JUDGMENT : His Honour Judge Hicks QC. TCC. 2nd December 1998

Introduction

1. In February 1996 the Defendant expected to enter into a contract with Railtrack PLC for the replacement of railway signalling installations in the Woking and Surbiton areas. It is the Defendant's case that in due course it did indeed become the contractor for that work. The Plaintiff strongly disputes that case and I shall in due course refer to the submissions of both parties on that point and consider whether they affect the questions before me but meanwhile it is, without prejudice to that issue, convenient for narrative purposes to treat the Defendant as a main contractor and any contract between the Plaintiff and the Defendant (the latter asserting and the former denying the existence of any such contract) as a sub-contract.

2. I must consider elements of the history in more detail later, but it is convenient to set out the basic framework at this point.

3. On 6 February 1996 the Defendant invited the Plaintiff to tender for part of the contract works. The Defendant did so. There were negotiations and further tenders or revisions but it is common ground that no contract between them had been entered into before July 1996 although the Defendant had meanwhile, by a letter dated 14 March, authorised the Plaintiff to commence what were called "Phase II works", which included work on site, and the Plaintiff had done so in the week beginning 18 March.

4. One of the reasons for the absence of any binding contract between the parties at this stage was that Railtrack's approval of the Plaintiff as a sub-contractor was required. That approval was not forthcoming until 1 May 1996 and did not then extend to the whole of the work for which the Plaintiff had tendered; essentially it permitted the Plaintiff to carry out the civil works only, not the specialised electrical and signalling works. That led to further negotiations between the Plaintiff and the Defendant.

5. On 8 and 12 July 1996 there were meetings between Mr Brosnahan and Mr Ryan of the Plaintiff and Mr Court of the Defendant. On 31 July 1996 the Defendant wrote a letter to the Plaintiff. It is the Defendant's case that a sub-contract was entered into between the parties either at those meetings or by the Plaintiff's continuing to carry out the sub-contract works without demur following receipt of that letter. The Plaintiff denies that, contending that material terms were never agreed.

6. It is common ground that the parties contemplated entering into a formal sub-contract but never did so; the Defendant was to submit a draft but did not send one until 26 June 1997 and the Plaintiff rejected it. The Plaintiff's case is that the parties were not to be bound until the formal sub-contract was entered into; the Defendant's that its function was merely to carry into effect what had already been agreed, with binding effect, between them.

7. Disputes arose between the parties, in particular as to the basis on which the Plaintiff was entitled to be paid, and the Plaintiff commenced these proceedings on 27 November 1997, alleging the execution of works for the Defendant's benefit in the absence of any contract and claiming payment upon a quantum meruit and a declaration that there is no contract between them. By its Defence the Defendant asserts a contract entered into as summarised in paragraph 5 above, alternatively an estoppel against denial of such a contract, and denies any liability to the Plaintiff.

The issue

8. By the order made on 30 April 1998 on the hearing of the summons for directions it was ordered that "the issue as to whether there was a binding contract between the parties" was to be tried "before quantum issues" and two trial dates were fixed, the first "dealing with the contract issue" and the second "dealing with quantum issues". The first trial was conducted before me on 6,7,8,9 and 22 July 1998.

9. The fact that only two trials were fixed and that the second was to be confined to quantum issues would suggest that at the first trial it would be necessary at least to establish not only whether there was a contract but also, if so, what were its terms. On the other hand the issue, as formulated, was simply whether there was a binding contract and the Plaintiff, which was claiming a declaration in general terms that there was not, but was not of course advancing any positive case as to the terms of any contract there might (contrary to its primary case) have been, was left to open the trial. The consequence was that the evidence and submissions before me were largely confined to the question, yes or no, of the existence or otherwise of a contract. The Defendant necessarily advanced to some extent a case as to the terms of the contract it propounded, but there was no exploration of that field in sufficient detail to enable me to make adequate findings in that respect, should I come to the conclusion that a contract of some kind was entered into. On the other hand the time period and circumstances of formation of the putative contract canvassed were confined to those described in paragraph 5 above; I was not, for example, asked to consider the contractual effect or temporal scope of the letter of 14 March 1996, or the effect on the latter question of any decision as to the events in July 1996. I must return to the question whether in those circumstances I can reach a satisfactory conclusion, and if so where that leaves the further conduct of this litigation, when I have considered in more detail the matters disputed before me.

10. Although the contract issue was, apparently by common consent, confined in that way the estoppel issue, despite not being mentioned in the order of 30 April, was with equal unanimity fully canvassed in evidence and argument. I am therefore, subject to the same caveat, prepared to consider it and, if in a position to do so, to rule on it.

The law

11. The necessary and sufficient conditions for the formation of a contract are agreement (usually in the form of offer and acceptance), consideration and contractual intent. Where substantial commercial organisations embody or record the progress and outcome of their negotiations in documents, as happened here for much of the time, issues as to the legal consequences of those negotiations are primarily to be resolved by construing the documents in their factual setting. Where, however, there are doubts whether crucial oral exchanges (as at the meetings of 8 and 12 July 1996) are adequately or accurately recorded they must be resolved on the evidence of the witnesses, as must the facts as to what was said to the extent that the documents are found to be incomplete or unreliable. Leaving aside the law as to misrepresentation, mistake and rectification, none of which features here, the wishes and intentions of the individuals participating and their beliefs, then or later, as to the effect of the documents or oral exchanges, are irrelevant except to the limited extent to which matters of shared knowledge or understanding at the time may be part of the factual setting.

12. These are, in my understanding, elementary and familiar propositions. In their application to this case the presence of consideration is not in doubt. Nor, properly understood, is that of contractual intent, for although the Plaintiff's case is that there was no contract that is because it denies that agreement was reached on essential terms; it does not allege that had there (objectively) been such agreement it was nevertheless not intended by the parties to have legal consequences.

13. That leaves the requirement of agreement and in particular, on the facts of this case, the questions whether all essential terms were settled and whether there was communication of acceptance. The setting in which those questions fall to be decided, as briefly summarised above, is a familiar one in the construction industry. Mr Williamson, for the Defendant, cited the following passage from Keating on **Building** Contracts (6th edition) as a useful summary of the relevant principles, and I agree:

> *4. It is sometimes difficult to determine whether a concluded contract has come into existence when there have been lengthy negotiations between the parties but no formal contract has ever been signed. It is suggested that a useful approach is to ask whether the following can be answered in the affirmative:*
> *(a) [concerns contractual intent]*
> *(b) at the time when they are alleged to have contracted, had [the parties] agreed with sufficient certainty upon the terms which they then regarded as being required in order that a contract should come into existence?*
> *(c) did those terms include all the terms which, even though the parties did not realise it, were in fact essential to be agreed if the contract was to be legally enforceable and commercially workable?*
> *(d) was there a sufficient indication of acceptance by the offeree of the offer as then made complying with any stipulation in the offer itself as to the manner of acceptance?*

14. Although (b), (c) and (d) are all of relevance here and must be addressed on the evidence and facts (b) and (d) did not receive any significant elaboration in submissions on the law. Further attention was, however, paid to (c). The reported decisions in this field are, of course, voluminous, but I think I need refer only to two cases relied upon heavily by Mr Williamson as qualifying the extent to which the court can or should find that there is no contract because of failure to agree upon apparently essential terms. In neither shall I attempt to recite or summarise the full facts, which as in all such cases are lengthy and complex.

15. In ***Pagnan S.p.A. v Feed Products Ltd*** [1987] 2 Lloyd's LR 601 the issue was whether there was a concluded contract for the sale and purchase of corn pellets by American sellers to Italian buyers. Bingham J found that there was. He referred at page 612 to four matters relied upon by the plaintiff buyers as excluding the formation of a contract. He disposed of the first and third by findings of fact. As to the second, the absence of agreement on the loading port or range of loading ports, he found that there was no express agreement but held that the law of England applied, under which there was an applicable rule allocating the choice of port to the buyer in the absence of any express term, custom or other reason to the contrary. As to the fourth, the absence of agreement on loading rate, demurrage and despatch, or carrying charges, he again found that there was no express agreement but that appropriate terms could be implied. On this last point, however, he went further, and it is to that additional passage that Mr Williamson particularly points:

> *5. But, say the buyers, agreement of these points, even if not legally necessary, is so usual and of such economic significance to a buyer that the parties must have envisaged continuing negotiations and cannot have intended to commit themselves without such agreement. This is a substantial argumnt and raises what I regard as the crucial issue in this part of the case. I accept that these are terms of economic significance to buyers, and to these buyers. I accept that it is usual for parties to reach express agreement on them. I accept that on Feb. 1 the buyers and sellers expected terms to be put forward for agreement, as they had been by Herr Winkelman and very shortly were by ADM. I do not, however, accept that either party intended express agreement on these terms to be a pre-condition of any concluded agreement. I think the parties regarded these as relatively minor details which could be sorted out without difficulty once a bargain had been struck, as in the event they were. I have no reason to doubt that ADM and the sellers intended to bind themselves on advance of settling these terms, and when ADM did suggest detailed terms the sellers accepted them at once and without demur. .... I do not think either party thought these points at all likely to give rise to disagreement, and I doubt if either gave any thought to the consequences if they disagreed. I conclude that this is a case in which the parties did mutually [intend] to bind themselves on the terms agreed on Feb. 1, leaving certain subsidiary and legally inessential terms to be settled later.* (page 613)

16. The buyers appealed. In argument on this last point Mr Rokison, on their behalf: "*.... went out of his way to make it clear that he does not submit in this case that the agreement upon the remaining points such as rate of loading, rate of demurrage and so on was essential in order to make the contract work. He concedes that any gap in those respects could have been filled by implication of law. But that is not, he says, what the parties intended. They intended to agree these matters between themselves. Until they had done so, therefore, there was to be no binding contract.* (page 618)

17. The trial judge had, as appears above, expressly found the facts as to the parties' intentions in terms incompatible with that argument. It would have been sufficient for the Court of Appeal to uphold that finding, as they did. Before doing so, however, Lloyd LJ, with whom Stocker and O'Connor LJJ agreed, set out some propositions of law on which Mr Williamson relied. The relevant passages are as follows:

(3) .... [the parties] may intend that the contract shall not become binding until some further term or terms have been agreed .... .

(4) Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled .... .

(5) If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty.

(6) It is sometimes said that the parties must agree on essential terms and that it is only matters of detail which can be left over. This may be misleading, since the word "essential" in that context is ambiguous. If by "essential" one means a term without which the contract cannot be enforced then the statement is true: the law cannot enforce an incomplete contract. If by "essential" one means a term which the parties have agreed to be essential for the formation of a binding contract then the statement is tautologous. If by "essential" one means only a term which the Court regards as important as opposed to a term which the Court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound and, if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the Judge, "the masters of their contractual fate". Of course the more important the term the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so-called "heads of agreement".

18. The other case was ***G. Percy Trentham Ltd v Archital Luxfer Ltd*** [1993] 1 Lloyd's LR 25. That was an appeal from this court, in which His Honour Judge Rich QC had found that two sub-contracts had been concluded for aluminium walling, screens and windows. Before turning to the facts Steyn LJ, with whom Ralph Gibson and Neill LJJ agreed, considered the approach to be adopted to the issue of contract formation and identified four matters of importance, as to two of which he said:

6. The third matter is the impact of the fact that the transaction is executed rather than executory. It is a consideration of the first importance on a number of levels. .... The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential. .... Fourthly, if a contract only comes into existence during and as a result of performance of the transaction it will frequently be possible to hold that the contract impliedly and retrospectively covers pre-contractual performance. (page 27)

19. As to the facts, there had in relation to the first contract been three allegedly unresolved matters: (i) payment procedure, (ii) insurance of unfixed goods, and (iii) disputes procedure. The first was disposed of by an unchallenged finding of fact by the trial judge. As to the second Steyn LJ held that, although the parties had not initially been at one, on the judge's findings *"this obstacle to the conclusion of a contract was removed in April 1984"* (that is, during performance of the sub-contract works). As to the third matter the judge had held that it was inessential - *"the parties were content to treat it as a matter for further agreement after the conclusion of the contract"*. That finding was upheld and Steyn LJ added: *"In any event the parties subsequently agreed on the* ***adjudicator*** *and stakeholder"* (the only unresolved points). (pages 28, 29) He concluded his treatment of the first contract as follows:

7. And it does not matter that a contract came into existence after part of the work had been carried out and paid for. The conclusion must be that when the contract came into existence it impliedly governed pre-contractual performance. I would therefore hold that a binding contract was concluded in respect of phase 1. (page 30)

20. What may, in my understanding, be derived uncontroversially from those decisions is that the ways in which objections to the formation of a contract on the ground of alleged failure to agree essential terms may be met include the following:

(1) Findings of fact that the relevant terms were in truth agreed, as in the first and third topics in ***Pagnan*** *and the first in* ***Trentham.***

(2) Findings that the parties intended to be bound despite absence of agreement on the relevant terms and that those terms were capable of being supplied by operation of law, by custom or usage or by implication, as in the second and fourth topics in ***Pagnan.***

*(3) Findings that the parties intended to be bound, as in (2), and that the relevant terms were objectively inessential, in the sense that the contract was complete, workable and enforceable without them, as in the third topic in **Trentham**.*

*(4) A finding that, despite failure to agree before performance of the contract began, later agreement of the relevant terms brought into existence a contract which "related back" to pre-contractual performance, as in the second and third topics in **Trentham**.*

21. There are also no problems in accepting the propositions in ***Trentham*** that performance tends to exclude absence of intention to create legal relations (an objection not raised here) and to make it easier to imply terms rather than find no contract. It is also clear that parties are free by "letters of intent" or "heads of agreement" to enter into limited interim contractual relations. Such interim contracts may or may not be superseded by the more comprehensive agreements which documents of that kind normally contemplate but meanwhile they are complete and binding in themselves (see ***Pagnan,*** end of proposition (6) in paragraph 17 above). Nor is it in doubt that parties can be bound forthwith although there is "some further formality to be fulfilled" (ib., proposition (3)).

22. Where none of those situations obtains, however, I do not find in the actual decisions in either of those cases, nor have I been able to envisage, any further circumstances in which parties who have failed to agree material terms are nevertheless contractually bound.

23. I must confess, moreover, to some difficulty in accepting some of the conclusions which might be thought to be implicit in parts of the above quotations from the judgments, where they go beyond what was necesary for the decisions. It is clear that if parties fail to reach agreement initially on particular terms, that will not prevent the immediate formation of a contract in cases within categories (2) or (3) in paragaph 20 above, or the later formation of a retroactive contract under category (4). I am not aware, however, of any principle or authority which would sanction the concept of an initially binding contract, retroactively void or voidable by failure to agree outstanding terms, if that is what is contemplated by proposition (5) in paragraph 17 above. Nor do I find it easy to discern by what criterion the first and third categories of proposition (6) in that paragraph are to be distinguished, if not in some such way as I have attempted in paragraph 20 above, or how performance can make an essential term inessential (paragraph 18 above). Whether a contract is "incomplete" for absence of agreement of the terms in question is the very point at issue in such cases and must, in the last resort, be a matter for decision by the court, not one within the autonomy of the parties, except that they can indubitably exclude contract formation pending agreement of any term they choose (proposition (3) in paragraph 17).

24. I do not understand there to be any dispute of consequence as to the law applicable to the issue of estoppel, which is pleaded in the alternative as arising by convention or representation. As to the former, on which Mr Williamson rested the main weight of his estoppel argument, I accept as authoritative the passage which he quoted from the judgment of Brandon LJ in ***Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd*** [1982] 1 QB 84 at page 130G, himself citing Spencer Bower and Turner on Estoppel by Representation, 3rd edition, at page 157:

> 8. This form of estoppel is founded .... on an agreed statement of facts the truth of which has been assumed, by the convention of the parties,as the basis of a transaction into which they are about to enter. When the parties have acted in their transaction upon the agreed assumption that a given state is to be accepted between them as true, then as regards that transaction each will be estopped as against the other from questioning the truth of the statement of facts so assumed.

25. As to estoppel by representation there is again no need to go beyond the definition quoted by Mr Williamson, this time from Keating on **Building** Contracts, 6th edition, page 284:

> 9. If a party makes a representation with the intention and effect of inducing another party to alter his position to his detriment in reliance on the representation, the party making the representation may be estopped from relying on facts which are at variance with the representation. The representation must be a representation of fact or of an existing state of mind or belief .... .

Before the July meetings

26. Since it is common ground that no contract was concluded before the meetings of 8 and 12 July 1996 I need not review the earlier evidence in any detail; it is sufficient to summarise the history in such a way as to provide an adequate background to and setting for later events.

27. On 5 February 1996 Railtrack wrote to the Defendant, by its then name of ADTranz, about the resignalling project. The letter began, after reference to an earlier one:

> *.... Railtrack give their approval for you to proceed with the Phase 2 Works in advance of the completion of the Phase 1 Works.*
>
> *10. This approval is given in return for your written undertaking to negotiate an agreed target cost (ATC) that is contractually within £53,526,260 (the ceiling cost) in accordance with the documents referenced in the Attachment 1 to this letter.*
>
> *11. This approval does not constitute a final agreement, which agreement shall only be reached on the successful conclusion of Phase 1 and the establishment of an ATC by 31 March 1996.*
>
> *12. The documents referred to in the attachment included tender documents issued by Railtrack on 28 March 1995 and a tender submitted by the Defendant on 18 May 1995.*

28. The Plaintiff was not a party to that letter. It is, however, relevant to the issue before me in a number of respects. It shows that the Defendant had been involved since the spring of 1995. It shows, by the amount of the "ceiling cost", the scale of that involvement, which bears on the size and expertise of the administrative resources which the Defendant may be assumed to have had available. It was clearly used, as the Defendant's project manager Mr Court accepted, as the model for a letter of some importance from the Defendant to the Plaintiff to which I shall come in due course, despite its inaptness in important respects to that situation.

29. By a letter dated 8 February 1995 (a mistake for 1996) the Defendant invited the Plaintiff to tender for sub-contract work defined as "*work package WP009 - Signal Installation*". The letter refers to a number of enclosures, but I accept the Plaintiff's evidence that some of them were not then supplied, namely *"Appendix 1 Estimated Cost of Works", "Cost Schedule 3"* and Binders 2 and 14 of the "*Railtrack documents*". A number of material facts emerge from this letter and its accompanying documents:

    (1) The work package was for Phase 2 works, described as "finalisation of design based on the information from Phase 1" and "the construction of the works". Phase 1 was stated to have commenced on 18 September 1995 and to be "a 12 week period", which on that basis should have ended on 5 December 1995, but was plainly still not complete.

    (2) The Defendant was stated to be "finalising the contract conditions" with Railtrack and would "forward this document to the Tenderer when available for agreement on a back to back basis".

    (3) In item 5, "Tender requirements", the letter stated: "The tender prices should be for a Fixed Price Lump Sum for all items of the work", but in item 6, "Tender price", tenderers were required to complete their response against "Cost Schedule 3" (a Railtrack document), which was stated to be segregated into clearly identified lump sum and reimbursable items. There was no such schedule, but there was a schedule of numbered items prepared by the Defendant, with descriptions and unit quantities, leaving rates and totals to be inserted by the tenderer.

30. On 12 February the Plaintiff submitted a tender, which subsequently went through a number of revisions. I need not for present purposes recite them all and shall note only the most material changes. The price was initially £4,938,878.30, arrived at by completing and summing the items in the Defendant's schedule of quantities and adding £627K for preliminaries. By its covering letter the Plaintiff expressed five qualifications, of which 1, 2 and 4 concerned working hours and 3 and 5, which were accepted by the Defendant, read:

    3. All works trains, rail cranes, etc. required to effect the works - supplied by Adtranz free of charge.

    5. No allowance for additional works arising from unforseen [sic] conditions, e.g. instability of existing embankments.

31. The Plaintiff was, it would seem, the tenderer favoured by the Defendant, for on 19 February there was a "pre-letting meeting" at which its representatives were taken through, and asked to accept, a set of pre-prepared "minutes". Those minutes were, however, then amended by the Defendant to reflect later events and eventually signed by both parties on 15 March, and so far as it is necessary to consider their contents it is for the most part best to do so at that stage.

32. One item of immediate relevance, however, was present from the outset, namely *"Geotechnical surveys to be issued to Sub-Contractor"*. A report on such surveys was plainly an essential part of the "information from Phase 1" on which the Plaintiff's *"finalisation of design*" was to be based. On 20 February the Plaintiff received from the Defendant a document entitled "SWIMU Geotechnical Consultancy Survey Report". It is not now, I think, in dispute, and certainly I have no hesitation in finding, that that must be read as meaning that the document is a survey report by an organisation calling itself "*SWIMU Geotechnical Consultancy*", not that it is the report of a geotechnical survey, which it plainly is not. It is expressed to be "*based solely on the results of a desk study and visual assessment"* and not on any "*conventional site investigation techniques*" and was wholly inadequate as a basis for working designs. In the event, as Mr Court accepted, no Phase 1 design was ever completed by or on behalf of the Defendant or supplied to the Plaintiff, which had to commission and pay for its own geotechnical surveys.

33. On 21 February there seems to have been a site meeting at which soil conditions were discussed, for on 23 February 1996 (wrongly dated 1995) Mr Court wrote to the Plaintiff stating that 25 "special foundations" had been identified in areas of suspect embankment and 15 in other locations, a total of 40.

34. On 29 February 1996 Mr Brosnahan of the Plaintiff wrote to the Defendant with a revised tender and mentioned two specific changes. The first dealt with the *"special bases"* by adding a provisional sum of £100,000 for "*undefined additional works to 40 No. bases*". The second arose because Mr Court had objected to a separate item for preliminaries, which had accordingly been removed and *"allocated across to most of the rates in the pricing schedule"*. The five qualifications of 12 February were repeated, except that 5 now read: "*Additional works arising from unforseen [sic] conditions - provisional sum allowed"*.

35. It would seem, although I do not recall any direct evidence on either side on the point, that both parties had pressing reasons for feeling it necessary to bring matters to a head by 15 March 1996. Certainly that is what happened, and a number of important documents came into effect on that date, although some are dated 14 March. What the Defendant could not do, however, was enter into a substantive contract for the execution by the Plaintiff of work package WP009, for at least two reasons. One was that the Defendant itself had no substantive contract with Railtrack. The other was that the approval of the Plaintiff by Railtrack as a sub-contractor was necessary and had not been obtained.

36. The documents in question were:

    (i) the Defendant's response dated 14 March to the qualifications expressed in the Plaintiff's letter of 29 February;

(ii) the Plaintiff's fifth tender dated 15 March, with a tender price of £4,677,453.95;

(iii) the revised "pre-letting meeting minutes", signed on 15 March;

(iv) a "compliance letter" from the Plaintiff dated 15 March;

(v) a letter of authority from the Defendant dated 14 March 1995 [sic] but not delivered until receipt by the Defendant of documents (ii), (iii) and (iv).

37. Documents (i) and (ii) require no further comment. The "minutes" are in terms expressed to "form part of the sub-contract order" if the Plaintiff "be successful in securing this sub-contract". They add documents (i), (ii) and (iv) to the list of "Sub Contract Documentation" in the original version. They repeat the promise of geotechnical surveys quoted at the beginning of paragraph 32 above.

38. Document (iv) is a manuscript letter written and signed by Mr Brosnahan. It reads:

13. We confirm that our offer is fully compliant to the documentation which we have received.

14. That is to be compared with a box in the "minutes" reading:

15. The sub-contractor confirms that his offer is fully compliant to the documentation referenced above.

16. Mr Brosnahan's evidence, which I accept, is that he was required by the Defendant to sign a separate letter of compliance as a condition of receiving authority to proceed but deliberately altered the closing words because the Plaintiff had not received all the documentation referred to in the minutes, in particular the full Railtrack tender documentation.

39. Document (v) reads as follows, with omissions or summaries where appropriate:

17. Further to our invitation to tender .... we authorise you to commence with phase II works in advance of the completion of phase I works.

18. This approval is given in return for your written undertaking to negotiate an agreed Fixed Price that is contractually within £4,677,434, (the Ceiling Cost), in accordance with the documents scheduled in the su-contractors Pre-letting meeting minutes which you have acknowledged and signed.

19. This approval does not constitute a final agreement which agreement shall only be reached on the successful conclusion of phase I and the establishment of an agreed fixed price by 31st March 1996.

[Reserves right to remove "stageworks, fringeworks and cable recoveries" from the scope of the work if Plaintiff's ability to carry them out not demonstrated to Railtrack; any such removal to be "at the rates and prices in schedule 3, issued to us on 12th March 1996"]

[Times for completion to be as set out in schedule 4]

20. Payment for work shall be by monthly application, submitted at the end of the month in which the works were carried out.

21. The contract valuation date is 27th of each month. ....

22. We acknowledge that you have received and signed our sub-contractors pre-letting minutes which will form part of the sub-contract between us.

23. The main contract terms and conditions are the I Chem E green book modified, adjusted and augmented where necessary by Railtrack special confitions and Railtrack particular conditions.

24. It is our intention to enter into a subcontract on a back to back basis with the main contract conditions in so far as they apply.

25. In the event that there is no agreement to proceed with all of the Phase 2 works, then the rights and obligations of the parties shall be as set out in Clause 42 'Termination by the Purchaser' of the General Conditions of the Main Contract as amended by the Special Conditions.

26. Please confirm your acceptance .... .

40. The derivation of the first three paragraphs from the Railtrack letter quoted in Paragraph 27 above, without proper adaptation, has had some curious results. The references to phase 1 made sense in their original context, in which the addressee was responsible for both phases. Here the writer is responsible for phase 1 and the reference to it, in the first paragraph at least, must either be otiose or, presumably, act in some way to exonerate the Plaintiff from the consequences of working to an incomplete or inadequate design. "Ceiling cost" had a technical meaning in the Railtrack letter, as had "agreed target cost", and the references to them in the second paragraph fitted the vocabulary and machinery of the intended contract arrangements. No such sense can be made of the corresponding part of the later letter, where "fixed price" replaces "agreed target cost". I reject Mr Court's evidence for the Defendant in his witness statement that the intention was to reach an agreed target cost below the "ceiling" by 31 March; in cross-examination he agreed that the expression "target cost" had no meaning in relation to the sub-contract.

41. Nevertheless certain aspects of the letter of authority of 14 March are clear:

(1) It is not a "final agreement".

(2) The "final agreement" is not to be entered into until the specified conditions are fulfilled, which is to happen by 31 March 1996 (but in the event did not).

(3) Implicitly, another pre-condition is Railtrack approval, but the only items contemplated as removable for that reason are stageworks, fringeworks and cable recoveries.

(4) The intended "final" sub-contract is to incorporate the pre-letting minutes and to be on a *"back to back"* basis with the main contract conditions "*so far as they apply*".

(5) Nevertheless work is to proceed meanwhile and it is contemplated that that may last for some time, since there is provision for monthly interim payments.

(6) Provision is made for the orderly winding up of the relationship under the letter of authority if the parties do not proceed to the contemplated "final" agreement for all the Phase 2 works.

42. In my view (and I did not understand the contrary to be suggested on either side), whatever the nature of the relationship created by the letter of authority, it was not only not a substantive sub-contract for the whole or any part of the work for which the Plaintiff had tendered but was equally not a binding contract to enter into such a sub-contract or to include any particular terms in such a sub-contract.

43. On 18 March 1996 the Plaintiff began to work under the letter of authority and thereafter continued to do so. In particular the prescribed machinery for monthly valuations and payments was operated from the outset, the first valuation being submitted on 26 March, although at Railtrack's behest the period changed in and from June 1996 from a calendar month to four weeks. By letter dated 18 March 1996 the Defendant enclosed and called upon the Plaintiff to comply with a copy fax from Railtrack as to payment applications, which required physical work on site to be valued "in accordance with schedule rates".

44. On 1 May 1996 Railtrack wrote to the Defendant expressing willingness to accept the Plaintiff's carrying out the "civil related elements" of work package WP009, but not point motor installation, terminations or stageworks/fringeworks. That was a wider exclusion than was envisaged in the letter of authority of 14 March. The Defendant wrote to the Plaintiff on 3 May with a copy of that letter, suggesting "a meeting in the near future to agree the value of the works which we now have to omit from your scope".

45. The exclusions required by Railtrack entailed a substantial reduction in the work previously contemplated, but there were potential offsets arising from the inclusion of other work. In particular the Defendant had on 11 March 1996 invited the Plaintiff to estimate for additional works known as "RAMS" (Reliability, Accessibility and Maintainability System) and on 10 June the Plaintiff submitted a price of £1,031,073.96 for them. On 21 June the Defendant wrote with its priced summary of the items to be omitted from the original work package, amounting in all to £1,005,200.00.

46. Another matter under consideration between the parties was the programme. On 3 May 1996 the Plaintiff wrote referring to the Defendant's documents bearing on that aspect and recording that it would re-submit a method statement "*respecting your requirement but without prejudice to our contractual situation*", namely that its tender was *"based on and allied to"* its own tender programme. The Defendant replied on 10 May rejecting that assertion: *"[Your] tender programme has no significance in the contract documentation*". It is to be noted that in that exchange both parties appeal to a contractual relationship which, as is now common ground, did not then exist.

47. One of the reasons for my findings in paragraph 38 above as to the circumstances in which Mr Brosnahan wrote and signed the "*compliance letter*" of 15 March is that it was not until 3 July that the Defendant wrote to the Plaintiff with a "full list of Tender Documentation available to you for review from 4th July 1996 to 8th July 1996". These were Railtrack main contract tender documents. In 1996 4 July was a Thursday and 8 July the following Monday. The evidence of the Plaintiff's witnesses was that arrangements for this inspection, which had to be conducted in the presence of a representative of the Defendant, were discussed at a meeting on the morning of Friday 5 July and that the inspection itself took place that afternoon by Mr Gilmore, the Plaintiff's quantity surveyor. Mr Gilmore was not called as a witness, but his report of his review of the tender documentation was in evidence and although the first page appearing in the bundle is dated 5 July three of the others (those dealing with "Binders 2, 3 and 4") are dated 4 July. I therefore find that the inspection took place on 4 and 5 July, the latter being effectively the last working day available for the purpose, since the meeting to discuss outstanding issues beween the parties had been arranged for Monday 8 July.

48. Mr Gilmore's report, having noted that one of the binders listed by the Defendant had not been received, continues with an *"assessment summary*" reading: "*Several items should be discussed before contracts can be agreed"*. The general format of the following pages is to list the contents of each binder in greater or less detail and to note against each item, in a "comments" column, either "*No Action*" or "*Action Required"*. There are many entries in the latter form.

The July meetings - the agenda

49. The factual setting of the meetings on 8 and 12 July 1996, as appearing from the documents and evidence summarised above, was therefore as follows:

(1) There was no substantive sub-contract (paragraphs 41(1),(2) and 42 above).

(2) The Defendant had not provided the Phase 1 design for which it was to have been responsible and which was to have been the basis of the Plaintiff's work (paragraph 32 above).

(3) Nevertheless work was proceeding and was being paid for, as had been the case since 18 March, under the letter of authority of 14 March (paragraphs 41(5),(6) and 43 above).

(4) There was an unresolved conflict or ambiguity in the provisions in the tender documentation, the letter of authority and the payment instructions as to how far and in what sense any price agreed was to be "fixed" or "lump sum" or was to be by rates and measurement or subject to other variation (paragraphs 29(3), 39 and 43 above).

(5) It was contemplated that the intended sub-contract would be on a "back to back" basis with the main contract conditions "so far as they apply" (paragraph 41(4) above) but there had been no discussion or agreement as

to what that meant, and could not usefully have been until the main contract documentation had been inspected by the Plaintiff (paragraph 47 above).

(6) The parties had yet to discuss and agree the effect on the schedule of work, and on the price, of the exclusions from work package WP009 required by Railtrack (paragraphs 44 and 45 above).

(7) There was also outstanding the Plaintiff's estimate for the RAMS works (paragraph 45 above).

(8) The parties were in dispute about the programme (paragraph 46 above). Connected with that were repeated complaints by the Plaintiff, which I have not included in my summary above, about delays and difficulties encountered in the execution of the work for lack of design and other information and services from the Defendant.

50. Some or all of the matters listed in the last paragraph were obviously ripe for discussion by early July, and it is common ground that many of them were in fact discussed at the two meetings. There is, however, a surprising paucity of evidence, especially in writing, and where there is oral evidence some conflict, as to the intentions and expectations of the two sides in arranging to meet. It cannot, in my view, be coincidental that the documents were hurriedly and belatedly produced and inspected just before the first meeting and that points arising from that inspection were among the first discussed, so that was clearly one of the purposes. The Defendant had as long ago as 3 May called for a meeting to agree the value of the omissions, so I have no doubt that that was another. The Plaintiff's witnesses were emphatic that the main purpose was to discuss their concerns about the deficiencies of the phase 1 design, the need to redesign, and the consequences in costs. The Defendant denies that and suggests that that topic was not raised until the second meeting. The dispute may not be of great moment, because the second meeting was in substance a continuation and completion of the first and Mr Court seems to have been "in the chair" in the sense of setting the order in which points were taken, but I accept the Plaintiff's witnesses' evidence that this subject was not only of great concern to them but was known by the Defendant to be so and to require discussion and that it was raised at the first meeting, although not negotiated in detail until the second.

51. I derive confirmation of those conclusions, and some particularisation of their generality, from a document prepared by the Defendant headed "Meeting Report WOK/60.0113/JULY/96". The date of the meeting is given as "18th July 1996" and the subject as *"Signalling Civils Progress Meeting*". Those particulars are repeated at the head of each of five succeeding pages. On the first page is the Plaintiff's rubber stamp dated 5 August 1996, initialled under "Seen" by Mr Rossiter and under "To" by Mr Ryan. The persons recorded as present were a Mr Breton of the Defendant, as chairman, a Mr Wynne of the Defendant for part of the time and Mr Ryan and a Mr Rossiter of the Plaintiff.

52. This document was accepted at the trial at face value, both as an accurate record of the meeting with which it deals and as to the date of that meeting. There was no apparent reason to doubt its value in the first of those respects but it seemed to me, on further consideration, that the dating was suspect. In that connection, and for other reasons which will appear, the following items are significant:

4.0 Order

4.1 Adtranz/Murphy still to agree scope of work eg clarify CAD welding and level of design.

4.2 Adtranz have agreed the conditions of contract with Railtrack, now to agree changes with Murphy.

5.0 Information Requirements

5.7 Murphy requested information for RAMS enhancement which are required to be carried out eg troughing.

12.0 Financial

12.1 Not discussed as meeting due to be held with Peter Court to resolve Contract Sum and content of Murphy work.

53. My reasons for doubting the accuracy of the date were, first, that although the Plaintiff's case is indeed that no contract was entered into at the meetings on 8 and 12 July there was no evidence from its witnesses of any arrangement for a further meeting such as seems to be evisaged by the items quoted above. Secondly the same items would make perfect sense as records of a progress meeting held shortly before, rather than after, those of 8 and 12 July, since all the matters mentioned were indeed discussed at the latter. Thirdly, and most specifically, under "*Any other business",* item 13.2 reads: *"Adtranz urgently wish to resolve stagework items and it was agreed this would be Wednesday 3rd July 1996".* In 1996 3 July was a Wednesday; 3 August was not.

54. Because of those doubts I invited further representations from the parties. At that appointment it became common ground that there should be a further short hearing to resolve the issues raised on further documentary and oral evidence. That hearing took place on 20 November 1998. By then it was common ground, as a result of the parties' further researches, that there had been a meeting on 2 July 1996 at which much of the business recorded in the document in question was transacted, but that the document itself, in its typed form, was not created until some time later, very likely 18 July, and was not received by the Plaintiff until the date of its stamp, 5 August. The remaining, narrow, area of dispute was whether, as the Defendant maintained, the whole of its contents (except as appears on its face) derives from the notes and recollection of Mr Breton of what happened at that meeting or whether, as the Plaintiff contended, a few items record events at later meetings or reflect other after-acqired knowledge. I heard further evidence from Mr Ryan and Mr Court; Mr Breton, who chaired the meeting on 2 July 1996 and was the author of the document, was also called. In the light of that evidence and of the further documents produced I am satisfied that in all material respects the contents of the document accurately record or

summarise the attendance at and business of the meeting of 2 July, without later addition, except as appears on its face as, for example, when item 5.13 has one sentence recording a question raised by Murphy and a second reading: "Post meeting Adtranz checked but found no problem". It is for that reason that I have included my discussion of it in this section, since it is important confirmatory evidence that the agenda for the relevant meetings included the contract sum, the scope or content of the Plaintiff's work - in particular the "level of design" - and the changes needed in the Railtrack conditions of contract for the purposes of the sub-contract. All these are specifically covered in paragraphs 49 and 50 above; CAD welding and the issue of troughing are not, but were raised at the meetings under one or more of the headings there listed.

The July meetings - documents

55. The meetings of 8 and 12 July were not recorded in any formal way and such informal notes as exist are fragmentary and incomplete. That is itself a relevant fact, although not one to which too much weight should be attached, in considering the question whether these were meetings at which a contract was concluded.

56. On the Plaintiff's side the only note is one by Mr Ryan reading:

27. Meeting with P. Court: Monday 8th July '96.

28. Unforeseen services - excluded.

Friday 12th 10 am.

57. There are also some sketches made by Mr Brosnahan on four sheets of a ring-bound pad. The first is headed "P. Court", "L. Ryan" and "P. Brosnahan" (those names being bracketed), followed by "Woking ADTRAZ". After the first sketch on the second page appears "Friday. 12th - 10.00. P. Court/ADTRAZ". The sketches are of foundation designs for signal posts or gantries.

58. Mr Court made notes of the first meeting as follows:

Murphy/ADt. 8/7/96.

PC - ADt

PB, LR - MCL

1. PCB. Binder 12 clause 35.
2. Painting. Binder 2 clause 10.5.3 & 10.5.4.

29. Murphy's are not painting.

3. Train running. Binder 13 clause 4.10.2.
4. [A sketch, with the annotation:] If Ex. trough clashes with a gantry base, then who diverts troughing?
5. Extra-over costs for signal-sighting

30. Signal Sight B of Q Diff

Cantilever 35 38 -3

Gantry Base 82 76 +6

Straight Post 102 83 +19

E/o 48K

31. Murphy need schedule of Gantries/Posts etc from Collis.

6. Quants remeasured. Fixed price for activities.
7. CADWELDS - In or out? currently out.
8. Possessions - Murphys want to go!
9. Who prioritises possessions

32. BCM - Priority of path over signalling Installation.

10. Relax MS supplements.

not happy with worksite} need flexibility *

want specifics [arrow] what is the need for this?

11. Refuges? Do we still want Murphys to price?

MB to action

4677

omit (1005)

add 981

4653

59. There is also a very brief note of Mr Court's of the second meeting:

12/07/96.

33. Liam Ryan/Paul Brosnahan

[sketch]

34. Area no UTX schedule W/BF to Woking

Km 33 to 40

[sketch]

* Schedules marked up from plans @ Woking. *

34,000 16
660
36,000
840
71,500
52,500
124,000 (130K)

60. Between and after the meetings correspondence between the parties continued on operational matters, but a letter of 12 July from Mr Ryan to the Defendant, for the attention of Mr Court, seems to be related to one of the subjects of discussion. It encloses a sixteen-page document "identifying locations where existing Troughing impinges on proposed Locations for Signal Bases", identifies one area as being "of the greatest urgency" and offers to "submit our estimate for these diversions with handling of existing live cables under supervision of S & T personnel".

61. Another such letter from Mr Ryan of 17 July is relied upon by the Plaintiff. It reads as follows:

35. We write to record our concern that the level of Design Deliverables for WP009, as we now understand it, is substantially greater than we were given to understand at tender stage.

36. At tender stage dicussions, [we] understood or were given to understand the following, regarding Design Requirements for WP009:

i) Phase 1 design for bases for Signal Structures was complete with the exception of a number of Special Bases, the design of which required site specific investigative work.

ii) Phase 1 design for Retaining Walls, Trackside Platforms, Hardstandings, R.E.B's etc were approved standard installations.

iii) [We were] to take over Phase 1 Design as the completed effective design and following a check of Phase 1 calculations, resubmit as Murphy design.

iv) [We were] to carry out site specific investigative work for identified Special Bases and submit full design with calculations for these Special Bases.

37. An allowance of £16,000 was made within our tender .... for item (iii) as we understood it.

38. The site specific investigation and design for item (iv) above is provided for in the provisional sum for Special Bases which also includes additional installation elements which are foreign to the Normal Base installation i.e. piling, cantilever sheet piles etc.

39. We consider that the amount included within our tender for the design reflects our understanding of the limited deign requirement outlined above.

40. Following various discussions with your goodselves and based on rejections of our initial design deliverables, it is quite clear that the design deliverables for WP009 are much greater than envisaged at tender stage.

41. We have established approximate cost of achieving these design deliverables at £145,000.00, and as you are aware we have not allowed for this within our bid.

42. We would therefore ask you to make a fair and reasonable assessment of this situation and we seek an accommodation to adjust our design costs.

62. The Defendant did not respond to that, but Mr Court wrote on 31 July to the Plaintiff, for the attention of Mr Brosnahan, a letter on which in turn the Defendant relies, as follows:

43. Further to your recent meetings with our Mr Court we detail below the revisions to your contract order value:
£

44. 1 Original Order Value 4,677,434.00

45. 2 Omit as Adtranz letter .... (1,005,200.00)
3 ADD Rams 1,031,074.00
4 Omit Rams Terminations as JM letter ....
Woking (Item 4.06) (21,971.96)
Surbiton (Item 3.06) (27,964.00)
5 Omit Rams troughing as JM letter ....

46. Woking (Item 4.01 & 4.01A) (34,660.00)

47. Surbiton (Item 3.01 & 3.01A) (36,840.00)
6 ADD Design (Ceiling Cost Reimbursable

48. against Submitted Invoices) 130,000.00

49. Revised Contract Order Value 4,711,872.04

50. We look forward to receiving your agreement to the above to enable us to finalise the sub-contract.

63. The Plaintiff in turn did not respond to that letter.

The July meetings - oral evidence

64. The participants at both meetings were Mr Brosnahan and Mr Ryan for the Plaintiff and Mr Court for the Defendant. They all gave evidence, and were indeed the only witnesses at the hearing before me. I do not find

myself able to simplify the task of finding the facts, where in dispute, by any general preference for the evidence of one or more of them over others. They were all, in my view, affected not only by the ordinary difficulties of recollection which afflict even the most conscientious witness, but also by an element of wish-fulfilment (although that sometimes, by reason of the way in which the issues developed, had what were probably unintended consequences). I must therefore deal with each case of conflict of evidence on its own merits.

65. The Plaintiff's case is that there cannot have been a concluded contract because on a number of material topics the parties reached no agreement, either because they tried and failed or because they were not concerned at those meetings to do so. Some of those topics are distinct, but others are intimately connected and difficult to consider in isolation. It is therefore necessary to consider with some care in what order to address them in the interests of clarity. I propose to start with the question of design.

66. Mr Court, in his evidence, and Mr Williamson, in the conduct of the Defendant's case, sought to minimise the importance of this question, and even to suggest that it had not been "on the agenda" for the 8 July meeting, although it was the Defendant's own case not only that it was discussed at the continuation meeting on 12 July but that a significant term of the agreement then reached related to it. I have already found that it was on the agenda. Its importance ought perhaps to speak for itself; the basis of the invitation to tender was that the Defendant would have supplied a complete Phase 1 design by 5 December 1995 but it had not done so by the time work started on 18 March 1996, and by the date of the July meetings it was apparent that it never would. Since, however, that importance is denied by the Defendant it is relevant to record some important admissions by Mr Court.

67. It was put to him in cross-examination that the SWIMU report was only a desk-top study and gave no indication of conditions at particular bases. Initially he disagreed (although the phrase "desk study" is actually the report's own self-description) and claimed that it provided a design specific to specific locations.

> 51. When pressed by reference to a particular site he referred to what he called the "design pack", but since it was not apparent on the face of the page to which he referred how that helped I asked him whether he was saying that the Plaintiff could safely submit a firm price and build to the designs supplied to them, and in reply he accepted that they could not. A little later he accepted a suggestion in cross-examination that qualification 5 to the Plaintiff' tender (quoted in paragraph 30 above) entailed that the Plaintiff was not accepting liability for the "CS" design supplied by the Defendant. A little later again it was put to him that in the event a geotechnical survey was required in order to design and he replied: "To design for construction, yes". I asked him what other sort of design he intended to distinguish by that qualification and he replied: "For price". He agreed, however, that if a firm lump sum price was required there was no useful distinction.

68. I therefore reject the evidence in Mr Court's witness statement that "the problem with design was not one of increased scope, it was simply that JMS realised that they had not allowed enough in their tender price for the design required and therefore were seeking more money". The problem was the Defendant's failure to provide the design which should have been the basis for tenders.

69. As is implicit in the admissions summarised in paragraph 67 above, and in any event obvious from the nature of the situation, that failure had two aspects. The first was that the Plaintiff had to carry out investigations and design work outside the scope of the invitation to tender and wished to be paid for that. The second was that the adequacy of the schedule on which the Plaintiff had priced, and in particular the accuracy of its quantities, was put in question. I shall confine my attention to the former aspect at this point; the latter is best treated in conjunction with other questions going to the amount and variability of the price for the phase 2 works.

70. It is common ground that at the meeting on 12 July the question of an increased payment for design was discussed in detail. Mr Brosnahan wanted £136,000 or £137,000 but Mr Court wished to make any increase conditional upon a matching reduction in the price of the RAMS work. He found about £124,000 in that way (these are the figures at the foot of his note in paragraph 59 above) by omitting troughing, to which Mr Brosnahan agreed, and terminations, which had to go in any event because that was one of the activities for which the Plaintiff was not approved by Railtrack. £124,000 was not enough for Mr Brosnahan, but they compromised on £130,000, against invoices. So much is not in dispute. The issue is whether agreement of that compromise figure was firm and unconditional, as the Defendant alleges, or was subject to conditions, and if the latter whether they were fulfilled.

71. The first condition, according to the evidence of the Plaintiff's witnesses, was that Mr Court required a formal application for the additional design fees, to which he would then respond. Mr Ryan's letter of 17 July, the Plaintiff says, was that letter. Mr Court did not recollect any such arrangement, but he could not say that it did not happen, nor could he offer any other sensible explanation of the letter. Neither can I. I therefore accept the Plaintiff's evidence on this point. In my view, however, this condition was fulfilled by Mr Court's letter of 31 July. It is true that it does not in terms refer to that of 17 July, which was indeed never explicitly answered, but in substance and reality it responded to it by confirming the agreed figure of £130,000, "reimbursable against submitted invoices".

72. The second alleged condition, according to Mr Brosnahan's witness statement, was that the £130,000 was acceptable only if "a standard design for the bases could be achieved to minimise costs". To illustrate that concept, he said, was the purpose of the sketches which he drew during the meeting. Mr Ryan's witness statement does not put it in that way; his recollection was that because he and Mr Brosnahan considered that design could

be standardised that should enable them to minimise and control its cost. Mr Court did not recall any such stipulation, although he conceded that it "makes sense". It is not contained in or referred to in Mr Ryan's letter, although that is not particularly significant because by its nature that did not purport to be a confirmation of a concluded bargain. It is not referred to in Mr Court's letter either, but since it was in the Plaintiff's favour the force of that omission also is somewhat weakened. What is rather more significant, in my view, is that there was no evidence that the matter was ever raised again by the Plaintiff with the Defendant, as would surely have been necessary had it been a requirement and had sufficient standardisation not been achievable. Taking all the evidence into account I conclude that this condition either did not exist or was fulfilled.

73. The third condition, according to the witness statements of both Mr Brosnahan and Mr Ryan, was that the agreed figure did not include geotechnical analysis works. The Defendant's case, as put in cross-examination, was that the point was raised and that Mr Ryan wanted to hold out for excluding this work but Mr Brosnahan overruled him. Mr Brosnahan denied that, but when the overruling episode was put to Mr Ryan in cross-examination he said that he thought he had "*misunderstood*"; he was against inclusion of geotechnical costs, but when it was clarified that the investigation to be included in the £130,000 was limited to local soil sampling and analysis he was happy. Moreover, in his witness statement, he had accepted that in discussion Mr Brosnahan *"suggested that geotechnical investigation .... might not be required"* and *"advised that our main concern .... was the cost of re-design .... £136,000"*. There does, therefore, seem to have been some difference of view between the Plaintiff's two representatives at some stage, although not necessarily in the face of the enemy, because when Mr Court came to give evidence he did not speak to the *"overruling"*, as put to the Plaintiff's witnesses. He simply said, in cross-examination, that although he did not recall Mr Brosnahan's wanting to exclude geotechnical surveys he equally had no firm recollection to the contrary and that such a desire would make sense. In a situation in which neither party's oral evidence much helped its argued case I find it safer to base my conclusion on a document, namely Mr Ryan's letter of 17 July. That was clearly intended to be a comprehensive formulation of the Plaintiff's case for an increased payment, asked for a *"fair and reasonable assessment"* against an "*approximate cost*" of £145,000, and contained no suggestion that geotechnical work would be a further extra. I conclude that the Plaintiff did not make the exclusion of geotechnical work a condition.

74. Finally, the Plaintiff's witnesses say that Mr Court made the increase in design costs conditional upon their "*taking on board*" all the contents of the (main) contract documents, to which they did not agree. I do not think I need deal with that separately here. There are already issues, to be addressed later, as to whether the parties were at one on the incorporation of main contract conditions and this point can be considered in conjunction with them.

75. I turn next to a cluster of questions concerned with price, and in particular those arising under heads (4), (6) and (7) in paragraph 49 above. As to (6) and (7) the Defendant's case is simply that they were agreed at the figures already proposed in correspondence, subject to the omissions from the RAMS quotation already referred to in paragraph 70 above, and that that is supported by Mr Court's contemporaneous notes and recorded more exactly in his letter of 31 July. In the note of 8 July (paragraph 58 above), where the amounts are rounded to the nearest £1,000, "4677" is the Plaintiff's final tender price (paragraph 36(ii) above), "1005" the Defendant's price of the omissions from work package WP009 required by Railtrack (paragraph 45 above) and "981" is the Plaintiff's price of £1,031,073.96 for RAMS (paragraph 45 above) less £49,935.96 for the omission of terminations. In the note of 12 July the sums totalling £71,500 are for the further omission of troughing from RAMS; I do not recall (if I was given it) the explanation for the increase of the omission for terminations there to £52,500, but it was not suggested that it had any significance for the issues before me.

76. It is a curious feature of this case that neither the figures at the foot of Mr Court's notes of 8 July nor those in his letter of 31 July incorporate the one apparently clear and quantified record of a specific agreement in the body of the 8 July notes, namely item 5, where extra-over costs for signal-sighting are analysed and totalled to £48K. It seems to be common ground that that was agreed; Mr Court explained its absence from the letter of 31 July by saying that he regarded it as a variation.

77. The Plaintiff's witnesses did not dispute that the figures in paragraph 75 above were agreed as "clerical values", in Mr Brosnahan's words. Their evidence, however, was that there was an unresolved dispute about preliminaries. As already recounted in paragraph 34 above the separate item for preliminaries in the original tender had at the Defendant's request been removed and the amount reallocated by adjusting rates in the priced schedule of work. The Defendant's stance was therefore that when items such as terminations were omitted they should come out at the rates finally tendered, including any element representing preliminaries, since the omission would reduce proportionately the work covered by that element. The evidence of the Plaintiff's witnesses was that they challenged that approach, in principle because the cost of preliminaries was not directly proportional and specifically because the cost of signal engineering, a preliminaries item, had primarily been recoverable within the charge for terminations, which was to go, whereas a signal engineer would still be required, and was indeed being requested by the Defendant's staff. The issue was, Mr Ryan said, left unresolved. In his witness statements Mr Court denied that the issue of preliminaries in general or the cost of a signalling engineer in particular was ever discussed, but in cross-examination he agreed that there was already a question whether a signalling engineer would be needed and that this had been an issue from the moment omissions appeared.

78. I accept the Plaintiff's evidence on the signalling engineer point. Although, as I have already indicated, Mr Brosnahan and Mr Ryan were by no means perfect witnesses I do not believe that they invented this story and Mr Court, to some extent at least, resiled from his outright denial that the point ever arose. It is not, of course,

mentioned in his letter of 31 July, but then it would not have been because it is not suggested that he had accepted the Plaintiff's position. The question whether the Plaintiff was in some way bound or is otherwise prejudiced by its failure to reply disputing that letter is a general one to which I shall come in due course.

79. Apart from figures, however, there is also the question whether the parties were at one on the question raised in paragraph 49(4) above of the status of any price agreed. The Plaintiff must first establish that it was discussed at the July meetings, for if the parties had been content in this respect to leave matters as they stood on the documents then, given a contract complete in every other way, any conflict or ambiguity would in my understanding simply have to be resolved by ordinary methods of construction.

80. There is in fact no real doubt that the question was discussed. That was not only the evidence of the Plaintiff's witnesses but was accepted by Mr Court when cross-examined about his note 6 of 8 July: "Quants remeasured. Fixed price for activities". It would indeed have been surprising had it not arisen, given that the potential price implications of the design deficiencies (see paragraphs 67 and 69 above) were not taken into account in any other way.

81. The remaining issue is therefore whether, having been raised, it was resolved. I find that the Plaintiff's representatives were contending for general remeasurement. It was certainly what they needed to deal adequately, from their point of view, with the design deficiency problem. Leaving aside the distinction between "quantities" and "activities", about the precise effect of which I am not clear but which does not seem to affect the point of principle, it was what Mr Court's note 6 records, and his own account of the origin and significance of that note was that "I wrote down what Mr Brosnahan was saying". It was what Mr Brosnahan at one point in his cross-examination claimed that Mr Court agreed.

82. If Mr Court did indeed agree then this was not an unresolved difference. The principal evidence that he did not do so was his own. Having given the explanation of note 6 just quoted he continued that he nevertheless considered that there should be remeasurement only if there was a variation from what he called the "design documents", meaning those supplied to the Plaintiff, not if only from the Plaintiff's priced schedule. I asked him whether he put that to Mr Brosnahan and he said he thought so. I asked him how the matter was left and he thought it was left that the Defendant would pay only if the design changed (again, as I understood him, meaning the phase 1 or "Defendant's" design, as distinct from that which was the Plaintiff's responsibility as part of phase 2). I asked him whether it followed that either the parties misunderstood each other or there was no agreement and he replied that perhaps they misunderstood.

83. The Plaintiff's evidence on this point was not wholly consistent. On the one hand there was Mr Brosnahan's assertion, recorded at the end of paragraph 81 above, that Mr Court agreed to remeasurement. Both he and Mr Ryan also said of various specific examples of reasons for change of quantities which they advanced that Mr Court agreed that they could be treated as variations, and one of those may have been the occasion for Mr Ryan's solitary note: "Unforeseen services - excluded". On the other hand, when the distinction between two potential sources of change was explicitly put to Mr Brosnahan in re-examination a rather different response ensued. He was asked first whether there was any discussion of what would happen if work changed because the "S.C." drawings supplied by the Defendant were wrong and a different design was needed. He replied that he believed Mr Court stated that that would be a variation. Asked whether they were told that if the work "as built" differed from the Murphy design they would be paid the difference he replied "No". I then asked him if that would have been acceptable if suggested and he replied that it would have been, but that that "was not the terminology".

84. I find that Mr Court did not agree to general remeasurement. That accords not only with his own evidence and with what Mr Brosnahan said when, in effect, the distinction later taken by Mr Court was put to him, but also with what seems to me to be the strong inherent improbability that Mr Court would have conceded such a potentially open-ended source of increased cost.

85. I conclude that on this question also the parties were not at one at the close of the meetings.

86. I have accordingly found that in two significant respects the parties did not during the July meetings reach agreeement on material terms. In the circumstances I do not think it necessary to analyse in detail the evidence on all the other terms which the Plaintiff alleges were left unsettled. I shall, however, briefly express my conclusions on the main topics of discussion.

87. It is convenient to start with Mr Court's note of 8 July, which is the nearest approach there is to a record. Notes 1 to 3 are cross-referenced to binders in the Railtrack documents inspected by Mr Gillmore and are plainly concerned with questions arising from that inspection, the general nature of which was whether the Plaintiff should in the sub-contract, by reason of the "back-to-back" relationship, be under particular obligations to be imposed on the Defendant by the main contract documents.

88. There was first the issue of PCBs, the standard abbreviation for the class of toxic contaminants having the generic name of Polychlorinated Biphenyls. Mr Gillmore's report on the relevant item simply reads: "35 PCB's (in existing equipment) - Action required". Although never expressly articulated the shared assumption against which the discussion of this point proceeded was that the relevant item in the Railtrack documents imposed liability for and the expense of detecting and dealing with PCBs in existing equipment on the Defendant. (Mr Williamson annexes to his closing submissions what he says are the relevant provisions and submits that they do not in fact impose obligations or allocate risks, but it is clear that that was not the basis either for the discussion on 8 July 1996 or

for the evidence at trial.) The Plaintiff objected to the imposition of a corresponding obligation on it on the ground that it had made no allowance for such a cost in its tender, there being no such item in the schedule of work. There was no real dispute as to how the discussion went. Mr Brosnahan's witness statement says: "Peter Court said that the PCB's should not be discussed at this stage until a survey had been carried out to establish if PCB's were present". Mr Ryan, in cross-examination, said that he went to great lengths on that item because they had had a job which cost £1,000 per square metre for PCB removal, and when it was suggested that he was happy he replied: "It was left over".

89. The Defendant contends, in effect, that an agreement to "leave it over" was a sufficient agreement, presumably under head (2) or (3) of paragraph 20 above. Assuming, without deciding, that that would have been so in the absence of the issue whether or not the relevant Railtrack term should be applied "back-to-back" I do not see how it can be true in the instant situation. It was of course the case that there might in the event be no PCBs, and it was therefore not only possible but necessary to "wait and see" in terms of actual treatment. It may be (I do not have to decide the question) that under a free-standing contract parties could be bound despite agreeing to defer resolution of a question of liability which might never arise. If there was to be a present contract here, however, there was no dodging the immediate (not future) question, yes or no, was the Railtrack term on this point to apply "back-to-back"? The matter can be tested by supposing that immediately after the meetings the Defendant had submitted a draft formal contract to give effect to the agreement which on its case had been reached. Such a draft would undoubtedly have contained a "back-to-back" clause, with any relevant exceptions. Would PCBs, or would they not, have been one of the exceptions?

90. Mr Court's item 2 was painting. Here he noted "Murphy's are not painting" and it is not in dispute that that records the agreement reached.

91. Item 3 concerned train running. The issue was whether the term of the Railtrack documents which placed the cost of problems or delays associated with the use of works trains on the Defendant should be passed on to the Plaintiff on the "back-to-back" principle. The Plaintiff's position was obviously that it should not. It was put to Mr Brosnahan in cross-examination that Mr Court accepted that position but he denied that, saying that the point was unresolved. Mr Court said in effect that the Plaintiff had nothing to worry about because the Defendant was supplying the works trains, so that the relevant provision in the Railtrack documents would by its nature not "bite". That, however, was argument rather than evidence that in the meeting he conceded the Plaintiff's requirement that the term should be excluded. He certainly did not record any agreement, as he did on painting. I accept Mr Brosnahan's evidence that this point was left unresolved. It was obviously a material one.

92. Item 4 concerned troughing, and the question is well summarised in Mr Court's note: "If Ex[isting] trough clashes with a gantry base, then who diverts troughing?" Mr Brosnahan said that it was unresolved, and when that was put to Mr Court he agreed, although he added "but I saw it as a site clash", perhaps intending to imply (if so, mistakenly) that it needed no resolution. Mr Ryan's evidence, both in his witness statement and in cross-examination, was that Mr Court accepted liability for such diversions. I accept the evidence of Mr Brosnahan and Mr Court, supported as it is by the fact that in Mr Court's note the question posed is left unanswered, and therefore find that this issue was not agreed. It was clearly a material one.

93. I have already dealt with items 5 and 6. Item 7 concerned the question of cadwelding, specifically identified in the minutes of the recent progress meeting as requiring clarification under the head of "scope of work". Mr Court's note is ambiguous as to whether the question "In or out?" is answered or left open by "currently out". The only evidence seems to have been Mr Brosnahan's, in his witness statement, that Mr Court did not know whether cadwelding was to be used or not. That does not help as to whether this was being treated as a contractual or operational question, and since the point was not pursued in the Plaintiff's closing submissions I do not feel any need to make any separate findings

94. In Mr Court's notes of 8 July there remain only items 8 to 11, which were concerned with purely operational matters or were for other reasons not treated as impinging on the issues before me.

95. There was some suggestion by the Plaintiff's witnesses that in addition to the specific matters arising from the examination of the Railtrack documents already considered they reserved their position more generally on the basis that the opportunity for inspection to date had been inadequate and that they would need to examine them more thoroughly. I do not believe that anything said along those lines can have been of any significance. It was certainly not followed up by any further inspection, nor was there any need for one for contractual purposes until draft formal contract documents were received if the Plaintiff's case that meanwhile there was no contract was correct. This point is connected with the evidence, referred to in paragraph 74 above, that Mr Brosnahan and Mr Ryan rejected a demand by Mr Court that in return for the "uplift" in design costs he required them to "take on board" all the (main) contract documents. I do not think this matters. Mr Court may well at some stage have suggested something of the kind, but it plainly did not affect the outcome at the time, in view of my findings in paragraphs 88 to 91 above, and again could not do so in the future if there was no concluded contract.

96. The remaining item on the "agenda" identified in paragraphs 49, 50 and 52 above was that of the programme. There was, however, no significant evidence that this was pursued at the July meetings in terms of what should be the contractual provisions, as distinct from complaints by the Plaintiff that it was being delayed by inability to obtain necessary possessions, by lack of information and by other defaults on the part of the Defendant or Railtrack

The July meetings - other considerations

97. That deals with the specific terms alleged by the Plaintiff to have been left unsettled. Some more general considerations were advanced on each side for and against the formation of a contract. I have already referred to one in paragraph 55 above - the informality and incompleteness of the only contemporaneous records. After the more detailed consideration which I have now completed of the most important of those records - Mr Court's notes of 8 July 1996 - it can be added that although scrappy in appearance they do give some clues, albeit of variable clarity and reliability, as to whether the questions raised were or were not answered, which gives significant support to the conclusion that not all of them were. There is also the fact that Mr Court's letter of 31 July neither purports to confirm the reaching of an agreement nor refers to any of the matters (except as to price) which it is now the Defendant's case were settled at the two meetings. Mr Court gave no adequate explanation of that omission; his witness statement claims that he confirmed "all of the matters discussed at the meetings", but that was simply not true.

98. On the other side reliance is placed first on the fact (it is said) that the parties had reached "commercial agreement" on 15 March 1996, subject only to Railtrack's decision on the Plaintiff's acceptability, and secondly on the Plaintiff's failure to dispute the letter of 31 July. I do not see how the first point assists. Had there been no outstanding question of acceptability in March the questions surrounding the deductions from price would not have arisen, and there might not have been any RAMS work, but all the other issues discussed in July would have had to be resolved before a contract could have been entered into. As to the letter of 31 July Mr Brosnahan's explanation was that he was waiting for the sub-contract documents. That is not convincing; the letter itself expressly requests "your agreement to the above" as a prelude to finalising the sub-contract. My own conclusion is that the Plaintiff simply thought its purposes best served if nothing was brought to a head for the time being. That may not have been a particularly admirable stance in terms of good business practice, but I do not see how it can turn failure to agree material issues into agreement. I am of course at this point dealing only with failure to respond as evidential of an earlier contract; the Defendant has a quite distinct alternative case that it was constitutive of a contract when taken in conjunction with the continued execution of the works, but I shall deal with that separately.

99. Both sides also relied on subsequent events, but as always I approach the suggestion that they can be of assistance with considerable reserve. What parties think about the legal effect of what they have done is frequently mistaken and cannot prevail over a true view of that effect. On the Plaintiff's side it is said that when the Defendant did eventually submit formal sub-contract documents in June 1997 their terms differed in important respects from those now alleged by the Defendant to have been agreed at the July meetings. I have not considered the factual basis of that contention in any detail but, assuming that it is correct, it does not in my judgment materially assist the Plaintiff, not only for the general reason already given but also because in such circumstances drafts frequently fail to accord with what has previously been settled, whether from simple incompetence or deficiencies in communication or for less creditable reasons.

100. The Defendant, for its part, placed great weight on the fact that in subsequent correspondence the Plaintiff frequently referred to the "contract" or to "contractual" rights and obligations. I am satisfied that many of the uses of the noun were examples of a widespread practice of employing "contract" not in any technical legal sense but simply as a synonym for "job". There were, however, other instances in which the existence of a contract in a legal sense was asserted or assumed. I take that into account, and am willing to assume that in a case in which the direct evidence was more evenly balanced it might affect the result, but in my judgment this is not such a case.

101. There was evidence as to the frequency (as the Plaintiff alleged) or infrequency (on the Defendant's case) of the former's requests for a draft formal sub-contract, but I did not find that of any assistance either way.

102. In the result I conclude that no contract was formed at the meetings of 8 and 12 July 1996.

The letter of 31 July

103. I have already considered the relevance of Mr Court's letter of 31 July 1996, and the Plaintiff's failure to respond, to various aspects of the question whether a contract was formed during the July meetings. The Defendant, however, advances an alternative case that the contract was formed by the Plaintiff's continuing to carry out the sub-contract works without demur following receipt of that letter.

104. I have set out the terms of the letter in paragraph 62 above. In my view the Plaintiff's continuation of the works after receipt of it lacks crucial elements required before a finding of the consequential formation of a contract would be justified. Such a finding would entail treating the letter as an offer and the continuation as an acceptance. The letter itself plainly does not contain all the material terms of the alleged or any contract but in its context, and in particular having regard to the words "*revisions to your contract order value",* it might arguably incorporate the terms of the tender documentation of March 1996. That would not be the contract as alleged by the Defendant to have been entered into at the meetings earlier in July, but this is an alternative submission and I am willing to asume, without deciding, that terms could be sufficiently extracted on that basis. Proceeding on that assumption, however, I note that the letter not only does not suggest that "*silence means consent",* or less colloquially that a simple failure to respond, still less failure to cease work, will be taken to be acceptance, even if such a term could be imposed, which I doubt; it expressly calls for a positive response by the words: "*we look forward to receiving your agreement to the above to enable us to finalise the sub-contract".* Again assuming in the Defendant's favour, without deciding, that the response requested, if forthcoming, would have amounted to

acceptance rather than simply initiating negotiations as to the form of a draft contract, the simple fact is that there was no such response.

105. The truth is that the Plaintiff did nothing whatever to indicate acceptance of the letter of 31 July as a contractual offer and that its continuing to work, since it does not need or have any fresh justification at that point, is properly to be construed as a maintenance of the status quo and accordingly as referable to the origination of that state of affairs by the auhority given by the Defendant in March 1996.

106. I therefore reject that way of putting the Defendant's case also.

Is the state of the main contract negotiations relevant?

107. In opening Mr Dennys referred to the documents, so far as they are in evidence in this action, relating to the contractual negotiations between Railtrack and the Defendant, and submitted that they showed that no main contract had ever come into existence. Were it necessary for the purposes of this action to make a finding on that issue I should of course be under a duty to do so, despite the obviously unsatisfactory situation that it would have been reached in the absence of one of the allegedly contracting parties and would not be binding as between them. In my view it is not necessary, because not relevant to any issue before me, to make such a finding. There could be a contract between the Plaintiff and the Defendant but not between the Defendant and Railtrack, or vice versa.

108. What is relevant, so far as it can be established, is any common knowledge or belief of the Plaintiff and Defendant at the material dates as to whether there was such a contract. Any such shared knowledge or belief would be a material part of the factual setting in which to construe the documents and against which to assess the evidence of oral exchanges. Information or belief confined to the Defendant alone would at best have a more limited relevance, going essentially to the credibility of its witnesses.

109. It is clear that at 8 May 1996 there was a common understanding that there was no main contract; the Defendant was at pains to write to the Plaintiff on that date to make the position clear in that sense and to establish that the absence of any substantive contract should not cause work to cease. Its letter read as follows:

52. We write to advise you that [we] have still to agree a target cost with Railtrack MPD for this project. The target date advised to you has been overrun due to the level of Financial analysis being undertaken.

53. We understand that this will not affect the progress of your works and this letter is to provide you with information on the current situation.

110. On 28 June 1996 Railtrack wrote to the Defendant as follows:

54. Further to our letter .... dated 5 February 1996 we confirm our acceptance of the agreed target cost (ATC) of £52,526,206.00 as set out in your letter .... dated 17 June 1996.

55. The ATC fully reflects the requirements of the documents referenced in Attachment 1 to this letter, which documents shall form the basis of the agreement between the parties.

56. A formal set of contract documents will now need to be prepared in accordance with this agreement for execution as a Deed to be signed by both parties.

57. Please confirm your acceptance of this letter by return.

111. Attachment 1 to that letter listed ten documents, including a form of Agreement, conditions of contract of a specified date as amended by five further specified documents, and the Defendant's tenders.

112. On 11 July 1996 Mr Court, on behalf of the Defendant, replied to that letter as follows:

58. We are in receipt of your letter .... and we comment as follows.

59. We confirm our acceptance of your letter .... and that we are proceeding with the works accordingly.

60. In addition to the above we confirm the following points regarding the agreed target cost:

[There follow six items, one divided into five sub-items. Some are purely formal, others express agreement with points of detail advanced by Railtrack and there are others whose significance cannot be understood without more information than was forthcoming at the hearing, but two seem to raise points not yet agreed, and one of those certainly does, since the Defendants write: "We ask you therefore to urgently agree the wording of the retention bond and release all current retentions accordingly."]

61. We trust the above meets your requirements, and we look forward to hearing from you in due course.

62. He had not, of course received any reply to that letter at the time of the second of the meeting on 12 July.

113. Mr Court's evidence, which I accept, was that he did not inform the Plaintiff that the target cost had been agreed with Railtrack: "as far as I was concerned, this was not relevant to [the Plaintiff's] sub-contract works". A fortiori, therefore, he did not communicate at or before the July meetings any belief in the existence of a main contract even if (however surprisingly, given the terms of the correspondence) he held such a belief. On the other hand, as already noted, item 4.2 of the minutes of the meeting discussed in paragraphs 51 to 54 above reads: "Adtranz have agreed conditions of contract with Railtrack, now to agree changes with Murphy". Whatever was said at that meeting on the point, however, seems to have had no significant impact, while the minutes themselves did not reach the Plaintiff until 5 August 1996.

114. That is as far as the evidence of common information or belief at the date of the crucial meetings in July goes. To complete the history, Mr Court's evidence was that there were no further negotiations until Railtrack wrote on 2 December 1996 with "*proposed contract conditions and Schedules*", adding: "*In addition we will need to arrange for*

other contract documents .... to be copied. .... ." Nor, he said, was there anything further after that letter, about which nothing was done.

115. I conclude that there is nothing in this aspect of the case to require any review of the conclusion reached in paragraph 102 above or to cast doubt on its correctness.

Estoppel

116. Starting from the requirements for estoppel by convention set out in paragraph 24 above, what is the "agreed statement of facts" on which the Defendant relies? The pleaded particulars fall into two groups.

117. The first consists of the fact and the mode of calculation and certification of the Plaintiff's monthly applications for payment. Those circumstances, however, arose from and reflected the provisions of the letter of authority of 14 March 1996, as varied in June 1996 (see paragraphs 39 and 43 above). In so far as they constitute or imply a statement of facts the truth of those facts is in no way "questioned" by the Plaintiff in asserting that no contract was entered into in July.

118. The second group consists of alleged assertions by the Plaintiff of breaches by the Defendant or variations of a "contract" between them, or references by the Plaintiff to "disputed items" under such a contract. I have already commented in paragraph 100 above on the significance or otherwise of the use of the vocabulary of contract in the relevant correspondence. Setting that aside in favour of the Defendant, however, these were by their nature not "agreed" statements but assertions of the Plaintiff's position on the very matters in dispute between the parties.

119. For these reasons, and also on the broader ground that this is simply an attempt to introduce under the guise of estoppel a contract which has failed to gain entry in its own proper person, I conclude that no estoppel by convention has been established.

120. The alleged representation founding the alternative form of estoppel is that the Plaintiff was subject to a binding sub-contract. The particulars relied upon are first some of the same matters as those pleaded in support of estoppel by convention and secondly the failure to query the availability of sub-contract documents until 30 May 1997 and then in terms of a letter which refers to "our mutual agreement".

121. Assuming in the Defendant's favour that the alleged representation is capable of being one of fact for the purposes of this form of estoppel, the particulars relied upon suffer from the defect already pointed out in paragraph 118 above, namely that the Plaintiff was not asserting the positions on the matters in question maintained, then or now, by the Defendant, but the reverse. Moreover the failure to apply for sub-contract documents, assuming in the Defendant's favour that there was such a failure, cannot be a representation of any relevant fact.

122. As to the requirements of intention, inducement and reliance to the Defendant's detriment there is no plea of intention and the allegation as to the others is that the Defendant relied upon the alleged representations to its detriment by making monthly payments and not requiring the Plaintiff either to sign sub-contract documents or withdraw from the works. That is plainly nonsense, if any regard at all is to be had to the commercial realities. The reasons why the Defendant made monthly payments are first that it was bound to do so under the letter of authority and secondly that otherwise the Plaintiff would have stopped work. The reason why it failed to produce sub-contract documents was either that it was too inefficient or idle to do so, or that it was awaiting completion of the documentation and signature of a formal main contract, or both. The reason why it did not require the Plaintiff to withdraw is that that would have exposed it to the costly displeasure of Railtrack through inability to maintain the work programme, whatever the precise nature of the legal relationship between them.

123. I conclude that there is no estoppel by representation and that the plea of estoppel therefore fails in both its forms.

Form of judgment

124. I raised in paragraphs 9 and 10 above the question how far the matters actually canvassed before me corresponded with the issue directed to be tried, and how that would affect my ability to reach a satisfactory resolution of the questions before me. In the event I have found it possible to reach the conclusions expressed in paragraphs 102 and 123 above and now sinvite submissions on the appointment to hand down this judgment as to the appropriate form of the judgment (in the other sense) to be entered.

Nicholas Dennys QC and Dominique Rawley for the Plaintiff (Solicitor: J.P.Murphy)
Adrian Williamson for the Defendant (Solicitors: Neil F Jones & Co)