the defendant was told or must have known that Mr Goff did not have the requisite authority. His role in the negotiations up to that point had been central. The defendant was therefore entitled to rely upon Mr Goff as having authority not merely to negotiate but also to contract - a distinction which in most commercial relationships is a fine one and which requires to be identified for otherwise it will not be thought to matter. It is not however necessary for me to base my decision on this factor since Mr Heath in his affidavit accepted what Mr Goff agreed and the plaintiff's subsequent conduct ratified it.

23. In addition it is necessary to recall that the parties had attended the *"team building seminar"* a few days earlier at which the partnership Charter was signed. The terms of that document, though clearly not legally binding, are important for they were clearly intended to provide the standards by which the parties were to conduct themselves and against which their conduct and attitudes were to be measured. If Mr Heath had thought that Mr Goff had agreed to something that he ought not to have accepted Mr Heath would have said so for that would be consistent with an expression of *"mutual co-operation and trust"* and a relationship which was intended "*to promote an environment of trust, integrity, honesty and openness" and "to promote clear and effective communication*". On the other hand, I am not prepared to infer from Mr Brennan's evidence (in paragraph 42 of his affidavit) of the end of the meeting on 9 June 1997 - *"all four of us shook hands and agreed to leave the meeting with the understanding that the agreement reached would form the binding contract"* - that a binding agreement could then have been made. First, such an expression of mutual confidence was natural but there could not have been complete agreement at that stage since the sectional completion dates had yet to be established. Secondly, even Mr Brennan uses the words "the understanding that the agreement reached would form the binding contract" which is not the same as recognising that there was then a binding contract.

24. I do not therefore consider that the defendant is right in maintaining that a contract was entered into on 9 June 1997. However the defendant is right in the submission that by that date all the essential terms, bar one, were agreed. I do not have to reach a conclusion as to whether or not the plaintiff actually received the documents sent on 2 July 1997 (which had indeed been sent as a draft a week or so earlier). It is surprising that neither letter arrived, especially since Mr Brennan said that on 2 July 1997 he received the completed appendix from the plaintiff. Nonetheless I am satisfied that at the meeting on 17 July 1997 there was agreement about the only matter left outstanding at the meetings in June 1997, namely the contract programme. Clearly Mr Cooper had reservations about the feasibility of the programme but, following discussions with the precast supplier, the plaintiff put it forward as the contract programme, obviously within the *"partnering"* ethos which it was expected would naturally have led to a sympathetic approach to questions of extensions of time and of deduction of damages for delay if the plaintiff had not been able to maintain the programme because of the occurrence of a relevant event (as defined in the JCT conditions) and also for other reasons beyond its immediate control, such as being let down by a supplier or sub contractor.

25. Viewed in terms of offer and acceptance I conclude that at the meeting on 10 June 1997 (by which time all had been settled but the dates for the key stages for the first two phases) the defendant having received the plaintiff's assent to Mr Brennan's report and being satisfied with all other proposals of the plaintiff then offered to contract on that basis and on the dates then forecast by requiring the plaintiff to produce a confirmatory contract programme. That offer was accepted by the plaintiff's confirmation that the dates were feasible by tabling programme C.1289 rev 6 at the meeting on 17 July 1997. Even if there had been no such agreement on 17 July 1997 then alternatively I conclude that there was acceptance of the report and other agreed matters (including the programme) by conduct by one party or the other in either permitting or continuing the execution of the work on the basis of that programme as a contract or working programme. It is of course somewhat artificial so to analyse the parties' actions as there was clearly no distinct offer or acceptance since the parties were converging by stages on an agreed package just as a jigsaw is put together. At the meeting of 17 July the last stage was reached and the last piece was found and fitted. The plaintiff's evidence does not indicate what key terms were not agreed or which pieces of the puzzle were thereafter still missing and, given that work was continuing on a basis apparently acceptable to both parties, it would require clear evidence to displace the inference that it was not being carried out pursuant to some contract. The fact that much later the parties found some problems with the documents does not indicate that their agreement was materially incomplete. Indeed those problems were overcome and a set of documents acceptable to the plaintiff was prepared and signed by it. Thus viewed objectively in the manner suggested by Steyn LJ in **G Percy Trentham** there can be no doubt that by, say, the end of July 1997 the parties are to be regarded as contractually bound to each other. Although irrelevant, the parties' conduct in the latter part of 1997 is entirely consistent with the existence of the contract which I have found. In my view the plaintiff is trying to capitalise on the lack of a formal written contract (which it is sitting on) to extricate itself from, for example,the apparent absence of relevant events (or notices of such events) which might entitle it to an extension or extensions of time. This is particularly surprising since these days one would not expect, where the parties had made mutual commitments such as those in the Charter, either to be concerned about compliance with contractual procedures if otherwise there had been true compliance with the letter or the spirit of the Charter. Even though the terms of the Charter would not alter or affect the terms of the contract (where they are not incorporated or referred to in the contract or are not binding in law in their own right) an arbitrator (or court) would undoubtedly take such adherence to the Charter into account in exercising the wide discretion to open up, review and revise, etc which is given under the JCT conditions. In any event the events of late 1997 and the first part of 1998 are not inconsistent with the formation of a contract. It is by no means uncommon to find people seeking to improve on an agreement already reached for the purposes of incorporating the terms in formal contract documents. It is also not uncommon to find that one party attempts to include a matter not previously discussed or agreed. The attempt sometimes succeeds, particularly where the other party can secure an advantage. The fact that these steps are taken does not however imply that there was no concluded agreement on all the matters which the parties themselves had considered necessary for the formation of a binding contract.

26. Of possible consequence is the absence of a designated person to administer the JCT form. However it does not appear that this caused anybody any problems at the time. The defendant had professional advisers who attended meetings. They were evidently signatories to the Charter. It does not appear to me that the plaintiff or the defendant considered that any problem would arise over the nomination of a person to administer the contract, insofar as such a person was required, given the basis of the relationship between them.

27. Similarly although it was clearly envisaged that formal contract documents would be drawn up and executed by both parties, there was never an agreement that there would be no binding contract between the parties unless and until those documents had been prepared and executed. I have little doubt that the parties considered that the "partnering" arrangement that they had made, as exemplified by the Charter, made it unnecessary. People who have agreed to proceed on the basis of mutual co-operation and trust, are hardly likely at the same time to adopt a rigid attitude as to the formation of a contract.

28. For the purposes of section 5 of the Arbitration Act 1996 the arbitration provisions in the JCT conditions were accordingly incorporated by the agreement to use the JCT Form as evidenced by the reference to it in the minutes of the meeting of 12 May 1997 and in the use of the JCT sectional completion supplement, eg by Mr Goff, and, of course, the letter of 2 July 1997, on the assumption that it was received by the plaintiff, or alternatively by the references to that form in later meetings such as that of 31 October 1997 or 14 November 1997. In addition, if it be necessary, there might be reliance placed upon form of applications for payment which are consistent with the amendments made to clause 30 of the JCT contract.

29. Accordingly, I am satisfied that a contract was made which incorporated the JCT terms and otherwise the terms as set out in the contract as proffered on 2 July 1997 and in the documents signed by Mr Heath on behalf of the plaintiff and exhibited as Exhibit RAH3 to his affidavit of 4 January 1999. It would be remarkable if the latter were not a full set of the applicable terms, even though that contract was never exchanged with the defendant. Even if the facts were not as clear as I have found them, I would have acceded to the application that an issue should be directed under RSC Order 73, rule 6 since such an issue could now be tried in this court in a matter of weeks so that the parties could know where they stood at a time rather earlier than would be the case if there were now a stay of these proceedings in favour of arbitration. In any event it is highly desirable that an issue such as the formation of a contract incorporating an arbitration agreement should be determined by the court before the arbitration commences and before time and money is expended on an assumption which might turn out not to be valid, as I indicated at the outset of this judgment.

30. Finally, I am indebted to counsel for their careful and clear analyses of the facts and the law. The defendant's application will be granted and the proceedings will be stayed pursuant to section 9 of the Arbitration Act 1996.

Howard Palmer appeared for the applicant, the defendant, instructed by Masons.
Paul Darling appeared for respondent, the plaintiff, instructed by Laytons, Bristol.