J Jarvis & Sons Plc v Galliard Homes Ltd [1999] ABC.L.R. 11/12

CA on appeal from TCC (HHJ Toulmin) before Evans LJ, Schiemann LJ, Lindsay J. 12th November 1999

MR JUSTICE LINDSAY:

1. This is the appeal of Galliard Homes Ltd. against the decision of H.H. Judge Toulmin C.M.G., Q.C. who, on 22nd May 1998, dismissed Galliard's application for a stay, pending arbitration, of proceedings begun by Jarvis Interiors, a division of J. Jarvis & Sons plc. In those proceedings, begun as early as July 1996 and which have so far run as far as an amended Reply and Defence to Counterclaim and a Reply to Defence to Counterclaim and in which discovery has already taken place, Jarvis, a contractor, seeks to recover from Galliard, an employer, in respect of works done by Jarvis. Galliard counterclaims, as yet, only for declarations but reserves the right, it says, to expand its counterclaim to claim damages for, we are told, work not done or poorly done by Jarvis. The Summons seeking a stay is dated 8th August 1996. Its practical consequence, intended or not, has been that an action which would very likely have by now been long since concluded, has, by reason of the Summons, progressed little further in the three years and more since the Summons was issued.

2. The Judge dismissed the Summons for three not unrelated reasons. Firstly there was, in his judgment, no contract at all between Galliard and Jarvis; the parties were never ad idem. Secondly, such dealings as they had were, in effect, "Subject to Contract" and hence amounted to no contract and, thirdly, there was, in any event, no written agreement to refer disputes to arbitration such as to permit the Court to stay proceedings pending that arbitration. Galliard, as it has to if it is to succeed, appeals against all three conclusions.

3. The dispute in this Court has been far-ranging and it will be as well to set out the facts at some length.

4. Before Jarvis came on the scene Galliard had earlier arranged for the construction of some 36 flats at Old Sun Wharf, Narrow Street, London E14. The main contractors for the development were Costains but Galliard contemplated that all fitting out would be done by another firm. There had been a meeting between Galliard and Jarvis on 9th January 1995 at which some form of Financial Statement may have been given by Jarvis to Galliard as to the cost of whatever works were then being discussed. At that point Jarvis had had no details of the terms of contract which Galliard was proposing although it may also be that some drawings or specifications of the works needed had already been given to them. At all events, on 11th January 1995 Galliard then sent "Contract Preliminaries" to Jarvis Interiors. They were said to include some specifications and drawings. They amounted to an instruction to Jarvis to tender on the bases then explained; they provided (clause 3.1.11) that the Contractor should make no alteration to the text of the Specifications, Form of Tender or to the Preliminaries without prior authorisation. They provided, in the alternative, for possession to be given to the contractor on 5th November 1995 or 19th December 1995. The Contractor was to complete the whole of the described works "in accordance with the Contract Particulars described hereinafter". Under the heading "Form, Type & Conditions of Contract" clause 4.1 of the Contract Preliminaries began:

   "The Form of Contract

   4.1.1 The work to be executed in this Building Contract will be carried out in accordance with the terms of the Articles of Agreement and Conditions of Contract of the Standard Form of Building Contract 1980 Edition (Private Without Quantities) incorporating amendments ... . as published by the Joint Contracts Tribunal ..."

   and the Preliminaries included certain standard amendments which had been printed in the years between 1980 and 1994.It is convenient to call the standard form as thus already amended as "JCT 80". The clause continued, after referring to that JCT 80: *"together with the amendments and insertions to the Standard Form as set out below."*

   The standard form JCT 80 is divided into two chief parts; "*Articles of Agreement*" and "*the Conditions*".

5. The Articles, when duly completed, amount to a contract in writing between the named Employer and the named Contractor on the basis of the Contract Drawings, Specifications or Schedules of Works which the form contemplates as having been referred to, at the price filled in ("the Contract Sum"). Provision is made for the naming of an Architect and Quantity Surveyor and there are frequent references in the Articles to the Conditions, the other main part of JCT 80. Article 5 states:

   "5. 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 .... and the Contractor .... it shall be and is hereby referred to arbitration in accordance with clause 41."

6. The Preliminaries required certain specified deletions of and additions to the Articles. Thus Article 4A was deleted, the effect of which was that, as it would seem, there was to be no Quantity Surveyor but rather some other person (not described) exercising the functions ascribed in the standard Conditions to the Quantity Surveyor. Two Articles were, by the Preliminaries, proposed to be added. There was to be an Article 6 whereby (the drafting is a little uncertain) the Conditions on the subject of Variations and as to Provisional Sums were to be as amended in the amended Conditions which I shall come on to. Further, and importantly, there was to be an Article 7 added as follows:

   "Guaranteed Maximum Price - for the avoidance of doubt this contract is deemed to be let on a Guaranteed Maximum Price basis, and therefore, all references to variations and fluctuations contained therein are deemed to be deleted."

7. The "therein", in context, can only refer to the standard Conditions. The term "Guaranteed Maximum Price" there twice mentioned was not defined in the Preliminaries or in the Articles, nor is it one of the over 50 terms defined in

the JCT 80 Conditions. Nor is it, as transpired in argument, even a term of art in the construction industry in this Country. The Preliminaries refer to an Appendix A listing the Specification and Drawings detailing the works to be done; there was evidence on Jarvis' behalf that the drawings were not then included.

8. At the foot of the Articles there is provision for their completion either under hand or as a deed under seal with, in the latter case, detailed marginal notes as to what was required for due execution by companies registered under the Companies Acts (as, I apprehend, were both Galliard and Jarvis).

9. Having so proposed special amendments to the JCT 80 Articles, the Preliminaries then turned to incorporating and amending standard JCT Conditions. Not all the proposals in the Preliminaries were complete (one without date required information from the Contractor); nor, perhaps, was complete consistency visible (the only date given for possession, for example, was 5th November 1995, without the alternative of 19th December 1995 earlier provided for). Nonetheless, there was a comprehensive incorporation of and reference to JCT 80 conditions, including the incorporation, on the subject of arbitration, of Conditions 41.1, 41.2 and 41.3 of the Conditions, which together amount to a full, even fulsome, provision for Arbitration. In clause 43 of the Preliminaries there is a provision intended to cover the position of variations and provisional sums given, it will be remembered, that all the JCT 80 Conditions referring to variations and fluctuations had been deleted by the added Article 7. The replacement conditions - clause 4.3.2 - provided:-

> *"1. Valuations of instructions regarding variations and/or expenditure of a provisional sum will be carried out by the Architect in accordance with the rules set out in clauses 13.5.1 to 13.5.6 of the Conditions of Contract*
>
> *2. The Contractor shall provide sufficient information for and cooperate with the Architect in the preparation of the aforesaid Valuations."*

10. Thus on the subject of variations the Preliminaries were proposing an amalgam partly of the Preliminaries' own proposals and partly of JCT 80 Conditions. Thus JCT 80 Conditions 13.5.1 to 13.5.6 were proposed but 13.1 (defining "Variations"), 13.2 (the manner of instructing so as to require a Variation), 13.3 (instructions as to provisional sums), and 13.4 (Valuations of Variations and of provisional sum work) were all excluded, as was 13.7 (which provided that the ultimate consequence of a variation would be that its Valuation (a reference back to the excluded clause 13.4) would be added to or deducted from the defined Contract Sum.

11. There was no provision in the Preliminaries that proposed any alteration to that part of the Articles which provided that the Articles themselves could either be executed under hand or under seal but the Preliminaries, under the heading "4.1 The Form of Contract" provided:

> "4.1.3 The Contract will be executed as a deed under seal."

This provision will be returned to later as it is the basis both of one of Jarvis' principal arguments and of one of the Judge's conclusions.

12. Jarvis wrote on 16th January 1995 to BUJ, Galliard's chosen Architects for the project, presumably now on the basis of the Preliminaries which had been sent to them by Galliard on 11th January. Jarvis had earlier sent out alternative revised Financial Statements of £1.474m and £1.295m but both incorporated detailed proposed amendments to the works, both as to omissions and additions. In many cases, too, Jarvis, presumably finding the drawings or specifications they then had incomplete or unclear, had made assumptions as to dimensions or as what would be acceptable to or desired by Galliard. For all that, Jarvis' earliest tenders were detailed, with costs broken down into many headings, each given its estimated price in the global total. Now, on 16th January 1995, they were proposing further changes and indicated a "Revised Contract GMP £1,247,339-55 plus VAT". Mr Day, Jarvis' Estimating Manager, no more defined "Gross Maximum Price" or "GMP" in these dealings than had the Preliminaries but the term had plainly already come up in discussion at least between Galliard's Architects and Jarvis. Mr Day, after setting out some concerns about inflation of material costs if not mitigated by early orders and payments for materials off site adds:

> *"We therefore recommend a GMP of £1,300,000 plus VAT. We currently acknowledge this figure exceeds your GMP by £150,000.... ." although savings, he said, might halve the overspend to £75,000. Presumably, whatever a GMP was, Galliard had initially stated that it was required not to exceed £1,150,000.*
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> *On 26th January Jarvis wrote to BUJ with some possible savings to achieve a "Revised Recommended GMP" of £1,290,000. On 17th February 1995 Jarvis revised their offer to £1,099,698 plus VAT and specified what amendments they had incorporated to achieve that figure, described as "our final offer". Despite that, Jarvis, who were aware of competitors also seeking the work, later suggested further detailed amendments and savings bringing the revised contract sum down to £1,139,870 (24th February 1995) and £1,138,958 (10th March). This last letter was successful in that, shortly afterwards, an important letter was written by Galliard to Jarvis on 14th March. In argument it was called "the Letter of Intent".*

13. Galliard wrote in it that it was their intention to enter into a contract with Jarvis. They continue, so far as material:

> *"Detailed below is our agreement:*
>
> *1. You have agreed to sign a contract .... for the Guaranteed Maximum sum of £1,138,958 excluding VAT. The scope of the works has been defined by your letter and schedule of works dated 14th February ....."*

Pausing there, none such is in our papers, but the letter continues:

"and subsequent letter dated 10th March 1995."

14. By now it had become clear that Galliard wanted 2 of the 36 flats to be completed ahead of the others as show flats and another as a Sales Office. The Letter of Intent continued:

"The form of contract will be the JCT Standard Form of Contract 1980 Edition without Quantities printed to incorporate amendments 1-13, further amended by the addition of a new article to allow for the fact that the contract sum is a guaranteed maximum price and amended clauses as listed in the Preliminaries document on the 11th January 1995"

15. The reference to a "new" article suggests that something other than the article 7 which had been proposed in the Preliminaries was now in mind on the subject of the contract being for a GMP, especially as the Preliminaries had proposed other changes to the Articles which were unmentioned in the Letter of Intent; if the only changes now proposed to the Articles were to be as specified in the Letter of Intent that would have left those other changes unprovided for, despite no changes to the Preliminaries being described. However, no "new article" as to GMP was specified and the Letter of Intent continued: *"Your contract will be with Galliard Homes Ltd. ....."* and, importantly: *"In the event that we do not enter into a formal contract with you through no fault of Jarvis Interiors, you will be reimbursed all fair and reasonable costs incurred and these will be assessed on a quantum meruit basis."*

16. On the appeal no one has argued that there was as yet any contract between the parties. Moreover, I see the reference to *"a formal contract"* as only adding force to a view, to which I shall return, that, absent express agreement or necessary implication otherwise, there was to be no contract on the basis of the Preliminaries unless and until there was a "formal contract", namely one, in the context of those Preliminaries, under seal. This last paragraph of the Letter of Intent, further, may also go some way to have put in the parties' minds that a relatively leisurely approach could, if necessary, be endured, at any rate by Jarvis, in the completion of a formal contract, notwithstanding that the work by Jarvis had actually begun on the show flats. So long as no fault could fairly be attributed to Jarvis they could always fall back on the not uncomfortable basis of a quantum meruit. The presence of the paragraph also in my view denies the usual force to be attributed to the dictum of Steyn L.J. in ***G. Percy Trentham -v- Archital Luxfer*** [1993] 1 LLR 25 at 27 that the fact that a transaction is performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations, at all events if the dictum is used to support the existence of some contract other than on a quantum meruit.

17. Jarvis' response on 24th March to the Letter of Intent in terms refers to it as just that and invited BUJ to send a definitive set of tender drawings. There then follows a period of several months in which Galliard by its Architects propose changes and in which Jarvis ask for details and information and give the best estimates they can of the effects on price which are involved. BUJ were by now issuing "Architects Instructions" as if there was a contract. Indeed, by 4th August 1995 Jarvis asserted to BUJ:

"It is our understanding of the situation that we are already in a binding contract with the Employer on the basis of our tender, as set out in our letter and Schedule of Works dated 14th February 1995 and letter dated 10th March 1995 and as subsequently consolidated in our Contractors Proposals dated 10th July 1995 and his acceptance of 14th March 1995. If the Employer will send us written confirmation that he agrees with our understanding of the situation as expressed in this letter, we will be happy to commence as requested."

18. Neither Mr Tackaberry Q.C., for Galliard, nor Mr Friedman Q.C., for Jarvis, now contends for a contract as at this stage but the letter is of interest as inviting Galliard to agree what, had it then agreed, would have been a contract in writing other than by Deed. No answer to this letter is in the papers before the Court. By 6th September Jarvis were complaining that variations were still arising at an alarming rate and asking for an urgent response. By 15th September Jarvis claimed to have already incurred costs of over £70,000. Costains still had not vacated the site; drawings were still awaited from BUJ. On 16th October BUJ were asking Jarvis to quote for some particular works. An internal communication within the Galliard side shews Galliard's Managing Director, Mr Black, as wishing to achieve a Fixed Price Contract with Jarvis; he adds: *"If Jarvis are not satisfied I do not mind throwing them off because I am convinced we can get the finishing done ourselves."*

That is not the language of a party which considered itself already bound to the sort of comprehensive contract that would have emerged from the incorporation of the Preliminaries; it is not, however, inconsistent with a contract under which, if Jarvis were turned out through no fault of their own, they would be entitled to a contractual quantum meruit.

19. On 1st November 1995 Galliard instructed Barrie Tankel Partnership plc ("BTP") to be the Quantity Surveyors in relation to the fitting out works. It will be remembered that the Preliminaries had expressly deleted Article 4A of JCT 80, which, as a term agreed between the parties, would have led to the appointment of a Quantity Surveyor. One of the many tasks given to BTP by Galliard was the drafting of the building contract, a provision, of course, consistent with there still being a need or preference for a formal contract. By now Mr Black of Galliard was seeking a meeting with Jarvis. Throughout the unfolding events there were many site and other meetings; I shall mention only the more significant ones.

20. On 8th November 1995 Mr Black was fulminating to Jarvis *"We have a fixed price with you ....."*. As he had, only days before, instructed BTP to draft the contract and as none had yet been produced it is hard to see his reference to his having a fixed price as being other than bluster and no party now asserts on this appeal that there was any contract at this date. There was a meeting on 9th November; variations and their costs were still being discussed. Two mutually conflicting positions became plain; Galliard was trying to establish a fixed overall

project cost on the one hand and yet, on the other, variations and their costs were still under consideration. BUJ complained on 14th November that Jarvis were frustrating the progress of *"the remainder of the fitting out contract"* but Jarvis the same day gave the figure for its costs to date at £192,519 plus VAT and the total costs to completion of £1,394,835. Detailed figures were supplied. There still remained a host of details where what, referring to Galliard, BUJ called a *"client decision/cost assessment"* was still required. On 22nd November Jarvis sent BTP revised costings leading to a revised draft final account of some £1,425,000 but the next day, after Mr Black of Galliard had met Mr Shaw of Jarvis, Jarvis by letter confirmed a contract sum of £1,325,000 plus VAT, together with a Schedule of *"free issue items"* or *"free issues"* (which were items as to which the necessary materials were to be provided to Jarvis by Galliard at Galliard's expense).

21. By this date Jarvis had completed or were close to completing the Show Flats and the time at which Costains would vacate the whole site and leave the next contractor to do the rest of the fitting out was fast approaching. Jarvis were concerned that remedial work would be necessary to complete Costain's works and they had expressed their letter of 23rd November as an offer which excluded base building remedial works.

22. On 29th November 1995 Jarvis assured Galliard that it was getting on with the project but pointed out that Galliard's architect was still working on a defect survey with Costains. On the same day Jarvis confirmed to BUJ a revised contract sum of £1,355,057. However, even at this stage there was a lengthy Schedule of Items prepared by BTP that still required pricing. A meeting was arranged for 1st December 1995. It is at this meeting at which, asserts Galliard, a contract was agreed and it is that contract which is the only one which Galliard asserts on this appeal. There was, of course, evidence given both by witness statements, affidavits and orally as to this meeting. It requires close examination.

23. The meeting of 1st December took place between Mr Black, Galliard's Managing Director, Mr Urquhart of BUJ, the nominated Architects, and Mr Shaw and Mr Day of Jarvis. Mr August of Galliard was also present but only in the sense that it was his office that was used; he seems to have contributed nothing to the meeting and gave no evidence. BTP, the Quantity Surveyors nominated by Galliard, were unrepresented at the meeting but earlier that day had produced the lengthy Schedule of outstanding matters which needed discussion. The first stage of fitting out works - the Show Flats, the Sales Flat and some entrance hall works - was complete and the greater task of the fitting out of the remaining 33 flats needed to be tied up.

24. Mr Urquhart, Mr Black and Mr Shaw provided affidavits in chief which included reference to the meeting. Mr Day's written evidence in chief on the subject consisted of an unsigned Witness Statement exhibited to an affidavit from the Solicitor responsible for taking it. Mr Urquhart and Mr Black provided further affidavits in reply. No one, in written evidence in chief, suggested that the phrases "Guaranteed Maximum Price" or "GMP" were used at the meeting. Mr Shaw's and Mr Day's written evidence was to the effect that such phrases were not used. In their evidence in reply Mr Urquhart and Mr Black both refer to GMP but in terms of what was understood (rather than said) or as to what Galliard needed rather than as what had been mentioned on the day. It is notable that neither Mr Urquhart nor Mr Black, although commenting on the very paragraphs of the evidence of Mr Shaw and Mr Day on the point, do not counter their assertions that the phrases "GMP" and "Guaranteed Maximum Price" were not used.

25. As for the oral evidence, it became clear that the meeting of 1st December took something of the order of an hour to an hour and a half. Mr Shaw produced a drawing register - an Architect's document containing a schedule of the material drawings for use as a benchmark - and made the point that the price in discussion was on the basis of those drawings. The discussion seems to have moved on to BTP's schedule of outstanding matters. They began to be gone through, if not one by one then at least in some detail, with Mr Black marking the Schedule as the discussion proceeded. Agreement was reached that several classes of items - Mr Urquhart lists 7 - should be "free issues" in the sense I have explained. The terms "Guaranteed Maximum Price" and "GMP" were not used. Nor was any JCT standard form mentioned. There was discussion as to the cost of some works being passed to Costains. Mr Black made the point that his target was a price of £1.325m and the task for the meeting was to see how to get to it, if at all possible. If juggling the various costings for separate items could not lead to an overall total of £1.325m then, as the Schedule being discussed recognised, a "commercial adjustment", a price reduction, would have to be proposed and, if possible, to be agreed by Jarvis. Eventually, after discussion of the figures for other items, Jarvis were invited to make a "commercial adjustment", a reduction of the order of £9,800 (strictly £9,852) to lead to a price of £1,325,000. Mr Black and Mr Shaw shook hands.

26. In context that handshake was surely intended to mark some agreement but the question I shall need to return to is, agreement as to what? No form of contract had been mentioned either as incorporated or at all. "GMP" had not been mentioned, nor had "Lump Sum Price with variations". There is no evidence any arbitration provision or, indeed, any other familiar contractual provision was even mentioned, let alone agreed. There is no evidence anyone said words directly to suggest that as from then on there was a contract or that as from then on the parties were bound in any way that suggested that a legal relationship that had not hitherto existed now did. There is no evidence that anything was said, let alone agreed, to the effect that the terms (or any of them) referred to in the Preliminaries were or were not now incorporated into such a legal relationship (if any) as there was between the parties, nor that the reference in the Preliminaries to the contract being under seal was now overtaken by events. Nor is there any evidence that anything was said which suggested that although there was now recognised to be a contract, it was nonetheless prudent or desirable to continue with the idea of having the contract reduced to writing or its being under seal. It was not said or agreed that the provision in the Letter of

Intent as to a quantum meruit was now displaced by some new agreement or arrangement, despite its being Mr Black's oral evidence that the quantum meruit mentioned in the Letter of Intent was intended only to cover the position until Jarvis started work. Although the BTP Schedule which was marked by Mr Black as the items on it were discussed, by its reference to "Original Tender Sum £1,138,000" as a starting point for a discussion of specification changes and their impact on price, could be taken to refer back to the original tender, there was nothing but that which did so refer back.

27. On 4th December 1995 Mr Black faxed Mr Shaw mentioning that "we have agreed with you that the price for the total job at Old Sun Wharf is £1,325,000" but mentioning also one exclusion and the possibility of a further "free issue" and further specification changes.

28. On 8th December BTP (to whom, it will be remembered, Galliard had given the task of drafting the contract) wrote to Jarvis "confirming for the avoidance of doubt" in their first main paragraph that the "Contract Sum" of £1,325,000 was a "guaranteed maximum sum for the completion of 36 Nr. flats to the specification of the completed show flats and all instructions issued up to and including 1st December 1995 and any claim in respect of all loss and expense incurred to date". There were a further 5 headings in their letter, including that Jarvis would take possession of the site on 11th December 1995. BTP's letter ended:

"Please will you sign and return this letter to acknowledge your agreement to its terms

A clean copy of the Schedule that had been discussed on 1st December and the figures then agreed upon, including the "Commercial Adjustment" of £9,528 by Jarvis, was included.

29. On or about 11th December Jarvis began the fitting out works to the remaining 33 flats. BUJ, as Architects, began to serve Interim Certificates as if a JCT 80 Contract had come into being.

30. On 18th December Jarvis replied to BTP. They conspicuously did not sign and return BTP's letter or otherwise acknowledge agreement to its terms. They acknowledged that "*the contract sum of £1,325,000 plus VAT*" was inclusive of all claims as previously submitted but, as for its being a GMP figure, they took the view that it should be considered as a lump sum contract subject to variations. On 22nd December Jarvis wrote to BTP suggesting a different form in place of the first main paragraph of BTP's letter of 8th December taking out, inter alia, the reference to a GMP. Jarvis indicated that if BTP incorporated this different form then they, Jarvis, would be pleased to sign the letter of acceptance. On 5th January 1996 BTP asked Jarvis to consider a number of points including that the Architects were preparing a revised specification *"which reflects the final agreed specifications*", and that such document would form part of the contract documents which would supercede their letter of 8th December. They could see no reason, they said, why Jarvis could not sign up that unamended letter "pending the execution of formal contract documents". The drift of their reply suggests that Galliard still contemplated and required formal contract document but that until then there was to be a written contract in the terms of their (unamended) letter of 8th December, the letter which Jarvis had so far failed to agree.

31. Work on the flats progressed. On 10th January 1996 there was a Site Meeting. Amongst the considerable list of topics dealt with was an agreement that the Architects would forward a completed specification as to the required finishes and that Jarvis would supply updated Mechanical and Electrical proposals. The Architects reserved the right, they said, to issue instructions for immediate effect as to any item which they considered could have a detrimental effect on the programme (meaning that they could do so even if Jarvis had not at the time agreed its cost implications with Galliard).

32. On 17th January 1996 Jarvis sent to BUJ a list of items which they considered to be extras to be paid for above the "current contract sum" and on 22nd January they sent detailed costings of over £66,000 for additional works. On 23rd January Jarvis told Galliard that the issue of the formal contract document and of specifications setting out both parties' agreement to the contract sum was still awaited. It was urgently needed, said Jarvis, for the protection of both parties and to avoid further confusion as to the scope of the works included within the contract sum. Further drawings and instructions, said Jarvis, had been given to them since 1st December and, if the contract sum was to be kept to, then savings in other areas would have to be devised. On 24th January Galliard said it had negotiated a fixed price which it expected Jarvis to stick to. On 29th January BTP rejected the costings, at over £66,000, which Jarvis had supplied, a high proportion, they said, but not all of which items should have been within the revised contract sum.

33. Work continued on the site. On 8th February Jarvis complained that still the design team had not issued the Contract Documents and fully comprehensive drawings and specifications. Jarvis had produced, and supplied, a copy of their own drawings and specifications. Jarvis, by its Mr Shaw, continued:- *"It is evident from the documents that the terms of the contract between us are such that the works to be carried out for the agreed price of £1.325m are those described in the Letter of Intent dated 14th March 1995 plus the additional variations listed within the Schedule prepared by [BTP] on 29th November 1995. Further enhanced works are additional and must therefore be added to the agreed contract sum".*

A little later, Mr Shaw added: *"If it remains your position that these works are included in the contract price then, notwithstanding the fact that I can see no documents which support your position, I am advised that it may prove the case that we have never actually reached an agreement and therefore no contract exists between us".*

If that was the case, he said, a quantum meruit would be required. It was in the interest of both sides, he concluded, to agree contract terms within a few days.

34. Galliard, by Mr Black, answered to Jarvis that the contract at £1.325m still stood, as also did BTP, who added that the agreement at £1.325m "*supersedes Appendices A-O within your Schedule of Offer documents*", a supercession which no evidence suggests had been discussed or agreed at the meeting of 1st December.

35. On 16th February Jarvis complained that still no contract documents had been produced, nor even had there been, they said, agreement on variations to the specifications. Mr Shaw added (though not, it would seem, accurately) that that had prevented Jarvis from concluding sub-contract agreements with its sub-contractors. Mr Black's reaction was that Jarvis was working to build up some spurious case. As works continued BTP drew up highly detailed schedules (on "Scott Schedule" lines) of variations and claimed additional items. BTP and Jarvis met and failed to reach agreement. The Appendices A-O, which BTP had said had been superceded, were said by Jarvis to be necessary parts of the contract documentation which the Architects and BTP were drawing up.

36. Works still continued, with the Architects requesting quotations for newly proposed additional works and with their issuing Architect's Instructions making changes and referring to many drawings issued after 1st December 1995.

37. On 19th March BTP told Jarvis that they were in the process of preparing contract documentation and they forwarded them to Jarvis on 25th March 1996. A specification, Contract Sum Analysis and Drawings were also sent for signature by Jarvis. The Articles of Agreement sent for signature are not fully before us and are thus impossible to compare with those in the Preliminaries but they would seem to differ at least in that there were now to be new Articles 8, 9 and 10 which had not existed, at any rate as such, previously. Moreover there was now proposed to be a "Supplementary Agreement" which, inter alia, provided a limit to the final cost of "the Works" - the fitting out of the 36 flats and associated works - which it described as "the Guaranteed Maximum Price". Article 2 identified £1,325,000 as "the Contract Sum" but that sum was not in terms identified as the GMP referred to in the Supplementary Agreement. The forms sent contemplated their execution as deeds. The Supplementary Agreement represented a series of new changes which BTP had made to some form which had been proposed by the Architects. On the same day, 25th March, BTP asserted to Jarvis that the Contract Documents would be representative "of the agreement reached on 8th December".

38. Works and site meetings continued. Jarvis met BTP on the subject of the contract documents and took up points with them. BTP responded as to some points, referring others to the Architects. On 23rd April 1996 Jarvis asserted that whereas at one stage they had believed that a contract had been reached, it had by then become apparent, they said, that none ever had. They referred especially to the new "Supplementary Agreement". They would be looking, they said, for a reasonable sum for the works which they had done and the expenses which they had incurred.

39. On the same day BTP responded by letter saying, inter alia, that Jarvis would be paid under the contract the total of £1,325,000 *"plus Qur estimated value of additional works properly instructed by the Architect"* (my emphasis) and: *"The finalisation of the contract documentation is a pre-requisite for the execution of the payment terms."*

40. On 1st May BTP wrote to Jarvis saying the project was being administered "in all respects as if this contract has been executed by both parties in accordance with the agreement as at 4th December 1995" (again, my emphasis). The next day Jarvis sent to BTP their comments on the proposed contract documents. By 6th June the Architect was observing (or purporting to observe) a lack of activity at the Site and on the same day Jarvis was asserting there was no agreed contract and that they were proceeding on a quantum meruit basis. On 7th June the Architects gave notice to Jarvis under clause 27.2.1.2 of the JCT Contract ("Default by Contractors"). On the same day Jarvis again asserted there was no contract. Mr Black asserted that they had shaken hands on £1.325m and Mr Shaw said that that was so but said that they had not agreed what works were to be within that price. On 24th June, after further correspondence, Galliard gave notice under (or purportedly under) Clause 27.2.2 determining Jarvis' employment with immediate effect. Jarvis were no longer at the site and Galliard finished the fitting out itself.

41. On the 26th July 1996 Jarvis issued a writ against Galliard which claimed on alternative bases. In one limb Jarvis relied on the Letter of Intent of the 14th March 1995 to substantiate a claim on a quantum meruit basis (not of the kind commonly resorted to where there is no contract at all but on the basis that there was, in the events that had happened, a contract that Jarvis should be remunerated on a quantum meruit basis). That claim was for £1,631,970 less the £1,029,752 already paid, namely for £602,218. An alternative claim was in the same sum but on the basis that Jarvis were entitled to remuneration on a quantum meruit basis in the absence of any contract all.

42. On the 8th August 1996 Galliard applied by summons for a stay of all further proceedings under section 4 of the Arbitration Act 1950. Costs apart, that is the only relief sought by the Summons. It would seem (this is not in our papers) that on the 6th December 1996, at the first hearing of that summons, His Honour Judge Hicks Q.C. gave leave for a defence to be filed without its prejudicing the application for a stay. After a formal amendment to the Statement of Claim on 18th December 1996, on the 20th January 1997 Galliard served its Defence. It asserted contracts made at 14th March 1995 and on the 1st and (perhaps) the 18th December 1995.

43. On the 19th December 1997 (the delay is not explained) Jarvis re-amended its Statement of Claim. Still there are alternative claims alleged. A contract of the 14th March 1995 is alleged which, it is said, required Galliard to pay remuneration on the quantum meruit basis if, (as was alleged to be the case), no formal contract were to have emerged. Alternatively there was a claim for remuneration on the quantum meruit basis in the absence of

any standard form contract having been required by Galliard to be entered into by Jarvis (as Jarvis asserted to be the case). It was now specifically asserted that there was no contract at or after the 1st December 1995 but, in the alternative to that, if there was one, then it still led to remuneration on a quantum meruit basis. It was asserted that the effect of the provision in the Preliminaries that *"The Contract will be executed as a deed under seal"*, coupled with the reference in the Letter of Intent to the case if there were to be no formal contract, made the dealings between the parties "subject to contract" until such formal contract emerged, which (it was alleged) it never did. It was further asserted that even if there was any contract it did not contain or incorporate an arbitration clause. Jarvis's quantum meruit claims were now quantified as £1,770,181.80 less the same figure of £1,029,752, namely £740,429.80.

44. On the 14th January 1998 Galliard served an amended Defence and Counterclaim. It now averred, additionally, that a binding contract had been concluded between the parties in March, in November and in December 1995. It also asserted that all such contracts contained or incorporated the provisions of the Standard Form of Building Contracts 1980 Edition (private without quantities) including the Articles of Agreement and the arbitration provisions which were in both the said articles and the said Standard Form. Liability in any sum was denied.
Galliard counterclaimed for a declaration which (so far as relevant for immediate purposes) was that a contract had been concluded between the parties which incorporated, amongst other terms, the provisions of the Articles of Agreement and of JCT Standard Form of Contract 1980 Edition (without quantities) with amendments and the Contractors Designed Portion Supplement (1994 Edition) and, in particular, the arbitration provisions contained therein.

45. On the 21st January 1998 Jarvis served their amended Reply and Defence to Counterclaim which, again limited to what is immediately relevant, denied that Galliard was entitled to stay under section 4 of the Arbitration Act. Galliard served a Reply to Defence to Counterclaim and, we are told, discovery was completed.

46. It was only the Summons of 8th August 1996 that was before the Learned Judge and against that background, the only questions before the Judge were thus whether all further proceedings could be and, if so, should be stayed pursuant to section 4 of the Arbitration Act 1950. That section provides as follows: *"If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."*

47. Section 4 appears in Part I of the 1950 Act. Section 32 of the Act, still in Part I provides as follows: *"In this Part of this Act, unless the context otherwise requires, the expression "arbitration agreement" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not."*

48. His Honour Judge Toulmin Q.C. dismissed Galliard's application. Leave to appeal was refused. On the 13th October 1998 Beldam L.J. gave leave to appeal to Galliard. Jarvis has served a Respondent's Notice arguing that the parties had never been ad idem as to the work to be included within the price and that there was uncertainty as to the works required.

49. It is not said by either side that there was here any *"arbitration agreement"* wholly independent of any other contract or contracts; if there was any *"arbitration agreement"* at all it came about only by way of its incorporation in some larger contract. By far the greater part of the case has thus been taken up with looking into whether or not there was some larger contract and, if there was, what its terms may have been. But, even if were to be assumed that there was a larger contract, it does not follow from its existence that there was therefore an "arbitration agreement" within the meaning of section 32. As to that more limited point the Judge said: *"It is accepted by the Plaintiffs that it is unnecessary for the whole of the contract including the arbitration agreement to be in the same document; it is sufficient that the agreement to arbitrate is itself in writing and that there was a document which recognised the existence of an arbitration agreement between the parties - see* ***St. Raphael*** *[1985] 1 Lloyds Rep 403 at 408-409."*

50. A principal question, independent of the question of what, if any, larger contract existed, is this; even if there were some larger contract, was there a written agreement within the meaning of section 32 ("The Section 32 Point"). Another principal question, again independent of an examination of whatever precise terms may or may not be within some larger contract, is whether the parties remained effectively "Subject Contract" throughout, which, were it to have been the case, would again lead to there being no agreement within section 32 ("the Subject to Contract point"). I will deal with these issues first.

A The Subject to Contract point

51. On this issue the Judge was in Jarvis' favour. He held: *"Even if an agreement had been reached on 1 st December 1995 on whether the price was a guaranteed maximum price (and, if so, what the term meant) or a lump sum price subject to variations, I am satisfied in view of the history of the dealings between the parties that, applying the*

standards of the reasonable expectations of sensible businessmen, such a contract would have been subject to a contract to be executed under seal."

52. The reference to the reasonable expectations of sensible businessmen was the Judge's reference back to ***G. Percy Trentham Ltd v Archital Luxfer*** [1993] 1 LLR 25 at 27, per Steyn L.J. in a passage to which he had earlier referred. As Steyn L.J. there points out and as already mentioned, where work has been done and paid for, where, in other words, a transaction has been performed on both sides, it will often be unrealistic to argue that there was no intention to enter into legal relations. But no one would argue that because work has been done and paid for then, without more, there must have been a contract (still less that there must have been any particular term within a contract). A further difficulty for Galliard in here relying on Steyn L.J.'s dictum is the provision in the Letter of Intent that if there was no formal contract through no fault of Jarvis, the latter would nonetheless be reimbursed. That, of itself, could explain both the doing of works and the payment therefor, even in the absence of any, or any other, contract.

53. Moreover, there were facts found by the Judge supportive of his conclusion. The terms of Preliminary 4.1.3 ("The Contract will be executed as a deed under seal") were supplemented by the provision in the Letter of Intent (should there not be "a formal contract with you"). There was no formal contract on the 1st December 1995 or at all and that was so even though BTP had been given the task of drafting one by Galliard. It is perhaps notable that the first inter partes thing that BTP did after 1st December 1995 was to invite Jarvis in writing to acknowledge its agreement to the terms which BTP then set out, which Jarvis never did. Nor can it be said that the production of a formal contract consisted merely of putting into formal shape that which had already been clearly agreed; both sides continued to refer to the preparation of or need for formal contract documents but their prospective contents were changing. As late as 19th March 1996, even on the Galliard side alone, BTP was changing whatever the Architects had earlier proposed should be included. There was, in my view, ample support amongst the facts found for the Learned Judge's conclusion as to the reasonable expectation of sensible businessmen in the circumstances. As to the specification of works, for example, Mr Urquhart said in evidence that whilst it would not have been strictly necessary, at or after 1st December 1995, to reduce it to writing, it would have been both desirable and normal that that should have been done. It would hardly be for sensible businessmen to conduct themselves other than as was reasonable and normal, at all events unless constrained to do otherwise.

54. As for a more legalistic analysis, the use of the definite article in Preliminary 4.1.3 in context suggests, in my judgment, a clear requirement by Galliard, unless the contrary was either expressly agreed between the parties or arose between them by necessary implication, that whatever, if any, contract emerged in consequence of the invitation which the Preliminaries represented, it would have to be under seal and, therefore also that the option afforded by the Articles (of execution under hand) was excluded. A person, such as Jarvis, dealing with Galliard on the basis of those Preliminaries would, in my view, be entitled to proceed upon the footing that, unless some antecedent agreement was expressly made or could be inferred by necessary implication, then there would be no contract between it and Galliard on the basis of the Preliminaries unless and until there was a deed between them. The effect was thus in that respect akin to the effect of the familiar phrase "Subject to Contract" save that it was more similar to the less familiar "Subject to formal contract". The effect of such phrases, albeit in a conveyancing context, is best summarised in Megarry & Wade's Real Property 5th Edn. p. 568 as follows:

> *"2. "Subject to contract." If an offer is accepted not finally but conditionally, for example with the common formula "subject to contract" or "subject to the preparation and approval of formal contract or "subject to suitable arrangements being arranged between your solicitors and mine," the effect is that until the necessary contract or arrangements have been made, there is no contract and either party can withdraw. This follows the ordinary rule that a contract to make a further contract on terms unspecified is no binding contract at all. If such a reservation is made, therefore, both parties have complete freedom of action;"*

and then:

> *"There can also be a binding contract even though the parties intend to make a more formal contract later, as, for example, where they say "this is a provisional agreement until a fully legalised agreement, drawn up by a solicitor and embodying all the conditions herewith stated, is signed." The difference lies between (a) mere negotiation preliminary to, or subject to, a contract which has not yet been made, and (b) an immediate binding contract, which can nevertheless be superceded by some later contract if the parties so wish. It is also possible for an agreement "subject to contract" to become legally binding if the parties later agree to waive that condition; for then, in effect, they are making a firm contract by reference to the terms of the earlier agreement."*

55. Even given a broad disposition to find a contract if one can, having regard to what was said and done and, more particularly, to what was not said or done by and on the 1st December 1995, I am unable to find anything overtaking the "Subject to contract" effect which I attribute to the combination of the Preliminaries and the Letter of Intent. The handshake between Mr Shaw and Mr Black in context represented, in my judgment, only an agreement subject to formal contract. It was, to revert to Megarry & Wade, mere negotiation (albeit then thought and intended to be concluded as to price and the other matters then discussed) preliminary to a contract which had not been previously made and was not then made.

56. If that is right then no arbitration agreement came into existence. This conclusion alone justifies the Judge's dismissal of Galliard's Summons, the only thing in front of him. Mr Tackaberry urges that a decision on the facts of

this case that the arrangements remained "Subject to Contract" would send tremors through the construction industry. I do not accept that. Firstly, there is no reason given in the evidence to suppose that the particular combination found here, of Preliminary 4.1.3 and the reference in the Letter of Intent ("in the event that we do not enter into a formal contract with you"), is at all common. Secondly, Mr Day's evidence was that in his experience of "Letter of Intent" dealings, over some 30-40 instances, none had previously nat led to a contract and that in some 85% of the cases work, as here, had begun before contracts had been signed. Such experience may or may not be typical but it was what was given in evidence and suggests no reason for regarding "Subject to Contract" dealings as inimical to ordinary practical requirements.

B The s32 point

57. Nothing, on the evidence, was put into writing at the meeting on 1 st December 1995 other than Mr Black's rough writings on BTP's Schedule. Jarvis put pen to nothing on that day. No one suggests that the arbitration provisions in JCT 80 were then referred to or identified in any way (as amended or unamended), nor even that any standard contractual forms were referred to. Mr Tackaberry urges two alternative routes to some arbitration provision having been then agreed.

In his first, he points out that the BTP Schedule discussed on the 1st December begins with a price, £1,138,000, plainly referring back to the £1,138,958 referred to in the Letter of Intent, which itself referred to JCT 80 as amended in the Preliminaries which, in turn, included comprehensive printed arbitration provisions. This route is doomed. The Letter of Intent, as its name suggests, was mere intention rather than contract and using its named price as a starting point for discussions as to price over 8 months later does not suggest that anything but its price was being used, even as a starting point. Moreover, the very Preliminaries thus sought to be incorporated include the provision of clause 4.1.3 that *"The Contract will be executed as a deed under seal"*. I fail to see how Galliard can claim to have the benefit of one part of the documents which it asserts were part of a contract alleged to have been made on the 1st December (the JCT Arbitration provisions) without its being stricken with the requirement of another part of the very same documents (that, in effect, the contract, if any, would be under seal).

In the alternative suggested route to an arbitration agreement Galliard asserts there was a contract made on the 1st December on unamended JCT 80 terms. However, that JCT 80 should be incorporated in unamended terms was never asserted as events unfolded, either before or after 1st December 1995, and such an assertion would, for example, have excluded the GMP provision (whatever it meant) which Galliard so often urged had been agreed.

58. That there were thus no arbitration provisions agreed on 1st December 1995 suffices, again, to justify the Judge's conclusion, but it may be useful to consider whether there could be said to be any such provision that was "written" within the meaning of s. 32. This subject introduces ***The St Raphael*** supra, to which the Judge referred, and also the later case of ***Zambia Steel & Building Supplies Ltd -v- James Clark & Eaton Ltd*** [1986] 2 LLR 225 CA.

59. Lloyd L.J. delivering the first judgment in ***The St Raphael*** held that the defendant, who was asserting there had been no written agreement to arbitration, had received an order sheet which unequivocally recognised the existence of an arbitration agreement and which, it appeared, had been signed and adopted by him. It incorporated a telex which itself incorporated the arbitration clause - p. 409. Sir John Donaldson M.R. held that the broker's note signed by the appellants and that signed by the defendant-respondent, read together, amounted to a written and, indeed, signed agreement to refer future disputes to arbitration - p. 412. He got to that conclusion without needing to deal with the "interesting questions" as to what precisely is required to satisfy s.32. Slade L.J. agreed. In the context it may be that Lloyd L.J.'s dealing with those "interesting questions" was obiter, but, at page 409, he held: -

..... that an arbitration agreement need not be signed and that the definition in s. 32 of the Act is satisfied provided there is a document or documents in writing which, to use the language of Lord Greene,

.... "recognise, incorporate or confirm the existence of an agreement to submit"".

The reference to Lord Greene M.R. is to his judgment in ***Frank Fehr & Co. -v- Kassam Jivraj & Co.*** (1949) 82 LL.R 673.

60. Five months after the ***St Raphael*** the Court of Appeal returned to a similar subject in ***Zambian Steel*** supra, but now the relevant definition was not s. 32 of the 1950 Act but the slightly different provisions of s. 7 of the 1975 Act which expressly include agreements contained in an exchange of letters or telegrams. Atp. 229 O'Connor L.J. held that: *"If it is established that a document with an arbitration clause in writing forms part of a contract between the parties, the assent by one party orally to the contract is sufficient"*.

It is not clear whether he there intended to go beyond Lloyd L.J.'s conclusion in The St Raphael from which he extensively cited. Ralph Gibson L.J at p. 235 held: *"If the term containing the agreement to submit [to arbitration] is incorporated in a document and it is proved that the party is bound by an agreement which includes the terms of that document, then no further proof of the agreement is, in my judgment, required."*

Sir Denys Buckley agreed with both judgments; there had been, in his view, a contract partly unwritten and partly in writing. The agreement to arbitrate was a written term of the agreement which the parties had entered into. The endorsed terms of business, which included the provision for arbitration (pp 235-236): *".... Thus became, in my judgment, a written record of the terms to which the parties were assenting and a contractual document, part of the contract."*

61. There is no need, here, to hesitate over whether there may be a relevant distinction between a written agreement to submit to arbitration on the one hand and, on the other, an oral agreement which includes some reference to a written term to that effect. It could be said in favour of such a distinction that the object of s. 32 was, surely, that it was to be capable of being seen, almost at a glance, whether or not its requirement was satisfied, an object which is not achieved if the existence and content of alleged oral agreements may be relevant. However, although it is difficult not to adopt the remark of Bowen L.J. in ***In re Eberhardt Co., Ex parte Menzies*** (1889) 43 Ch D 118 at 129, in the not altogether dissimilar context of the Statute of Frauds, and thus to say that Zambia Steel has "pushed the literal construction .... to a limit beyond which it would perhaps be not easy to go", if the test which it poses is applied, there is still, in my judgment, no written agreement such as s. 32 requires.

62. On 1st December 1995, the date of the only alleged agreement urged upon us as satisfying the section, there was, firstly, as I have already described, only an agreement which was in substance "Subject to formal contract". If that is wrong then, secondly, even if the agreement as a whole was not subject to formal contract, the particular writing sought to be included within it is part only of one document, another part of which insists that the incorporation of that document is, in substance, "Subject to Contract". If that, too, is wrong, then, thirdly, in the absence of any reference during the discussions on the 1st December to any standard form of contract, let alone to JCT 80 as amended, and in the absence also of any necessary implication from the discussions and handshake on that day that JCT 80's or any other arbitration provisions were incorporated into whatever was then agreed, it is still not possible to hold s. 32 to be satisfied. Even if the dealings of 1st December had amounted to such a thing, contrary to my earlier views, one cannot jump from an oral agreement to do particular works for a particular price at a particular place and over a particular period to a conclusion that either some particular or any arbitration provision must have been agreed to be incorporated within the subjects agreed.

    For these reasons, like the Judge, I see s. 32 as not satisfied and thus see a second ground, in part independent of the Subject to Contract point, for dismissing Galliard's application for a stay pending arbitration.

63. Some while after the rest of this judgment had been written Mr Tackaberry drew our attention by letter and by photocopies to a number of cases, hitherto uncited, which he believed might be of relevance, chiefly on this section 32 point. They are ***Mathind -vTurner*** (1986) 23 Con L R 17 C.A. (in which ***Zambia Steel***, heard some 6 months before, seems to have been cited), ***Nissan (UK) Ltd -v- Nissan Motor Co. Ltd & Ors*** C.A. unrep'd, 31.7.91 (in which ***Zambia Steel*** is mentioned only to be distinguished - p.80) ***Aughton Ltd - v- M.F. Kent Services*** (1991) 57 B.L.R.1 (where at p.27 ***Zambia Steel*** is mentioned), Rimeco ***Riggelsen Metal Co. -v- Queensborough Rolling Mills***, per Saville J. unrep'd 26.3 1993 (which followed ***Zambia Steel*** without comment) ***Sim Swee Joo Shipping Sdn. Bhd. - v- Shirlstar,*** per Mance J. unrep'd 17.2.1994 (a case under section 136 of the Law of Property Act 1925 where an analogy with ***Zambia Steel*** was not adopted) and ***Abdullah M. Farhem & Co. -v- Mareb Yemen Insurance co. & Anor*** [1997] 2 LIK 738 (in which the Zambia Steel test was saisfied by the terms of a pleaded telex).

    We have not heard argument from either side on any of these cases, nor, in my judgment, do we need to. That is firstly, because none, as I read them, extends beyond ***Zambia Steel*** and, secondly, because (as already mentioned) no written agreement such as section 32 requires here emerges even if the ***Zambia Steel*** test is applied.

No meeting of the minds,

64. The arguments which I have described as the "Subject to Contract" and "Section 32" points were the second and third of three reasons given by the Judge for his conclusion. The first was that Mr Black had had in mind a GMP contract and Mr Shaw a lump sum price subject to variations and that the difference between them represented a fundamental misunderstanding as to the nature of the contract. We were addressed by both sides as to the differences, or lack of them, between the two. One difference, at any rate in understanding, between the parties can be shewn by contrasting Mr Black's evidence that after 1st December 1995 a variation would only be ordered if Jarvis agreed to it (so that valuation of it would generally be unnecessary as any such agreement could be expected to include the price) with the provisions of Article 7 and clause 4.3.2 of the Preliminaries (valuation of variations by the Architect) - and see also BTP's letter of 23rd April 1996 supra. Mr Black also asserted in evidence that all Jarvis had to do, as to the 33 flats, was to copy the Show Flat, yet it is plain that there were frequent and repeated changes to the details of the works required of Jarvis (with consequential disputes as to whether or not they were within the handshake price) long after the Show Flats had been completed. Having set out the facts he found, the Judge continued: *"In those circumstances it is clear to me that there was no meeting of the minds between the parties and that, try as I can, I am not able to conclude that an agreement was reached when on the facts it is clear to me that no final agreement had been reached."*

65. Argument under this head took us to Lord Diplock's dictum in ***Paal Wilson & Co. v Partenreederei Hannah Blumenthal*** [19831854 at 915f, to Robert Goff L.J.'s preference, in ***Allied Marine Transport Ltd. -v- Vale do rio Doce*** [1985] 1 WLR 925 at 936, for Lord Brightman's judgment in the former case, and to the uncertainty described by Bingham L.J. in ***The Anticlizo*** [1987] 2 LLR 130 at 138 C.A. We were taken also to ***O T Africa Line v Vickers plc*** [1996] 1 LLR 700 where, at p. 703, Mance J. referred back to the celebrated case of ***Raffles -v- Wickelhaus*** (1864) 2 H & C 906 as a case in which offer and acceptance, although verbally identical, could, objectively regarded, have referred to different things - see also ***Scriven Bros -v- Hindley & Co.*** [1913] 3 K.B. 564. How far, if at all, and in what, if any, circumstances, the Court, in ascertaining whether a contract has been made, is entitled to have regard to such of a party's intentions as were not directly communicated or otherwise made manifest to the other, gives rise to difficult questions both of law and fact, as the case law cited above illustrates. If, for example, such

intentions can be resorted to, if at all, only if there is ambiguity in what is communicated between the parties, then a very careful inquiry has to be made of precisely what was said and done to see whether there was any such ambiguity.

The Judge concluded there had been no meeting of the minds. Mr Tackaberry argues that the Judge was in error and that he paid too much regard to sentiments that may have been in mind (in particular in Mr Shaw's mind) but which were left unexpressed. For my part I see it as neither necessary nor desirable to deal with this last issue.

66. It is not necessary because there are already two independent grounds for refusing a stay. It is not desirable because the parties have never agreed, as they might have done, either that a question or issue of fact or of law should be raised under O. 33 r. 3 R.S.C. nor what the question ought to be. Even as Mr Friedman Q.C., towards the close of his address, sought orally to frame what it could have been, Mr Tackaberry was shaking his head to disagree with such formulation. Without some question being sufficiently framed, duly laid before the Court and then properly resolved by the Court, argument could later arise, either in the later Court proceedings or in the arbitration, as the case might be, as to how far the resolution of some unraised question bound the parties, especially if, for example, there were to be later amendments to the pleadings or where, as here, in addition, a decision on the point was, in the event, not necessary for determining whether the basic relief - the stay - should or should not be granted.

67. Given the conclusions reached by this Court, reticence on this last issue does not affect the order proper here to be made (as, on the basis of those conclusions and given also the way the case has been argued, a stay will in any event be refused). Accordingly, for my part, without intending thereby to raise any doubts as to the Judge's conclusion, I say nothing further as to this last issue.

68. Reverting, therefore, to the appeal as a whole, I would dismiss it for the reasons I have given. In that circumstance it is unnecessary to rule on Jarvis' Respondent's Notice.

LORD JUSTICE SCHIEMANN: : I agree.

LORD JUSTICE EVANS:

1. I gratefully adopt the clear and compehensive summary of the facts which Lindsay J. has set out. The significant dates are these -

Dec. 1994/January 1995	Negotiations begin.
14 March 1995	Letter of intent.
14 August 1995	Jarvis commence work on site.
1 December 1995	Agreement upon which Messrs Black (Jarvis) and Shaw (Galliard) shake hands
24 June 1996	Notice of termination given by Galliard. Jarvis no longer at site.
26 July 1996	Writ issued by Jarvis claiming a quantum meruit.
8 August 1996	Summons by Galliard seeking a stay under section 4 of the Arbitration Act 1950. This requires proof of a "written agreement" to refer the dispute to arbitration (sections 4 and 32).

2. Galliards' Summons anticipated their first line of defence against the claim by Jarvis for a quantum meruit payment. The defence is that the work was done under a contract and for a contract price. The contract or contracts they alleged were spelt out in the Defence, which they served without prejudice to their Summons for the proceedings to be stayed. The Amended Defence included paragraph 5 which *"admitted and averred that (1) a contract was concluded on the basis of the Letter of Intent dated 14th March 1995"*. That was the Plaintiffs' (Jarvis') alternative case, pleaded in paragraph 3 of the Re-amended Statement of Claim.

3. For the purposes of defending the quantum meruit claim, it was necessary for Galliard to show that the work for which Jarvis was claiming remuneration was done under the terms of a contract other than that which was contained in the Letter of Intent. This became Galliard's contention in support of the Summons for the proceedings to be stayed. The judge rightly rejected their submission that the Letter of Intent was a 'formal' contract for carrying out the works. It clearly was not. It was expressly provisional, taking effect only until a formal contract was entered into, and it may have had no more than the contingent status of an unilateral contract: "if you proceed with these works, before a contract is entered into, then we will pay you a quantum meruit for them". This last difference is immaterial, because Jarvis did in fact begin work and entered onto the site, with Galliard's permission and even at their request, on 14th August 1995.

4. The only remaining submission as to the existence of a contract for carrying out the works is that such a contract came into existence on 1 December 1995, when Messrs Black and Shaw shook hands on their agreement that the contract price should be £1,325,000. When two experienced businessmen shake hands on what they regard as a deal, I am loathe and in my view the Courts always are loathe to hold that no legally binding contract comes into existence. But, for the reasons so clearly explained by Lindsay J., I find it impossible to say that a contract came into existence here. This is essentially for two reasons. First, and more importantly, it is not possible to be certain what the terms of the contract were. The meaning and effect of "guaranteed maximum price" are tied up with the parties' intentions as to the scope of the works to be carried out and in particular, in a context such as this, as to the extent to which, if at all, variations would be permitted, consistently with the "guaranteed maximum" price which was agreed. What their intentions were was left uncertain on 1 December, as they soon discovered in the course of subsequent correspondence, and this uncertainty, in my judgment, was such as to prevent an enforceable

contract from coming into being. I could also agree with the judge's conclusion, that "there was no meeting of the minds between the parties", if, as I understand, he meant that, notwithstanding the handshake and the parties' beliefs, they were insufficiently agreed.

5. Secondly, I agree with Lindsay J. that the agreement reached on 1 December was "subject to contract", meaning that it was not to have legal effect until a formal contract, meaning a contract under seal, was signed. That was the basis on which negotiations had proceeded throughout the year, and which was confirmed by the Letter of Intent. There was nothing to prevent the parties from agreeing to dispense with that requirement, but there is no evidence that they did so. The fact of the handshake, signifying agreement or what was thought to be a sufficient agreement, does not mean, of itself, that the basis on which the negotions were conducted was being changed. This is confirmed, though strictly it is not evidenced, by the fact that on 8 December the architects forwarded a letter agreement to Mr Shaw which, if accepted, would have become legally binding despite the earlier 'subject to contract' reservation, but Mr Shaw did not accept it, and in my judgment the reservation remained.

6. I agree, therefore, both with the judge and with my Lords that no contract for carrying out the works ever came into existence, and that for this reason Galliard's defence, that the Letter of Intent was superseded by a 'formal' contract, must fail. It follows from this that Galliard cannot rely on an arbitration clause contained in any such contract, because no such contract existed, and the difficult question whether there was a "written agreement" to arbitrate, if a contract incorporating the JCT 1980 conditions was concluded on 1 December, does not arise. However, that does not necessarily mean that the Summons for a stay of the proceedings should also fail, because the issue is whether the dispute that has arisen, vis. Galliard's rejection of the claim for payment for work done on quantum meruit basis, is one in respect of which a written agreement to arbitrate has been entered into. The clause relied upon is in writing, as part of the JCT form. The question is whether there was any contract between the parties, and if so, whether it incorporated the arbitration clause.

7. Both parties apparently were prepared to agree that there was a contract and that its terms are to be found in the Letter of Intent. The striking facts are that Jarvis began work on the project, entered onto the site at Galliard's request on 14 August and remained there until the following June. Throughout this period, work proceeded on the basis that the JCT 80 conditions applied. Instructions were given, 'variations' were notified, payments were demanded and certified, and not least, the architects gave notice of termination expressly in accordance with the Conditions (7 June 1996 p.742). The next question might be whether the arbitration clause should not be regarded as being incorporated in that contract also.

8. The correct analysis of the legal situation, in my judgment, is that a contract came into existence on the terms of the Letter of Intent, either when it was acknowledged by Jarvis (24 March), or when Jarvis began work, or, at latest, when Jarvis entered onto the site at Galliard's request (cf. Steyn L.J.'s reference to the reasonable expectations of sensible businessmen, ***G. Percy Trentham Ltd v Archital Luxfer*** [1993] 1 Lloyd's Rep. 25 at 27, cited by the judge at p.3A). Whichever of these is correct, it becomes arguable that there was a written agreement to arbitrate disputes which would include Galliard's rejection of Jarvis' quantum meruit claim. The arbitrator would have jurisdiction to assess the reasonableness of the sum claimed ; he might also have been able to decide whether the contract contained in the Letter of Intent was superseded by a formal contract, as Galliard has contended that it was, but this issue has instead been referred to and decided by the Court.

9. The appellants have not sought to support their Summons on the grounds outlined above, namely, by asserting that there was a contract in the terms of the Letter of Intent which incorporated the arbitration provisions of JCT 80. There may be good legal reasons for this, which I have overlooked, or there may be commercial reasons of which I am unaware. I have mentioned the possibility because otherwise it might seem unrealistic to hold that there was no contract governing the works which Jarvis carried out and for which remuneration is claimed. The claim is 'justified' by the terms of the Letter of Intent, and the parties were correct in assuming, as they did, that for all practical purposes the works were governed by the terms of the Letter. But I do not hold that that was necessarily the correct legal basis, because there is an alternative claim based on a right to reasonable remuneration independently of any contract, and we have not heard argument about that.

10. I therefore agree that we should dismiss the appeal.

Order: Appeal dismissed with costs. Permission to appeal to the House of Lords refused. (Order does not form part of approved judgment)

MR JOHN TACKABERRY QC (Mr M Gibson - 12.11.99 only) (instructed by HOWARD KENNEDY, London) for the Appellants
MR DAVID FRIEDMAN QC and MS CLAIRE PACKMAN (instructed by EVERSHEDS, London) for the Respondents