

Judgment His Honour Judge Thornton Q.C. High Court of Justice Official Referees' Business 21st November 1997

Introduction

1. This judgment is concerned with three issues of law concerned with the terms of the contract governing extensive refurbishment and redevelopment work being carried out at office premises at 36-40 Jermyn Street, London, SW1Y 6DN. The defendant is both the owner of the premises and the employer of the plaintiff who is the main contractor. The work is near to achieving practical completion (as at the beginning of August 1997) but the parties are in dispute as to what the contract terms are that govern the work and, as a corollary of this dispute, as to whether there is an arbitration clause which is incorporated into, or relates to, the parties' contractual relationship.
2. The reason why this dispute has arisen is because the work started pursuant to, or following, what the parties have referred to as a letter of intent sent on 23rd. October 1996. This letter actually set up a contractual relationship, pursuant to which the work started, which is a bilateral contract. A letter of intent is usually an unilateral assurance intended to have contractual effect if acted upon, whereby reasonable expenditure reasonably incurred in reliance upon such a letter will be reimbursed. Such a letter places no obligation on the recipient to act upon it and there is usually no obligation to continue with the work or to undertake any defined parcel of work, the recipient being free to stop work at any time. The effect of such a letter is to promise reasonable reimbursement if the recipient does, in fact, act upon it. However, the letter in question, whose terms I set out below, is one which imposes obligations on both parties. It requires the plaintiff to commence the Works. These Works consist of a defined package of work and contract administration. The plaintiff had an option of whether or not to start work but, having started, the plaintiff was under an obligation to continue with the Works and not to stop, unless the defendant appointed another contractor or gave notice abandoning the work or the contract was superseded by one of the two successor contracts envisaged by the letter.
3. I propose, therefore, to refer to this contract as "*the provisional contract*". It envisages that the parties will continue to negotiate about the form of the contract which would ultimately govern the Works and which would supersede the provisional contract once all the terms of the permanent contract had been agreed. In the letter sent on 23rd. October 1996, this contract is called "*the Building Contract*" but, in order to avoid confusion as to which contract I am referring to, I will refer to this second contract, that the defendant contends was agreed to and took effect, as "*the permanent contract*".
4. The dispute between the parties falls into two phases. The first phase is concerned with what documents were incorporated into the provisional contract and what its terms were as to payment, sectional completion and the time for completion. This phase is also concerned with whether an arbitration clause was incorporated into the provisional contract or, even if not, whether there is one in force between the parties that relates to disputes arising out of the provisional contract. If there is such an arbitration clause, the defendant intends to refer to arbitration any remaining dispute between the parties once I have disposed of the disputes I am concerned with. The second phase of the dispute is concerned with whether or not the parties succeeded in reaching agreement as to the remaining terms that would govern their permanent relationship. If they did, the question arises as to what those terms are and as to whether the plaintiff's work is now governed by these terms such that the permanent contract has now superseded the provisional one.
5. The action was started by the plaintiff by a writ dated 23rd. December 1996. The relief claimed is a declaration that the Works have been carried out pursuant to the letter of intent and that the plaintiff is entitled to be paid in accordance with the terms of the letter of intent which provide for the payment of all the plaintiff's reasonable costs properly incurred as well as a fair allowance for overheads and profit. The defendant has counterclaimed declarations that the provisional contract was entered into in the manner and upon the terms pleaded in the counterclaim and that the permanent contract was entered into on or about 14th. February 1997, again in the manner and upon the terms pleaded. In both cases, the defendant sets out, in the defence and counterclaim, a detailed course of dealing culminating, allegedly, in a concluded provisional contract which was superseded by a concluded permanent contract. The documents each contract is alleged to incorporate into that contract are also set out in the pleading. The defendant also claims specific performance of the provisional contract, namely an order requiring the plaintiff to execute a formal permanent contract in accordance with the agreements allegedly reached by the parties in entering into both the provisional and the permanent contracts.
6. I ordered that issues should be tried. The intention was to identify the legal issues that separated the parties and decide them in the hope that the remaining issues arising in the action and any outstanding valuation issues separating the parties would then be capable of resolution. In order to clarify these issues, I ordered that the following issues should be tried:
 1. Is there an enforceable arbitration agreement governing the resolution of disputes between the parties?
 2. What are the terms of the contracts?
7. It became clear during the hearing that the second issue consists of three parts. In the light of the discussion as to the ambit of this issue, I will set out my understanding of its contents:
 1. What documents were incorporated into the provisional contract entered into by the parties on or about 23rd. October 1996 and what were its relevant terms?
 2. (a) Did the parties reach agreement as to the terms of, and the documents to be incorporated into, the permanent Building Contract they were to enter into?

- (b) If so, when and how did the parties reach that agreement?
 - (c) Is the plaintiff now under an obligation to execute a contract in the agreed form?
3. What are the terms that now govern the plaintiff's work as to:
- (a) The time for completion;
 - (b) sectional completion;
 - (c) the contract sum;
 - (d) the basis of valuation of the work carried out; and
 - (e) the machinery of valuing the work?
8. I was concerned to discover what disputes the parties contended would be subject to arbitration if I held that their contractual relationship included an enforceable arbitration agreement since I did not want to embark upon the determination of any issue which one or other party might contend was encompassed by such an agreement. I therefore ordered the parties to identify which issues it contended would be subject to arbitration if I found that there was an enforceable arbitration agreement in existence. The plaintiff stated that it would only seek to refer valuation disputes to arbitration. The defendant, on the other hand, stated that everything included in both issues I have set out should be tried by me even if I found that there was in existence an enforceable arbitration agreement. It follows that both parties accepted that I should resolve all aspects of the two issues that I have set out and that I should not answer any further questions at this stage.

Factual background

9. I will first set the scene with a brief description of the factual background to the disputes. The project involved extensive refurbishment and redevelopment to Princes House which consists of nearly 5,000 square metres of accommodation located on seven floor levels. This required extensive stripping out work followed by the alteration and adaptation of the building to provide new office accommodation and the shell of limited residential accommodation. The tender documents for the work invited tenders to be submitted on two alternative bases, the first on the basis of a 65 week contract period and the second on either a 52 week period or such other period as the tenderer identified in the tender.
10. The proposed form of contract was the JCT standard form of building contract, private edition, with quantities. The contractor was to be, in effect, a management contractor, with most of the work to be placed with domestic sub-contractors subject to the arrangements set out in the proposed conditions entitled "*Contractor's Design Portion*" or CDP coupled with the arrangements for obtaining tenders and entering into sub-contracts outlined in the heavily amended clause 19 of the JCT Conditions. The manner in which these provisions would work to produce a precise definition of the work to be carried out by each sub-contractor and the sum to be paid to the plaintiff was dealt with in detail in the tender documentation. In summary, the tender provided for two stages. Stage 1 ended with the formation of the contract. The contractor had to submit a schedule of rates which were incorporated into the contract and to price a limited number of Bills of Quantities. These prices and the list of defined provisional allowances, being a list of the work packages to be the subject of the domestic sub-contracting arrangements with their provisional sum for inclusion in the Stage 1 tender, were all that the contract contained so far as pricing and work definition in the Bills of Quantities. The work required was, of course, fleshed out in the many specifications and drawings accompanying the tender.
11. Stage 2 was to be embarked upon as soon as the contractor was appointed or as soon thereafter as possible. The contractor would be given detailed Bill of Quantities to price. These would consist of all the detailed work packages of the individual sub-contractors. The contractor then was to price the bills using the pricing regime provided for in the schedule of rates. Where such could not be used for valuation purposes, the prices would be based upon the net prices obtained by the contractor plus an agreed increase for attendance, overhead and profit. The Stage 2 tender rules provided guidance to the quantity surveyor as to how to finalise the Stage 2 Bills of Quantities where the rates differed from the Stage 1 rates.
12. It follows that the contractor was to seek to control the cost of the work by being confined to payment at his tender rates unless the sub-contract rates were different and the tender rates were, in the circumstances, inappropriate. The appropriate rate might be, but would not necessarily be the sub-contractor's rate, depending on the operation of the guidelines for pricing Stage 2. An idea of the extent of the provisional CDP work can be gained when it is appreciated that, of the relevant tender of £4,202,561, a total of £3,129,700 consisted of provisional allowances for work included in Stage 2.
13. The plaintiff submitted both the tenders that had been sought on 2nd. August 1995. Following a meeting with the defendant's quantity surveyors, Northcroft, the plaintiff wrote on the 21st. August to Northcroft confirming that the amended tender figure was £4,202,561. The letter stated that the revised Bills of Quantities would follow in due course. This tender was based on a contract period of 56 weeks. The tender, being the revised alternative tender, envisaged that the date for possession would be 20th. August 1995. By that date, certain details of the proposed Building Contract had still to be agreed, particularly the details of the guarantee required from the plaintiff, the details of the sectional completion arrangements and a number of minor drafting points and proposed amendments to the conditions of contract.
14. Because there was a need to start the Works as soon as possible, the defendant agreed the terms of a letter of intent dated 21st. August 1995. This was a properly called a letter of intent, merely agreeing to pay: "*all*

reasonable costs properly incurred ... as the result of acting upon this letter up to the date you are notified that you will not be appointed."

5. The plaintiff was to : "commence the preparations as necessary to achieve a full start on site start on 11th. September, 1995, including the production and agreement with the design team of a detailed procurement, programme, method statement and information release schedule, the ordering of materials necessary to achieve the programme and to act on all instructions properly issued under the terms of the contract."
6. The letter indicated an intention to enter into a contract in the Contract Sum of £4,202,561.00 with reference to "your Tender".
15. Negotiations were being carried on by the two sides' solicitors. Although nothing major was holding up final agreement on all outstanding points, by 16th October there still remained some unresolved points, particularly the parent company guarantee and the details of sectional completion. Work had still not started and a further hitch arose. One of the existing tenants was refusing to vacate the property for a continuing period pending completion of the offices it was to move into.
16. This led to the sending of the letter which gives rise to the provisional contract. The letter refers to an escrow agreement. What was envisaged was that work would start, the details of the Building Contract would be finalised and, pending vacation by the remaining tenant still in occupation, the signed Building Contract would be held in escrow. It was envisaged that the signing would occur within a matter of days and, as the defendant's solicitors, Ashford, explained in a letter to the plaintiff's solicitors, Merricks, dated 16th October: "What is proposed therefore is that the contract documentation is agreed ... and be ready for signature by Thursday of this week ... Although the documentation is to be signed and exchanged it is not to be dated and will be held in escrow until the tenant has vacated and that [the plaintiff] will carry out approximately 5 weeks of work pending this event ..."
17. The letter of 23rd. October led to a start of work on 24th October. Remarkably, the final and agreed set of contract documentation was never completed, although the defendant now contends that agreement was finally achieved by 14th. February 1997. This is disputed and gives rise to one of the issues I must decide. Neither party is suggesting that the other is the cause of this delay in agreeing to the contract documentation, at least until the autumn of 1996 when the defendant contends that the plaintiff was seeking to impose new terms as to the date for completion and the contract sum on the defendant. However, any delay or change in the parameters by which the negotiations were being conducted is not at present said to affect the parties' contractual rights and obligations nor to give rise to a contractual claim.
18. The underlying cause of the dispute as to the terms upon which the work was carried out is the fact that the works have taken at least nine months longer than planned. The contractual responsibility for this delay is in issue. More importantly, the parties are at least £2 million apart so far as remuneration for the additional preliminaries payable for this period, the way that preliminaries should be calculated and the appropriate mark-up that should be paid for overheads and profit are concerned. There is also a dispute as to whether liquidated damages are claimable at all, the defendant is claiming £240,000 under this head.

The provisional contract

19. I should first set out the terms of the vital letter in full.
"To Hall & Tawse South Limited
Dear Sirs,
Re; Princes House 36-40 Jermyn Street London SW1
We confirm that it is our intention to enter into a formal contract in the form of the Standard Form of Building Contract 1980 Edition Private With Quantities (including amendments 1-14) ("the Building Contract") to appoint your Company as the Building Contractor to carry out works of refurbishment and redevelopment at the above property in the sum set in your tender (the Tender) dated 1995 (and subject to the terms and conditions set out in the tender).
The final form of the Building Contract together with the terms of an escrow agreement are those to be agreed between our Solicitors Bevan Ashford and your Solicitors Messrs Merricks, and confirmed by the Quantity Surveyors Northcroft.
The conditions attaching to your appointment are:-
(a) That the form of the Building Contract and escrow agreement are to be agreed as soon as practicable; and
(b) That you will execute the Building Contract (and any documentation supplemental thereto) and the escrow agreement within 7 days of the same having been sent to you for execution.
Pending the execution of the Building Contract and the escrow agreement we are now instructing you to commence the Works to be carried out under the Building Contract (as modified by the escrow agreement) with effect from Monday the 23 October 1995, including the ordering of materials necessary to the intent that you shall use your best endeavours to achieve the contract programme and to act on all instructions properly issued under the terms of the Building Contract.
In the event that we decide not to appoint you or proceed with the proposed Works for any reason, then you will be reimbursed after making due allowance for all previous payments which may have been made and all reasonable costs properly incurred by you together with a fair allowance for overheads and profit as the result of acting upon this letter up to the date on which you are notified that you will not be appointed.

The obligation will not extend to any costs or other sums prior to the commencement of the Works in tendering for the Building Contract or any legal costs incurred by you in the approval of any contract documentation.

Our commitment to pay is subject to you producing all necessary records, receipts and other reasonable documentation to enable us to validate your costs.

This letter and all obligations under it:

(a) Supersedes all previous letters of intent issued by us to you in respect of this Building Contract

(b) Will cease once the Building Contract and/or the escrow agreement is entered into

It is hereby agreed that the date for acceptance of your tender offer shall be extended to the later of the signing of the Building Contract or the 31st. March 1996 and it is hereby further agreed that you are commencing the Works today on the basis that we will provide a form of payment guarantee to you to secure the payments due under the Building Contract the precise form and sum to be guaranteed to be agreed between us.

Will you please signify your acceptance to the above terms by signing and returning the copy of this letter duly signed by and authorised signatory.

Your faithfully,

Ivory Gate Limited

We have received this letter of which this is an exact copy and agree to its terms

.....

Hall & Tawse South Limited

Dated 1995"

20. The letter was not dated but it is clear that it was sent on 23rd. October 1995 from the fax transmission details on the copy of the letter produced in court. Moreover, the plaintiff disclosed a photocopy of a top copy of the letter on which someone has written in manuscript "23.10.95.". No copy of the letter was signed by the plaintiff but it complied with the instruction contained in the letter by taking possession of the site on 24th. October, 1995 and starting the Works.
21. Both parties accept that the provisional contract was made by the defendant's offer being accepted by the plaintiff's conduct in entering onto the site and starting work. The first question I must answer is whether the offer referable to that acceptance is merely the letter whose terms I have set out, as the plaintiff contends, or whether it is referable to some of the earlier documentation as well, as the defendant contends.
22. It is necessary to consider the question of what the provisional contract comprised in two stages. Firstly, it is necessary to consider what the contract documents were. Having decided that, it is necessary to consider what reference may be made to non-contractual documents in order to determine the meaning and effect of the contract.
23. The defendant's case is that the contract incorporated 15 documents or groups of documents. On analysis, these documents fall into four groups:
 1. The tender documents sent to the plaintiff;
 2. The tenders and the documents which constituted the amendments to the alternative tender which, in its amended form, was the tender which the defendant intimated it would accept;
 3. Correspondence between the parties' solicitors negotiating points of detail in the proposed contract documents;
 4. The letters of intent.
24. The difficulty with the defendant's submission is that it is not possible to see how any of these documents, except the letter sent on 23rd October, could have formed part of the defendant's offer if the traditional analysis of contract formation is applied to the exchanges between the parties and their agents.
25. As defined in Chitty on Contracts, twenty-seventh edition, at paragraph 2-002, an offer is: "an expression of willingness to contract made with the intention (actual or apparent) that it shall become binding on the person making it as soon as it is accepted by the person to whom it is addressed."
 7. Acceptance by conduct can only occur when it is possible to link the conduct to an unequivocal offer. Clearly, the invitation to tender and the two tenders submitted on 2nd August cannot constitute part of any unequivocal offer or an expression of a willingness to contract on 23rd October since these documents had been superseded by the revised tender or offer of 21st August. At page T1/3 of the tender documentation, it is stated that the tendering procedure would consist of an evaluation by the quantity surveyor. As soon as the tender had been accepted, the quantity surveyor would prepare the Contract Bills. The contractor would then be appointed and, after the appointment day, the Stage 2 tendering process would start with the preparation of the Stage 2 Bills of Quantities which the contractor would then price, using, where possible, the agreed rates taken from the Contract Bills prepared at Stage 1.
26. These somewhat complex procedures show that the offer made by the plaintiff in its tender was not intended to be accepted without further ado. The offer would only emerge once Stage 1 had been completed, Contract Bills had been prepared and then accepted by the plaintiff and the plaintiff had then been informed by the defendant of its appointment as Contractor. A further indication that the documents forming the revised alternative tender were not part of the provisional contract is found in the provision of the letter that the tender would remain open for acceptance until the later of two dates, the signing of the Building Contract or 31st. March 1996. The need for this provision was that the tender stated that it was to remain open for acceptance for 90

- days. Had the tender documents already been incorporated into whatever contract was evidenced by the letter, there would have been no need to provide for the tender's acceptance period to be extended.
27. Of course, the terms of the tender and the procedure for accepting it could have been varied or departed from with the agreement of both parties. However, the correspondence relied on by the defendant shows no such intention. It consists of the parties' representatives battling specific points backwards and forwards. Had the offer contained in the letter sent on 23rd October been intended to vary the acceptance procedure set out in the tendering documentation and to incorporate the contents of the subsequent negotiating correspondence, it would have needed to make specific reference to both, indicating that its terms, and the offer it contained, were expressly subject to, and embraced, these earlier documents. Only in that way could the start of work be clearly linked to the additional documents and their contents that are relied on by the defendant.
 28. It follows that the offer was contained exclusively in the letter. The contents of the offer, and any document incorporated into it, or to be read with it, can only be determined by reference to the terms of the letter, to any implied term and to whatever surrounding circumstances it is permissible to take into account when considering its terms.
 29. The plaintiff argues that the only terms or matters which are not expressly referred to in the letter that may be taken account of are whatever works were envisaged from time to time by the parties. Such works are, one would have thought, given the terms of the letter, "the Works" that the letter instructs the plaintiff to commence. The letter defines such Works as the works set out in the plaintiff's tender. However, the plaintiff argues that it is not permissible to take account of the terms of the tender, even those of the revised alternative tender that the defendant had already indicated it was intending to base its appointment of the plaintiff on, since that would involve reading words into the gap in the letter which merely states that the tender the defendant intended to use is dated [blank] 1995. Such an exercise would, according to the plaintiff, constitute the process of the rectification of the letter, and would go far beyond any permissible process of construing the letter or of giving effect to its surrounding circumstances.
 30. I cannot agree that the parties are required to read the letter with that degree of unreality. The parties had been negotiating a large and complex renovation contract and the procedure for establishing both the scope and price of the work and the identity of the various sub-contractors to be employed, that was envisaged by the terms of the proposed contract, was also complex. The parties envisaged that the provisional contract would be replaced within days by an escrow contract which, in turn, would be replaced by the formal contract held in escrow. Clearly, the Works which the plaintiff was to commence were those defined in the tender referred to. Such Works included not only actual physical work on site but whatever was necessary to be done by way of planning, sub-contract negotiation and ordering of materials that would enable, so far as possible, the plaintiff to achieve the contract programme. This was an express requirement of the letter and even if the details of sectional completion were still being finalised, the length of the programme and many of the details of the various sections were known.
 31. Thus, the details of the work, the sub-contracting arrangements and the programme in existence at the date of the letter and forming part of the plaintiff's tender still in play had to be taken into account when giving effect to the twin requirements of commencing "the Works" and using the plaintiff's "best endeavours to achieve the contract programme". It would have been in the front of the minds of the representatives of both parties which tender had been accepted, subject to the final details of the contract being settled. This revised tender and the series of documents it embraced, were clearly being referred to in the letter and, in so far as needed to give effect to the requirements of the letter, can be referred to. The surrounding circumstances that may be referred to include whatever is necessary to identify the documents which identify the Works on which the current tender were based. This is because "your tender" is referred to in the letter. Since the tender and its contents would have been in the minds of both parties when the letter was sent and work started on 23rd. October pursuant to it, normal principles of the construction of commercial documents allow reference to be made to the contents of the revised alternative tender to identify what Works are referred to and to ascertain the tasks to be done in the early planning stages of the work.
 32. There are two other aspects of the prospective Building Contract which are relevant to any determination of the plaintiff's obligations created by the letter. Firstly, the terms of the JCT Standard Form referred to in the letter and any provision of the Bills of Quantities submitted with the tender which amends or qualifies these provisions are relevant because the letter requires the plaintiff to carry out the Works, acting on: "*all instructions properly issued under the terms of the Building Contract*". The plaintiff argued that the obligation to comply with such instructions only took effect once the Building Contract was in place. However, once that occurs, the provisional contract would cease to have any effect and this provision could never have had any use and would never had taken effect. What was clearly intended was that the Contract Administrator, to be appointed under the JCT Conditions, would issue instructions under the provisional contract so long as those instructions would be valid by reference to the Conditions identified in the letter. The complexity of the arrangements and procedures envisaged by the proposed contract were such that the Contract Administrator would need a framework for issuing instructions and that framework was to be the proposed Contract Conditions, being those referred to in the letter by the words: "*Standard Form of Building Contract 1980 Edition Private with Quantities (including amendments 1-14)*".

33. The second relevant aspect of the proposed contract arrangements that would be needed to be taken into account when considering the plaintiff's obligations created by the terms of the letter would be whatever is referred to by the reference in the letter to "the contract programme". The letter requires the plaintiff to: "use your best endeavours to achieve the contract programme". The parties had already discussed the possibility of creating a contract programme which would be included in the contract as a contract document, but without any conclusion being reached as to its contents or status. However, the tender Bills of Quantities, at item D on page 1/41D, provided an obligation on the Contractor as soon as possible after the execution of the Contract, to produce a Master Programme in some detail. This obligation was expressly linked to condition 5.3.1.2 of the JCT Conditions which requires the Contractor to prepare a Works programme showing, amongst other things, the commencing and finishing dates of all major activities, when critical information would be required from the Contract Administrator and the work content and duration of work in occupied areas. It was obviously intended that this programme would come into existence as soon as work started under the provisional contract since, otherwise, there would be no "contract programme", even though the letter instructed the plaintiff to achieve this programme. Moreover, the purpose of the letter was to instruct the plaintiff to commence the Works in a way that would enable the Building Contract then being negotiated to be taken up and carried on with as soon as it became effective. Thus, it was clearly intended that a Master Programme would be produced once work started. It follows that this reference is clearly a reference to whatever was produced, or was instructed to be produced by the Contract Administrator, by reference to Bill item 1/41D and condition 5.3.1.2 of the JCT Conditions.
34. It follows that the work content of the obligation to commence the Works was to be derived from the terms of the tender, from the terms of the JCT Conditions referred to in the revised alternative tender and from any instruction issued by the Contract Administrator which was empowered by the terms of those Conditions and the tender Bills. Moreover, the obligation to use best endeavours to comply with the contract programme was linked to the overall contract period envisaged by the revised alternative tender and the programmes of the kind I have referred to, being the Works Programme and the Master Programme.

Arbitration

35. The defendant contends that the provisional contract contains, or is subject to, the arbitration clause contained in the JCT Conditions. If the work has to be valued by reference to the terms of the letter, the defendant wishes to avail itself of that clause to determine any dispute as to that valuation. The clause reads: *"If any dispute or difference as to the construction of this Contract or any matter or thing of whatsoever nature arising thereunder or in connection therewith shall arise between the Employer or the Architect on his behalf and the Contractor ... it shall be and is hereby referred to arbitration in accordance with clause 41."*
36. This clause can only be applicable to disputes arising out of a valuation of work carried out under the terms of the letter if the terms of the arbitration clause contained in the JCT Conditions have become applicable because they are referred to in, or have become incorporated into, the provisional contract. This is not a case where the terms of an arbitration clause in another contract are wide enough to extend to disputes arising out of the provisional contract since there is no other relevant contract that could be in existence, if the provisional contract is still in being.
37. The defendant contends that since the parties had intended that the permanent contract would contain the arbitration clause provided for by Article 5 and condition 41 of the JCT conditions, since these clauses formed part of the offer documentation incorporated into the contract and since the letter refers to "the Works" which carries with it, by necessary inference, a reference to the JCT Conditions, there is an enforceable arbitration clause governing disputes arising out of the provisional contract.
38. In view of my finding that the only document forming the provisional contract is the letter sent on 23rd. October, I have, as a corollary of that finding, already determined that the offer documentation, with the arbitration clause it contains, does not form part of the contract documentation of the provisional contract. In order to determine whether the arbitration clause is, nonetheless, effective on the grounds that it has been incorporated by reference, I must first determine what the appropriate test is for determining whether or not the extraneous arbitration clause is contractually effective and enforceable.
39. A procedural problem arises. The test for determining whether there is an enforceable arbitration clause has been altered by section 5 of the Arbitration Act 1996. The previous law was based on section 7(1)(e) of the Arbitration Act 1979 which required an enforceable arbitration agreement to be "a written agreement". The test as to whether or not a reference to an arbitration clause created an arbitration agreement which was written was not clear cut. The test, at the very least, required the parties to express their intention clearly that they were excluding recourse to the courts and that arbitration was to be the method to be used to resolve their disputes. However, one line of authority went further and required the actual arbitration clause in question to be referred to. The relevant law, where these two views and the extent to which they differ are discussed and explained, is set out in *Aughton Ltd. v. M F Kent Services Ltd.* (1993) 31 Con LR 60, (CA) and *Giffen (Electrical Contractors) Ltd. v. Drake & Scull Engineering Ltd.* (1994) 37 Con LR 84 (CA).
40. However, section 5 of the Arbitration Act 1996 alters the law. The material parts of this section read as follows:
"(1) The provisions of this Part apply only where the arbitration agreement is in writing ...
(3) where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing."

8. The procedural problem that arises is which test should I apply, that provided for by section 7(1)(e) of the 1979 Act or that provided for by section 5 of the 1996 Act? This problem arises because section 5 of the 1996 Act came into force on 31st January at the same time as the Act repealed section 7 of the 1979 Act but with the following transitional provisions contained in the commencement order of the 1996 Act:
- "1(b) *"arbitration application"* means any application relating to arbitration made by or in legal proceedings, whether or not arbitral proceedings have been commenced; ...
- (c) *"the old law"* means the enactments specified [which include section 7 of the 1979 Act] as they stood before their ... repeal by the Act [of 1996] ...
- 2 The old law shall continue to apply to: ...
- (b) *arbitration applications commenced or made before the appointed day; ..."*
41. The question that arises is whether this action is *"an arbitration agreement"* because, if it is, the old law applies since the action was commenced before 31st January 1997. The parties both argued that the application only first was made when I first defined the issues to be argued in this preliminary or sub-trial. I cannot agree. The defendant is claiming a declaration that the parties entered into an agreement in defined terms, one of which is the arbitration agreement now contended for by the defendant. That counterclaim was served on 3rd March 1997, after the 1996 Act came into force. However, section 32 of the Limitation Act 1980 provides that, for the purposes of that Act, a claim by way of counterclaim is deemed to have been commenced on the same date as the action in which it is pleaded.
9. *It follows therefore, that the old law applies since an application which is deemed to have been commenced on 23rd December 1996 for the purposes of the Limitation Act must also be an application "made or commenced" on the same day for the purposes of the Arbitration Act 1996(Commencement No 1) Order 1996. Although it was argued that the declaration and the order for specific performance sought were not arbitration applications as defined, it seems to me that, if a party is seeking a declaration that a particular contract was entered into and that one of the clauses of that contract would be an arbitration clause and that party has the intention of relying on that clause subsequently if it succeeds in obtaining the declaration it seeks, that party is making an application relating to an arbitration. It follows that I should apply the old law.*
42. The defendant submits that the parties clearly intended to contract on the basis that that contractual relationship would contain an arbitration clause. Moreover, the letter refers to the plaintiff's obligation to act on instructions properly issued under the terms of the Building Contract. The letter also required the plaintiff to carry out the Works which, as I have already found, are defined by reference to the tender documents.
10. *None of these considerations are sufficient to incorporate the arbitration clause into the provisional contract. Even if the effect of these three features of the provisional contract was sufficient to provide, by reference, that the Works would be carried out pursuant to a contract whose terms included article 5 of the JCT Conditions, that would not have created an enforceable arbitration clause. At the very least the parties must signify their intention to incorporate the arbitration clause with clear language. As Ralph Gibson L.J. put it in the [Aughton](#) case, (1993) Con L.J. 60 at page 76:*
- "the [relevant] question [is] whether in the circumstances, the 'precise words alleged to do the incorporating' can properly be given the effect contended for as disclosing the intention of the parties. Thus, in this case, in my judgment, the issue turns upon the proper construction of the words of incorporation ..."*
43. The words which are alleged to do the incorporating are *"commence the Works"* and *"instructions properly issued under the terms of the Building Contract"* coupled with extraneous evidence that the parties intended the permanent contract, when executed, to contain an arbitration clause. These factors neither clearly incorporate the arbitration clause contended for nor clearly evince a common intention that the provisional contract should contain such a clause. Had the 1996 Act been applicable to this dispute, I would have reached the same conclusion. It is true that had the disputes, that are sought to be referred to arbitration, arisen out of compliance with instructions issued by reference to the terms of the letter, being *"instructions properly issued under the terms of the Building Contract"*, the terms of such instructions might have sufficiently referred to the JCT arbitration clause to make such disputes referable to arbitration since such disputes would have arisen out of further agreements constituted by acting on such instructions or out of an agreed variation of the provisional contract created by such instructions. Neither situation has been put forward as being applicable to the disputes between the parties. These, for the purpose of determining whether there is an enforceable arbitration clause, are to be taken as arising solely out of the terms of the provisional contract contained in the letter sent on 23rd. October 1995. These terms do not sufficiently refer to an arbitration clause to enable it to be concluded that the provisional agreement is made *"by reference to terms which are in writing"*, to adopt the words of section 5(3) of the 1996 Act. Indeed, the words of the letter do not clearly refer to an arbitration agreement at all.

A second or permanent contract

44. During the course of the Works, the parties' representatives negotiated the form of the permanent contract in a desultory fashion. Five lengthy schedules of amendments were exchanged over the period between October 1995 and February 1997. On 14th. February 1997, the defendant wrote to the plaintiff in these terms:
- "Further to previous correspondence in the above matter and, more particularly, pursuant to the letter of intent dated 23 October 1995, we enclose the form of Contract for signature by you and return to us.*

The Contract contains the terms set out in the original tender as varied by subsequent agreement between our respective Solicitors. For good measure, we also enclose a file comprising a schedule of amendments agreed by your Solicitors and copies of the relevant correspondence. You will note from that schedule of amendments that there were a number of points at issue which Ivory Gate have now conceded.

We are holding the Escrow Agreement in triplicate, duly signed, and, upon receipt of your signed part of the Contract, we will date the Escrow Agreement and release one of the originals to you.

We look forward to hearing from you as soon as possible."

45. This letter followed the plaintiff's writ that initiated these proceedings that claimed declarations and a gap in the negotiations between solicitors. It is clear that the negotiations had reached an impasse. This is to be seen from the plaintiff's solicitor's letter, Miss Della Johnson, to the defendant's solicitor, Mr. Martin Thornton, dated 28th. November 1996 which reads, in part:
- "My client is not claiming an additional sum should be added to the contract price or that the contract period should be extended for a further period. My client's basis of contract is on a "cost plus" basis and they are merely notifying you of the current costs and estimated costs of the project. Similarly, my client has an obligation to complete the works within a reasonable time, as good contractors they are again merely notifying you of the current estimated time for completion. There is no question of there being a "claim document" as that implies that there is an original contract period and contract price and that must be added to. You are well aware that the Letter of Intent does not state an original price or an original contract period. ...*
- The situation has moved on from October of last year (which your client will have to acknowledge as they produced no fewer than five sets of alternate dates for completion that they wished my client to contract upon), ...*
- With regard to the suggested contract sum this is, as you are aware, £5,616,740 and as regards the suggested time for completion, this is eighty six weeks.*
- This only of course takes into account events that our client was aware of some two months ago, and therefore may well need to be revised again as it has taken some two months to get a substantive response from you and my client is not willing to take the risks of matters that will affect the completion date in this period."*
46. The escrow agreement referred to in this letter was a different one to that envisaged in the earlier letter. It related to the security to be provided by the defendant to secure the payments it would have to make to the plaintiff. It was, in other words, a substitute for the payment guarantee required of the defendant by the earlier letter. Since the tenant, whose continued occupation of part of the site had necessitated an escrow agreement of the type envisaged by the earlier letter, had long since vacated the site, there was no further need for the escrow agreement envisaged by that earlier letter.
47. The suggested contract submitted with the defendant's letter of 14th February 1997 consisted of two volumes of documents which followed closely the revised alternative tender and the amendments apparently agreed to in the subsequent negotiations. In some cases, the amendments, or form of words, set out in the documents were those which the plaintiff's solicitor had been contending for most recently which the defendant's solicitor had "conceded", that is, had adopted and was now asserting were now agreed, having taken a different position previously. The documentation was accompanied by a third document which consisted of a schedule which summarised all the amendments to the contract conditions, compared to the form of the conditions set out in the revised alternative tender, and a concordance which sought to show the letter or particular schedule of amendments by which that particular amendment had been agreed. This volume also contained copies of this correspondence for reference purposes but the contents of this volume were not intended to form part of the completed contract.
48. The following relevant proposed terms appeared in the documents proffered as the form of the permanent contract for signature:
1. The date for completion was stated to be 13th. December 1996. This gave rise to some uncertainty within the documents because the accompanying schedule gave the date for completion as follows:
"Appendix Agreed except for Completion Date. Employer 16.11.96. Contractor 22.6.97."
 11. Thus, there were three dates in play, two put forward by the defendant and one which the defendant acknowledged was being contended for by the plaintiff. In fact, as I have already shown, the plaintiff was contending at this stage for a fourth date based on an eighty six weeks' contract period.
 2. The date for possession was not stated to be an agreed date since the schedule went on to acknowledge that the date was:
"Employer 20.8.1995. Contractor 23.10.95."
 3. The documents contained no sectional completion schedule although this had been the subject of sporadic negotiations which had produced at least four different drafts, all of which were contained in the volume of accompanying correspondence. Although there had been no agreement reached on the contents of this schedule, the parties had yet to agree that no schedule would be inserted into the contract nor that there would be no sectional completion arrangements contained within it.
 4. The contract sum was stated to be the revised tender sum of £4,202,561.00 whereas, as can be seen from the plaintiff's solicitor's letter of 28th. November 1996 which I have already quoted from, the plaintiff was now contending for a contract sum of £5,616,740.00.

49. The defendant submitted a document during the course of the hearing summarising its case for contending that a permanent contract had been agreed or entered into by 14th. February 1997. This read, in part, as follows:
- "The defendant submits that the draft of the JCT Standard Form of Contract was agreed between the solicitors for the Employer and the Contractor (as provided for in the Letter of Intent dated 23.10.95) in stages (in effect as a travelling draft) as recorded in the correspondence set out in [the third volume of documents referred to in the letter of 14th. February 1997] and further completed by the acceptance of the defendant's solicitors of the plaintiff's proposals for the outstanding clauses."*
50. There are two difficulties facing the defendant's submission that, by 14th. February 1997, the parties had reached agreement on the entire contract package for the permanent contract. Firstly, the parties were at loggerheads as to the contract period and contract sum. Both these points of disagreement arose because the plaintiff believed that these details should be revised from the corresponding details in the tender to reflect changes that had occurred in the intervening period whereas the defendant believed that the point of reference for these matters was 23rd. October 1995 and that any subsequent change should be dealt with by using the extension of time and valuation machinery of the contract conditions.
51. The second difficulty arises from the wording of the letter. This envisages that the permanent contract, or Building Contract, would only reach an agreed final form, when its final form with the terms of the escrow agreement, had been agreed between the two solicitors and had then been confirmed by the quantity surveyors. This clearly envisaged that the final package would be the subject of overall agreement by both solicitors. In fact, at best, the defendant itself had identified a proposed package by going through all the negotiation correspondence and picking out what appeared to be the agreed points or by adopting the plaintiff's most recent version of a point. That package would have had to have been checked and agreed to by the plaintiff's solicitor and then the quantity surveyor would have needed to confirm that package. This last step was one for the protection of both side's interests and could not be waived unilaterally by the defendant.
52. It follows that the parties had not reached the stage at which the defendant could insist on the operation of the provision in the letter which required the plaintiff to execute the Building Contract within seven days of the completed package being sent to it both because all the terms were not agreed and because the procedure set out in the letter that had to precede the contract's execution had not been observed nor completed.

The Letter of Intent

53. Underlying the dispute as to the payment provisions applicable as a result of the letter sent on 23rd. October 1995 is the question of whether the provisions for payment it contains are applicable to payments to be made whilst work proceeds under it. The letter, it will be recalled, provides that:
- "In the event that we decide not to appoint you or proceed with the permanent Works for any reason, then you will be reimbursed after making due allowance for all previous payments which may have been made and all reasonable costs properly incurred by you together with a fair allowance for overheads and profit as the result of acting upon this letter up to the date on which you are notified that you will not be appointed."*
54. The plaintiff contends that this provision is applicable to the work it has carried out despite it only being applicable, in terms, to two situations: (1) when the defendant has decided not to appoint the plaintiff; and (2) if the defendant decides not to proceed with the permanent Works. This contention is put in two alternative ways. Firstly, it is contended that the defendant has decided not to appoint the plaintiff. Secondly, the method of payment provided for in this letter must apply to the state of affairs when work is proceeding under the letter by necessary implication.
55. As to the first contention, it is clear that, even if the defendant has now decided not to appoint the plaintiff, that decision could not have been taken until a date sometime after the works had started. It follows that I must determine what payment provision applied prior to that date since my decision is sought as to the meaning of the terms of the letter and not as to whether the events that have occurred have given rise to the operation of particular terms of the provisional contract.
56. However, it is possible to give a clear answer rejecting the construction put forward by the plaintiff. It contends that the proffering of the letter of 14th. February 1997 was the communication of an intention not to appoint the plaintiff, save pursuant to the terms of that letter. That submission is open to two objections. Firstly, it contains a logical contradiction within it. If the letter evinces an intention to appoint the plaintiff in accordance with its terms, it evinces an intention to appoint the plaintiff and it cannot be characterised as an intention not to appoint the plaintiff. It may be that the letter evinces an intention not to appoint the defendant on terms acceptable to the plaintiff but that is a far cry from an intention not to appoint the plaintiff at all. Secondly, "appoint" has a clearly defined meaning given to it by the tendering procedure which states, at page T1/3 of the Stage 1 Tender Document, that:
- "Acceptance of the Tender: As soon as the Tender is accepted the Quantity Surveyor will prepare two copies of the Contract Bills....*
- STAGE 2 TENDER**
- General: Based upon the results of the Stage 1 tender a Contractor will be appointed. After the appointment date a Stage 2 tender Bill of Quantities will be produced and submitted to the Contractor to price."*

57. Thus, a decision not to appoint must be a decision based on the results of the Stage 1 tender which has followed the preparation of the Contract Bills. There is no evidence that these Bills were ever prepared and none that a decision was taken not to appoint the plaintiff in the light of them. It follows that no such decision has been taken, at least if the letter of 14th. February 1997 is relied on as the basis of such a decision.
58. The second way that the plaintiff relies on the express payment provisions contained in the letter arises from this chain of reasoning:
 1. Clearly, some basis of payment is to result from carrying out work pursuant to the terms of the letter.
 2. If work is carried out following the receipt of the letter, the law will imply a reasonable basis of payment.
 3. The letter provides for a cost plus profit basis of payment. This is what would be payable if reasonable payment is the appropriate basis of payment.
 4. Therefore, the appropriate basis of payment is the basis defined in the letter.
59. The problem with that argument is that a reasonable basis of payment may, but need not invariably, be calculated on a cost plus basis. Particularly where the parties had agreed, in a non-contractual sense, appropriate rates for the work, a reasonable basis of remuneration might well be the agreed rates. Thus, merely because the parties had agreed on a defined basis of payment for work in the event of a termination of work following a decision not to proceed at all, it does not follow that the same basis of payment would be regarded as reasonable for the work when the payment is to be made for the work at a time when the work is proceeding and whilst both parties remain under an intention to complete the Works.
60. The terms of the letter indicate that a different basis of payment were envisaged whilst work was proceeding under it. The parties envisaged that the letter would only have a short life, albeit that it kept open the possibility of a longer life for the letter by extending the life of the tender to the actual date of acceptance of the tender or 31st. March 1996, whichever turned out to be the later of these dates. If the plaintiff was to be remunerated on the basis of "cost plus" in this period, records, receipts and other reasonable documentation would be expected of the plaintiff. There would be no need to provide for the provision of such documents in the event of a decision not to proceed, since they would already have been provided. Thus, the express requirement to provide this documentation if a decision is taken not to proceed with the Works suggests that a different form of remuneration would have been applicable prior to that decision being taken.
61. The law undoubtedly implies a term into a contract requiring the performance of work and the provision of materials where there is no express remuneration provision is that the work will be performed for a reasonable remuneration. It must be remembered that this is a different basis of remuneration to a quantum meruit which is a restitutionary basis of remuneration where no contract exists between the parties and the court is seeking to assess the remuneration by taking into account the value of the work to the beneficiary of the voluntarily rendered services and the reasonable basis of remuneration of the volunteer where, by definition, there is no agreement as to these matters.
62. Inevitably, the starting point will be the actual, reasonably incurred cost of performing the work. However, the starting point in a contractual setting where no price has been expressed, must be the express or implied agreement of the parties.
63. In this case, there are a number of indications of what the parties' intention is. In particular, these indications are obviously and starkly present:
 1. The parties start from a tender whose composition and total amount are agreed. This emerges from the tender submitted by the plaintiff which the defendant indicated, in the letter, it was minded to accept. This consensus extends to the work content, so far as this is defined in the contract, the rates and overall contract sum, the proposed contract period and any working method identified in the tender.
 2. The proposed contract envisaged that most of the work would be fleshed out in sub-contractors' tenders, the plaintiff would enter into approved sub-contracts whose work content, rates and design responsibilities would have been negotiated by the plaintiff after the contract with the defendant had been entered into and which would then have been subject to the Stage 2 tender process whereby Bills of Quantities would be prepared by the quantity surveyor based on a complex but defined inter-relationship between the rates in the tender schedule of rates and the rates in the sub-contracts. These Bills of Quantities might be very different in both rates, work content and overall contract sum to the equivalent features of the tender.
 3. The plaintiff was to comply with the contract programme so far as reasonably possible and with any instruction issued by the Contract Administrator, such instructions being those which were empowered by the terms of the contract conditions envisaged as applying to the permanent contract once it was entered into.
 4. The period during which the reasonable remuneration under the provisional contract would be paid would be very short, namely a matter of weeks when the site set-up and Stage 2 tendering process would be in operation.
 5. The process of valuation and interim payment would not be significantly different during this period compared to that to be operated in the Building Contract. Otherwise, the letter would have provided for the procedure for valuation and payment and would not have relied on the statements that it was intended that the parties would enter into a contract containing the JCT Conditions.

64. In the light of these considerations, it is possible to define the reasonable remuneration intended by the parties as being, so far as reasonably possible, that which would be payable under the Building Contract once entered into. The rates and prices would be derived from, initially, the Stage 1 Bills of Quantities and, after the appropriate time needed for their production, those derived from the Stage 2 Bills of Quantities. Any extra remuneration would be derived from the terms of any appropriate instructions and the terms of the contract conditions to which they were referable and the time for completion and any consequent programme would be taken by reference to the condition 5.3.1.2 programme and the tendered contract period.
65. The problem in this case is to determine the extent to which these reasonable starting points should be varied or adapted, given that the arrangements which were intended to be provisional and temporary have turned out to be permanent. There are three areas that need detailed investigation before the appropriate rates or method of valuation of the delay, the profits and overheads and damages for delay, if any, can be ascertained. These are, in summary:
1. How the parties in fact operated the contract, particularly the Stage 1 and Stage 2 tendering procedures and the sub-contract negotiations and the terms of the sub-contracts, the instructions given to the plaintiff, the programmes it was instructed to produce and those it did in fact produce and any convention that had been adopted by the parties as to payment and as to the programme for carrying out the work.
 2. The reasons for the extension of the period of working by nearly nine months and the reasons why the tendered preliminary rates were tendered and are now considered inappropriate. Similarly, the reasons why the percentage for overheads and profit put into the tender, which appears to be 2 1/2%, (see page 6/1 of the tender documentation), is considered too low and why this figure was selected originally will need to be considered.
 3. The possibility that one or other of the parties were in breach of the implied terms that they should negotiate the form of the contract reasonably and should take all reasonable steps to conclude as soon as reasonably possible the Building Contract. The consequence of any such breach might be damages reflecting what could reasonably have been expected to have been recoverable by way of contract payments or as liquidated damages, had these implied terms not been broken by the other parties.

Letter of Intent - Conclusion

66. It is only possible to give an answer to the questions posed as to the meaning and scope of the terms of the letter of intent so far as time and payment provisions are concerned by reference to the state of the contract as at 23rd. October 1995. The relevant period of time, the relevant basis for calculating preliminaries, overheads, profit and damages for delay (if any) all need evidence of the matters I have indicated in this judgment before answers can be attempted.
67. As at the date of the letter, the payment was to be a reasonable payment derived from the implied and inferred intentions of the parties, using, as an aid to determine these matters, the matrix of facts it is permissible to refer to. The answers to the specific questions outlined above are:
- (a) The time for completion.
12. This was a reasonable time for completion, using the tendered period and the contents of any condition 5.3.1.2 programme as a guide.
- (b) Sectional Completion.
13. No guidance is to be found in the tender documentation. However, difficulties in working in partly occupied sections of the site would need to be taken into account in assessing whether there had been compliance with the express obligation to achieve, so far as possible, the contract programme and with the implied obligation to complete the works within a reasonable time.
- (c) The Contract Sum.
14. The starting point is the revised alternative tender sum of £4,202,561.00.
- (d) The Basis Of Valuation.
15. The Stage 1 Bills of Quantities and, when available, the Stage 2 Bills of Quantities.
- (e) The Machinery Of Valuing The Work.
16. The valuation machinery contained in the JCT Conditions.
68. I stress that these answers relate to the date when the provisional contract became effective on 23rd October. The answers to these questions, by reference to the position at the conclusion of the Works, requires evidence of the kind and extent I have summarised. The extent to which I should answer question 3, other than: *"the plaintiff's work was subject to implied terms that the work would be carried out within a reasonable time and for a reasonable remuneration"* is to be considered by the parties and, if necessary, should be the subject of further submissions.

Appendix

The following declarations were made following the handing down of the judgment.

Question 1: Is there an enforceable arbitration agreement governing the resolution of disputes between the parties?

Answer: No

Question 2: How was the provisional contract formed that was entered into by the parties? **Answer:** The parties entered into the provisional contract on about 23rd October 1995. The contract was made by the plaintiff accepting, by conduct, the defendant's offer contained in its letter of 23rd October 1995.

Question 3: What documents were incorporated into the provisional contract? **Answer:** The defendant's said offer letter dated 23rd October 1995.

Question 4: What terms form the provisional contract? **Answer:** The terms identified in the answers to questions 8-13 inclusive below.

Question 5: Did the parties reach agreement as to the terms and documents of the Building Contract they were to enter into? **Answer:** No.

Question 6: If so, by what manner and in what form did the parties agree to that contract? **Answer:** In the light of the answer to question 5, this question no longer arises.

Question 7: Is the plaintiff now under an obligation to execute a contract in that form? **Answer:** In the light of the answer to question 5, this question no longer arises.

Question 8: What is the scope of the work to be carried out under the provisional contract? **Answer:** The work defined in, or to be inferred from, the terms of the plaintiff's revised alternative tender.

Question 9: What are the terms that now govern the plaintiff's work as to the time for completion? **Answer:** The time for completion is by a date which is the last day of a reasonable period for completing the works. This period is to be determined by taking into account the tendered programme of 56 weeks and the programme that the plaintiff had an implied obligation to put forward, namely a works programme of the kind provided for in clause 5.3.1.2. of the JCT Standard Form of Building Contract, 1980 Edition, Private With Quantities.

Question 10: What are the terms that now govern the plaintiff's work as to sectional completion? **Answer:** There are no such terms.

Question 11: What are the terms that now govern the plaintiff's work as to the contract sum? **Answer:** There was no contract sum. The plaintiff's entitlement was to be paid a reasonable sum for the work carried out.

Question 12: What are the terms that now govern the plaintiff's work as to the basis of valuation of the work carried out? **Answer:** The basis of valuation of the said reasonable sum for the work carried out was as follows:

1. The sum defined in the said amended alternative tender, being £4,202,561.00;
2. The rates and prices derived from the Stage 1 Bills of Quantities and the Stage 2 Bills of Quantities;
3. A reasonable sum for complying with each instruction issued by the Contract Administrator. This work is to be valued, where possible, by reference to:
 - (a) the terms of that instruction;
 - (b) any valuation provision of the documents referred to in the terms of that instruction;
 - (c) the terms of any documents or standard form contract terms which are expressly, or by necessary implication, referred to in that instruction;
4. Such other rates or prices as, in all the circumstances, were reasonable or which should reasonably replace any part of the aforesaid bases of valuation.

Question 13: What are the terms that now govern the plaintiff's work as to the machinery of valuing the work? **Answer:** In so far as it was reasonably possible to use it, the valuation machinery of the said JCT Conditions and amendments 1-14 thereof.

Mr. Richard Wilmot-Smith Q.C. for the plaintiff instructed by Merricks.
Mr. Alan Steynor for the defendant instructed by Bevan Ashford