JUDGMENT : Honour Judge Toulmin CMG OC. TCC. 11th June 2003

1. These proceedings concern claims for breaches of contract in relation to the construction of a 2 x 660MW coal-fired power station at Sual in the Philippines. The claims are made by the first claimant, Mirant Asia-Pacific Construction (Hong Kong) Ltd (Mirant), acting on its own behalf and/or on behalf of the second claimant Sual Construction Corporation (SUAL), against Ove Arup & Partners International Ltd (OAPIL) and Ove Arup & Partners (Hong Kong) Ltd (OAPHK). There is an issue as to which parties are involved.

2. The claims arise out of the failure in about April 1997 of two of the foundations of Boiler House No 1 at the power station.

3. The claimants claim that the failure of the two foundations was caused by the negligence and/or breach of duty of OAPIL and OAPHK in

   "12.1 failing to provide a design for the G2 and G5 foundations that was suitable for the ground conditions

   12.2 failing to appreciate that the ground conditions in which those foundations were to be situated did not satisfy the design assumption that had been made ...

   and

   12.3 causing or permitting the G2 and G5 foundations to be constructed in ground conditions which were inadequate and which did not satisfy the said design assumption that had been made."

4. The claim for damages is for over $60,000,000 plus interest and VAT. The parties agreed that I should try the following preliminary issues, the resolution of which, it is said, will assist the parties in attempting to resolve the whole dispute.

5. The Issues
   1. "*Did the terms of that contract include FIDIC terms with a five-year duration of liability (clause 17) and a cap of £4m (clause 18.1)?"* I note that neither Issue 1 nor Issue 2 asks specifically when that contract was made. This is an essential question, which I include within question 1.
   2. *"Who were the parties to the contract under which OAPIL and/or OAPHK were responsible for the design of the Unit 1 boiler foundations?"*
   3. "*Insofar as there was a contract under which OAPIL and/or OAPHK had some obligation in relation to the inspection of foundation excavations approving ground conditions and/or inspecting formations for the Unit 1 boiler foundations, who were the parties to such contract?"*
   4. *"What were the nature and terms of the contractual obligations in relation to inspection of foundation excavations, approving ground conditions and/or inspecting and approving formations for the Unit 1 boiler foundations?"* At the end of the hearing the parties asked me to amend the question, see paragraph 312 below.
   5. "*If the FIDIC terms applied, was the claimants' letter dated 2 May 2001 a formal claim within the meaning of clause 17?"*

6. The Defendants' ConcessionsAt the outset it is useful to consider how the defendants now put Issue 2. At the beginning of the hearing, the defendants claimed that the contract was partly oral and partly in writing and was made on one of a number of dates. They contended that the Letter of Intent signed on 29 May 1995 did not have any legal effect. They said that if, contrary to their submission, it had legal effect, further terms were added to it on the dates when they say that the contract in fact was made.

7. I was offered as further alternatives that the contract was made in August 1995 when Revision A was sent by the defendants to the claimants, December 1995 when the defendants issued Revision B and March 1996 when Mr Elliott, as managing director of the claimants, countersigned the proposal for the site ground investigation which the defendants say cross-referred to the main agreement.

8. In his final submissions, Mr Bartlett QC on behalf of the defendants, quite rightly in my view, said "we make no formal concession but we are not concerned to argue that the Letter of Intent was not a binding agreement as far as it went." He also made it clear that the defendants were no longer concerned to argue that a binding agreement was concluded on Revision A terms soon after the letter of 17 August 1995. This case had been advanced by the defendants by an amendment made as recently as 7 February 2003.

9. The defendants now argue that an agreement was made incorporating the FIDIC terms either in December 1995 at a meeting in Jakarta when the defendants issued Revision B or in March 1996 at the time when, it is said, Mr Elliott agreed the proposal for the site ground investigation which incorporated the FIDIC terms or at some date between December 1995 and March 1996 when Mr Elliott's lack of response in querying the Revision B terms could be taken as consent.

10. The claimants' case is that the relationship between the parties was governed by the Letter of Intent which came into existence on or about 29 May 1995. It included the Proposal Revision C dated 11 April 1995 and the letter on OAPHK's notepaper dated 23 May 1995 supplemented by matters agreed orally during a meeting between the parties in early May 1995. It is accepted that the parties intended that a more detailed agreement would be entered into in due course but the claimants contend that no such agreement was ever concluded. They say that neither Revision A nor Revision B was in fact agreed.

11. Further, they contend that the FIDIC Form, itself, prescribed the sole manner in which agreement to the FIDIC Form was to be signified, ie by filling in and signing the appropriate parts of the pro-forma. This was not done. Hence they argue that there could not have been any agreement incorporating those terms.

12. The Nature and Quality of the EvidenceI have to bear in mind that most of the events took place seven to eight years ago. Much has happened to the witnesses in the meantime. This undoubtedly affected the quality of their evidence. There were also occasions when I felt that the witnesses were tailoring their evidence to the particular case that was being put forward. The claimant's former managing director, Mr Elliott, was called to give evidence by the defendants to the evident annoyance of the claimants.

13. In these circumstances, the ability to test the recollection of witnesses years after the events by reference to contemporaneous documents assumed particular importance. I am fortunate in having to assist me eight files of such documents arranged efficiently in chronological order. Most of the important documents were written at a time when they reflected the genuine views of the parties, since the disaster which triggered the litigation did not occur until about April 1997. I have, of course, to bear in mind the context in which the documents were written. My approach is therefore to consider the evidence of each of the witnesses in the context of the contemporaneous documents.

14. I should add a few words about some of the witnesses. Mr Elliott is a very successful businessman who is used to managing large construction projects. These have included the 66-storey Hopewell Centre, then the tallest building in Hong Kong. This contract was a relatively small item in the large overall contract to build the power station at Sual. Mr Elliott's CV indicates that he is well connected politically at a high level.

15. His style of management, as other witnesses explained to me, was to look at what he regarded as the important questions and make a decision in principle leaving others to consider the detail.

16. He was clearly concerned about his obligations under the confidentiality agreement under which he left Mirant. A breach of that agreement clearly renders him potentially liable to very adverse financial consequences. He gave evidence pursuant to a witness summons. He made it clear on a number of occasions that he was unsure of detail, but said he had a clear recollection about some important discussions and agreements. He admitted in cross-examination that he had been paid nearly HK$282,000 in relation to his giving evidence (about £23,500).

17. Mr Givelin was due to give evidence by video link but in the event his statement was admitted under the Civil Evidence Act. He is a partner in the firm of Frank and Vargesson, quantity surveyors. He was present at an important meeting on 11 August 1995 and gave Mr Elliott advice in a subsequent letter.

18. Mr Reynolds s is a commercial lawyer from the United States who gave evidence for the claimants. He says in his CV that he is known for his strong management skills. He was appointed as General Counsel of Mirant in 1997 at the time when Southern acquired CEPAS. His evidence was, of necessity, limited in relation to the questions which I have to decide.

19. Mr Roberts is the director responsible for energy products at Ove Arup & Partners International Ltd. Since 1976 he has been involved principally in oil and gas and power projects. Although not a lawyer, it is clear that he has had years of experience in all aspects of contract and project management including the drafting of major international contracts.

20. Mr Higson is a civil engineer who is an associate director with Ove Arup who has been a project director on major projects. Since 1992 he has been resident in Hong Kong and Singapore. Before that he was working for the Ove Arup Birmingham Office.

21. **The Law** There are three issues of law which are relevant to the questions which I am asked to consider:
a) the formation of the contract;
b) as a topic subsidiary to (a), the identity of the contracting parties; and
c) the law of estoppel.

22. Contract FormationThe relevant basic law is well known and can be set out in the following propositions:

23. a) The test for determining whether or not the parties have reached an agreement is to ask whether an offer made by one party has been accepted by another. In deciding this issue the court normally applies an objective test -- see Chitty on Contracts 28th ed, para 2.001.

24. b) The court will look at the entire course of negotiations to see whether or not there has been an unqualified acceptance of the offer -- see Chitty para 2.026.

25. c) An offer may be accepted by conduct but only if the offeree clearly acted with the intention of accepting the offer.

26. d) Even if the parties have agreed terms in the proposed contract, they may intend that the contract shall not become binding until some further condition has been fulfilled -- see eg Lloyd LJ in ***Pagnan SpA v Feed Products*** [1987] 2 LL R rep 601 at 619.

27. e) A letter of intent may create a binding contract if that was the intention of the parties -- see ***British Steel Corporation v Cleveland Bridge and Engineering Co Ltd.*** [1981] 24 BLR 94 at 119 per Robert Goff J. See also ***Hall & Tawse South Ltd v Ivory Gate Ltd [***1997] 62 Con LR 117.

28. f) Where an agreement is exclusively in writing, evidence of the parties' negotiations or of their subjective intentions is not admissible as an aid to construction of the written document -- see ***Prenn v Simmonds*** [1971] 1 WLR 1381. Nor is evidence of subsequent conduct admissible in these circumstances.

29. g) Evidence of subsequent conduct is admissible to show that the terms of a contract have been varied or to found an estoppel -- see ***Carmichael v National Power*** Plc [1999] 1 WLR 2042 at 2051.

30. h) The court interprets a written agreement by placing itself in the same factual matrix as that of the parties -- see Reardon ***Smith Line Ltd v Yngvar Hangsen-Tangen*** [1976] 1WLR 989 at 995-997.

31. i) Where the documents were not intended to constitute an exclusive record of the parties' agreement, the court in determining the terms and meaning of the agreement may have regard to the language of the documents, the way in which they were operated and the evidence of the parties as to how they were understood. See ***Carmichael v National Power Plc*** [1999] 1 WLR 2042.

32. In this context, it is appropriate to cite the passage in the speech of Lord Hoffmann in ***Carmichael*** at pp 2050 -- 2051 which is a relevant reminder of how to approach a case where much of the relevant evidence re1ates to events which took place as long ago as 1995 and 1996:

"In the case of a contract which is based partly upon oral exchanges and conduct, a party may have a clear understanding of what was agreed without necessarily being able to remember the precise conversation or action which gave rise to that belief. As the Court of Appeal pointed out, the Tribunal did not make any specific findings about what was said at the interviews or on any other occasion. But the terms of the engagement must have been discussed and these conversations must have played a part in forming the views of the parties about what their respective obligations were.

The evidence of a party as to what terms he understood to have been agreed is some evidence tending to show that those terms in an objective sense, were agreed. Of course the tribunal may reject such evidence and conclude that the parties misunderstood the effect of what was being said and done. But when both parties are agreed about what they understood their mutual obligations (or lack of them) to be, it is a strong thing to exclude their evidence from consideration. Evidence of subsequent conduct which would be inadmissible to construe a purely written contract may be relevant on similar grounds, namely that it shows what the parties thought they had agreed."

33. The Identity of the Contracting PartiesThis does not require a separate exposition of the law. Where the contract is exclusively in writing, the court will construe the document. Where the agreement is partly oral and partly in writing, the court will look at the evidence, including the surrounding circumstances and reach an objective conclusion.

34. Estoppel : In ***Johnson v Gore Wood*** [2002] 2 AC 1, 33 Lord Bingham cited with approval the statement of principle set out by Lord Denning MR in ***Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd*** [1982] QB 84 at 122. *"When the parties to a transaction proceed on the basis of an underlying assumption -- either of fact or of law -- whether due to misrepresentation or mistake makes no difference -- on which they have conducted the dealings between them -- neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seem to go back on it, the courts will give the other such remedy as the equity of the case demands."*

This approach was endorsed by Lord Cooke and Lord Hutton.

35. Within the general approach there may be conduct which can better be characterised as estoppel by representation rather than by agreement. As Lord Goff put it at p 99: *"Such an estoppel is not, as I understand it, based on a common underlying assumption so much as on a representation by the representor that he does not intend to rely upon his strict legal rights against the representee which is so acted upon by the representee that it is inequitable for the representor thereafter to enforce those rights against him."*

36. At p 120 Lord Millett referred to another form of estoppel which does not fit entirely easily with Lord Denning's definition, namely where because of a party's previous conduct, it would be unconscionable for a party to be permitted to act in a particular way.

The Facts

37. **The Parties**; It is convenient to start with a more detailed consideration of the parties to the dispute.

38. Until 1997 the first and second claimants were part of the Hopewell Group of companies. The first claimant CEPA Slipform Power System Ltd (CEPAS) was incorporated on 8 November 1993. Its parent company was Consolidated Electric Power Asia Ltd (CEPA). From 7 November 1997 to l6 May 2000 CEPAS became CEPA Construction (Hong Kong) Ltd. Its parent company was CEPA but by then CEPA had been taken over by Southern Electricity Asia-Pacific Ltd, a subsidiary of Southern Company incorporated in the United States ("Southern"). In due time after various changes the first claimant became from 16 July 2001 Mirant Asia-Pacific Construction (Hong Kong) Ltd (Mirant).

39. The second claimant was from its incorporation in the Philippines on 21 December 1994 to 16November 1997 Sual Slipform Construction Corporation and from 17 November 1997 it became Sual Construction Corporation. I refer to it throughout as "SUAL".

40. On 14 July 1997 CEPAS became a wholly owned subsidiary of Southern, which acquired the balance of the interests of Hopewell Holdings Ltd in CEPAS. Mr Elliott, who had been the managing director of CEPAS left in June 1997.

41. Both OAPIL and OAPHK are companies within the Ove Arup Group of Companies. OAPIL is incorporated in and operates from London. OAPHK is incorporated in and operates from Hong Kong. Arup companies had a long-standing commercial relationship with companies in the Hopewell Group, which extended back to a time substantially before the events which are the subject of this litigation.

42. Each company, OAPIL and OAPHK, has its own letterhead. Ove Arup and Partners use other letterheads, which do not indicate specifically which company in the Ove Arup Group is being referred to. There are letterheads, which say Ove Arup Ltd, Ove Arup or simply Arup. This is no doubt useful for branding purposes but is not helpful in understanding which company in the Ove Arup group is contracting at any one time.

The Past History

43. As Mr Higson told me in oral evidence, OAPHK had been employed in July 1985 by another company in the Hopewell Group to provide civil and architectural consultancy services in connection with a power station at Shajiao B in China.

44. In September 1992 OAPHK were again employed to provide similar services in connection with a power station in China known as Shajiao C.

45. In 1994 OAPHK were employed by another company in the Hopewell Group to provide civil and architectural design and consultancy services in connection with the power plant at Pagbilao in the republic of the Philippines.

46. It is therefore clear that by 1994 the Hopewell Group had had a continuing relationship with Ove Arup (Hong Kong) for a number of years.

47. The Present ProjectThe present project started with Mr Elliott, as the managing director of CEPAS at Sual, approaching Ove Arup to see whether they would be interested in becoming involved as consulting engineers in the Sual power project.

48. In April 1994 OAPHK made a Design Services Proposal to CEPA. The proposal starts by recalling that Ove Arup had been the civil engineering consultant to Slipform Engineering for five power station projects at Shajiao, A + B, at two projects in Manila and at Pagbilao. Ove Arup proposed to provide similar engineering services on this project. It emphasised that the proposed staffing was by a dedicated team of engineers who had all worked in Hong Kong and understood the way CEPA Slipform operate.

49. The detailed proposal for design services was submitted behind a covering letter from Mr Ayres, a senior director of the Hong Kong Company resident in Hong Kong (who is also a director of OAPIL), on OAPHK notepaper. The letter, dated I9 September 1994, was addressed to Mr Elliott at CEPA. The proposal itself had OAPHK on the title page.

50. Under 'Staffing and Management', the proposal emphasised that the work would be led from Hong Kong by a committed team. It emphasised that the team was still expanding.

51. Under 'Management and Organisation' it said 'the staff in the UK will be directly responsible to Hong Kong and be fully committed to the project'. The designs were to be developed in both Hong Kong and the UK.

52. In November 1994 Ove Arup made a proposal for a Seismic Design Statement. This proposal had the address of OAPHK on the cover sheet. It was addressed to CEPAS. The Ove Arup staff included Mr Higson. The covering letter dated 30 November 1994 was also on OAPHK notepaper, and was addressed to Mr Elliott.

53. By a letter dated 5 December 1994 on CEPAS notepaper, Mr Elliott confirmed to Mr Robertson at OAPHK his agreement that Ove Arup should proceed with the study. The study was completed and on 21 February 1995 an invoice was sent to CEPAS for HK$400,000. Both the covering letter and the invoice were on OAPHK notepaper.

54. On 15 February 1995 an internal memorandum from Mr Robertson at OAPHK sent to QAPIL, including Mr Roberts, discussed the scope of the work and how it should be organised. The memorandum said that Mr Robertson had discussed the project with Mr Roberts in Perth, Australia. "He agreed with me that a single project group in UK should be established to undertake the UK package of work and that the group needed to be a team, dedicated solely to this project."

55. On 21 March 1995 Mr Duncan Michael, chairman of OAPIL and, as appears from the notepaper, a director of OAPHK wrote to Mr Elliott at the address of the parent company CEPA on OAPIL notepaper referring to their meeting in the previous week and confirming the intention of Ove Arup to make a proposal for the engineering consultancy on 31 March 1995.

56. In fact there was a meeting on 28 March 1995 in CEPAS offices, attended by Mr Roberts, a director of OAPIL, Mr Fox, an Ove Arup Project Engineer who ran the design team in London, Mr Higson, an associate director of OAPIL and project manager who was resident in Hong Kong and Mr Colin Weir who was a senior employee of CEPAS but who in the event was not to be involved in the project.

57. Mr Fox wrote a note of the meeting. Mr Weir said that there was to be a Project Management Team made up from members of the consortium. There was a discussion as to where the design work was to be carried out. Mr

Weir said that he was not clear as to Mr Elliott's views except that the earlier stages must be done in Hong Kong with all consortium members present.

58. The note makes no mention of the proposed contracting parties. It concerns itself with practicalities as to how the work was to be done.

59. On the following day, 29 March 1995, Mr Roberts sent a fax on OAPHK notepaper to Ms Jenny Baster, the senior legal adviser for the Arup group. Ms Baster was resident in London. The fax enclosed the draft agreement between OAPHK and Slipform Engineering Ltd, with its covering letter dated 10 June 1994 on OAPHK notepaper. Mr Roberts asked whether Ove Arup should use this agreement or a modified agreement or whether they should write a new agreement.

60. Mr Roberts met Mr Elliott on 2 March 1995. He says that he is 'pretty confident' that he raised the question of using FIDIC terms with Mr Elliott at that meeting. There is no documentary evidence to support this and I find that he did not do so.

61. Ms Baster replied to Mr Roberts on 31 March 1995 with some general comments, which did not include any reference as to which were the appropriate contracting parties.

62. On 10 April 1995 Mr Roberts wrote to Mr Elliott on OAPIL notepaper saying that 'at our meeting on Friday, we said we would prepare a commercial offer for the Sual Power Station job based, where possible, on adopting concepts for the structures, buildings and site infrastructure which have proven to be successful in the past'. He said that the offer would be submitted on 12 April1995.

63. Section 4 of the proposal was sent under a covering letter of 11 April 1995. Again, Mr Roberts reassured Mr Elliott that the bid was based on using existing concepts wherever possible. The complete bid package was to be sent later in the day. The subject of the covering letter was described as "Sual Power Station -- Arup Tender."

64. Section 4 related to commercial proposals. The costs were estimated in £s sterling. The proposal included provisions for variations to the work and Terms of Payment. The concept of neutral funding was set out. The payment mechanism was that on the 10th day of each month, invoices would be issued which were to be paid within 14 days.

65. The section ended: *"We request all payments in pounds sterling as this is to be the currency in which the majority of our costs will be incurred. If the Project Office were to be located other than in the UK we would agree to reviewing the currency of payment in line with our exposure."*

66. Under paragraph 4.7 "Form of Agreement" Ove Arup said: *"We request the Form of Agreement under which the engineering services to Slipform are provided, reflects the technical and commercial proposals of this tender. We are willing to provide a draft agreement for discussion at Slipform's request."*

67. The full proposal followed later on 11 April 1995. The page setting out the history had on it *'Revision A 31 March 1994 -- Draft for Review. Revision B -- Tender dated 6 April 1995 and Revision C -- Tender dated 11 April 1995.'*

68. Underneath it had OAPHK and its address and underneath that the words "Ove Arup & Partners" with its address in London. There was no mention of Ove Arup International Ltd.

69. The Tender was addressed to Slipform. It runs with annexes to over 150 pages. Throughout Ove Arup & Partners is referred to simply as "Arup".

70. The Executive Summary sets out the commitments. It proposes that they will be realised by a core team of engineers. *"The team will be drawn together from within Arups on a best-man-for-the-job basis. The team will be assembled in Hong Kong for a six month front end concept phase followed by the establishment of a project office in London."*

71. The proposed risk and reward formula is set out in detail. The introduction refers to CEPA Slipform Engineering Ltd. Mr Roberts for Ove Arup conceded in evidence that there is no such company and that this was an error.

72. The section on Scope of Work sets out an overall programme (para 2.1) concept design phase (2.2) and preliminary and detailed design (2.3). The method of working (3.0) states that Phase 1 (conceptual design) will be carried out in Hong Kong and Phase 2 (detailed design) will be carried out from the UK Project Office. The Project Team (3.2) is set out in detail emphasising the expertise of the individuals and, where appropriate, their participation on previous projects. Their CVs are appended to the proposal. The commercial proposals sent ahead of the main proposal are incorporated in the main proposal.

73. There are detailed schedules of work, estimated numbers of man-hours for each stage of the project, and CVs of proposed Arup participants etc. In the CVs Mr Roberts is described as a director of Ove Arup & Partners as is Mr Ayres, although in his key data Mr Ayres is described as director of OAPHK. This impression is reinforced by the details of his experience when he is again described as Director of Ove Arup and Partners (Hong Kong).

74. Mr Higson is described as Associate Director of Ove Arup & Partners. He is said to be currently working at the Hong Kong Office as the Project Manager for Shajiao C Power Station. His experience from 1992 to the present is said to be 'Ove Arup & Partners Hong Kong'. In later meetings, eg on 7and 8 August 1995, he is described on the circulation list as OAPHK.

75. Mr Fox's recent principle area of involvement is said to be related to coal-fired stations in South East Asia but his experience from February 1994 is 'rejoined Ove Arup & Partners Industrial Engineering Products Division, London'. Of the others, Dr Littlechild is described as Associate Director in the Arup's Geotechnical Group in Hong Kong. Dr Oldroyd is described as having been based in Hong Kong until 1994 but since then as working from Ove Arup & Partners, Manchester.

76. This is sufficient to demonstrate that the proposed staff were based both in Hong Kong and London (and Manchester). The CVs of the remaining team members are to the same effect.

77. Mr Elliott met with Ove Arup 20/21 April 1995. Mr Elliott, Mr Ayres and Mr Higson were present on both days. Mr Weir attended only on 20 April 1995. The principles of Gainshare were discussed. Mr Elliott apparently made his view very clear at both meetings that many of the design principles were already set and were to be repeats of schemes developed at Shajiao C and Pagbilao. Site staffing and a basis for fees was also discussed. A target design fee of £3.7m was proposed. Mr Elliott suggested that Ove Arup review their current proposal and that there should be a further meeting between Mr Roberts and Mr Elliott early in the week commencing 1 May 1995.

78. There were internal discussions following this meeting. This was followed by the meeting between Mr Elliott and Mr Roberts on 11 and 12 May 1995. I do not have a note of the meeting from either side. It is said that Mr Roberts and Mr Elliott shook hands at the end of the meeting on their commitment to proceed.

79. Following from it, Mr Roberts drafted a letter of understanding, which was dated 22 May 1995, but was not sent. The draft included these words: *"Details of work scope, payment mechanism and contractual arrangements will be defined in greater detail in a new agreement currently being developed. A draft proposal for part of this agreement has been produced in a format similar to the appendices of a FIDIC type contract and is attached for discussion purposes."*

80. This is a rather tentative reference to a 'FIDIC type contract'. It was not included by Ove Arup in the letter which was in fact sent to Mr Elliott.

81. It is clear from the wording of the draft that the parties had not already agreed a proposal along these lines. Otherwise the draft would not have been attached 'for discussion purposes'.

82. In the event, the draft was re-worked and the formal letter was sent on 23 May 1995. Mr Higson said in evidence that the earlier draft had been sent to Mr Roberts in Australia and was modified by him. Even the tentative reference to a FIDIC type contract was deleted. I accept Mr Higson's evidence. In evidence Mr Higson freely admitted that he had no knowledge of FIDIC forms. There seems on the evidence to be no particular reason why he should have had any knowledge.

83. I find that FIDIC terms had not previously been discussed. The reason why no reference to FIDIC was even included in the draft 'for discussion purposes' is that Ove Arup did not think that it would have been acceptable to the claimants.

84. The letter went out on OAPHK notepaper and was signed by Mr Higson on behalf, not of Mr Roberts but of Mr Ayres who was resident in Hong Kong.

85. The letter was sent again on 28 May 1995. I have four different versions in the documents but only one is signed by Mr Elliott. There may have been two earlier versions which were signed by Mr Ayres but which underwent relatively minor amendments. The parties are in any event agreed that the version signed by Mr Elliott is the relevant one for the purpose of assessing the relationship between the parties.

86. The one signed by Mr Elliott and dated by him 29 May 1995 can be regarded as the Letter of Intent. It starts as follows: *"Following our recent meeting, we would like to confirm the agreement reached on the following principles relating to our appointment as civil engineering designers on the Sual project."*

87. It sets out the work scope by reference to the offer Revision C of 11 April 1995. The proposal that concept design will be undertaken in Hong Kong and preliminary and detailed design will take place in London is maintained.

88. Paragraph 3 provides as follows:

"(3) The fee for concept, preliminary and detailed design of the defined scope of the works is to be £3.75 million."

89. The letter goes on to stipulate that the cost of the design services will be neutrally funded (4); payment of sterling fee amounts shall be made in US $ (5); the provision of technical site supervision and quality control by Arup/CEPAS will be based on the formation of the joint team (6).

90. Paragraph 7 foreshadows a possible later change in the method of payment: *"A separate proposal will be made regarding the option of adopting a gainshare approach to fee payment and will be the subject of a later agreement. There will be no effect on our agreement relating to total fee payable if gainshare is not eventually included in the agreement."*

91. In other words the concept of gainshare/painshare is further to be discussed but there is already in place an agreement for a fixed price contract.

92. In place of a reference to FIDIC, the following paragraph said: *"As agreed, details of work scope, payment mechanism and contractual arrangements will be defined in greater detail in a draft contract being prepared by us."*

93. The letter concluded as follows: *"If you agree with the contents of this letter, we request that you sign a copy and return it to us as confirmation of our agreement and of your intention to appoint us as your design contractor. On that basis we will commence work".*

94. Mr Roberts says that the letter was written on OAPHK notepaper by mistake. He said in evidence that 'he had had a bad day'. He also said that it was intended that the contract would only be with OAPIL. This is despite the fact that the letter went out in the name of Mr Ayres whose CV emphasised that he was a director of OAPHK. The letter referred to the previous offer of 11 April 1995, which listed the offerors as OAPHK and Ove Arup & Partners which is the name which the group as a whole used when it did not differentiate between the members of the group.

95. In oral evidence Mr Roberts said that following instructions from Mr Michael, he explained very carefully to Mr Elliott that the project, if agreed, would be undertaken between Ove Arup & Partners International Ltd, and not Ove Arup & Partners Hong Kong.

96. Mr Elliott said in evidence that it was the international company, but this was to be a fresh approach. He explained that Mr Roberts had a responsibility to take care of it from the UK side. He said nothing about having been told explicitly by Mr Roberts that this was to happen on the instructions of Mr Michael, to whom he had spoken.

97. Mr Higson's explanation in oral evidence was very vague. It was that he thought that the fact of Mr Roberts being introduced as a director from the UK was evidence that this was to be a different set-up from the previous contract.

98. I should add that an explanation given by Ove Arup in support of the argument that the contract was between CEPAS and OAPIL was that this was an off-shore project and that OAPIL was to be paid in US$ as part of the off-shore structure. If Ove Arup had been paid in Hong Kong $ the contract would have been with OAPHK.

99. The letter was expressed to be signed on behalf of CEPAS. This was the company used for offshore works. There has so far been no direct reference to Sual in the documents. The claimants say that this is because the Letter of Intent deals with design.

100. Ove Arup proceeded with the work on the basis that they had an agreement and that the Letter of Intent constituted the agreement which governed the work. It is for this reason that Ove Arup no longer pursues its contention that the letter of intent had no binding effect.

101. On 30 May 1995 Ove Arup wrote to Mr Elliott in relation to the site-specific seismic investigation. The letter under the name of Mr Higson is on the OAPHK letterhead. It is addressed to Mr Elliott at CEPAS. It refers to the programme agreed at the meetings in Hong Kong on 11 and 12 May 1995. The letter says that the scope and principles of the remaining investigations were dependent on their letter and proposal of 3 May 1995 and should be completed in about four weeks. A note of the meeting is appended. The meeting is described as being between representatives of CEPA and Ove Arup. It confirms that the design will be mostly carried out in London, although a part of it will be done in Hong Kong.

102. It appears that in June 1995 work was undertaken by Ove Arup in London on drafting an expanded contract. This task appears to have been undertaken, not by the legal department, but by Mr Bramhall, who was a quantity surveyor employed by OAPIL. On the first page of a 17-page fax sent by him to Mr Roberts on 21 June 1995, he says that the 'base contract is FIDIC Client/Consultant Model Services Agreement, 2nd Edition, 1991.'

103. Some of the terms of particular application were addressed. Space was left for the commencement and the completion dates to be added.

104. There was a draft clause 31 (ii) relating to time for payment and agreement of compensation for overdue payment. These provisions were broadly in line with what had been agreed by the time of the Letter of intent. There were also provisions for payments in US$.

105. The draft does not contain any provisions purporting to restrict the time within which a claim could be made nor any provisions capping the amount which could be recovered from Ove Arup. The draft describes the principal place of business of the Ove Arup contracting party as the United Kingdom.

106, On 22 June 1995 Mr Higson wrote to Mr Southey in the accounts department of the claimants. This letter was in response to a letter of 21 June 1995, which is not in evidence. It referred to a complaint that meetings were taking place without the claimant's participation. The letter says, among other things, 'under no circumstances was there any intention that discussions would be made without being sanctioned by CEPAS'. The letter was on OAPHK notepaper and was addressed to Sual at an address in the Philippines. The claimants rely on this letter as indicating that Ove Arup were contracting both with CEPAS and Sual. This is the only Sual document, which is relevant to this history. Ove Arup say that it was addressed to Sual because it was in direct response to a letter which Sual had written to CEPAS.

107. Work proceeded. The concept design period was from 5 June 1995 to September 1995. During this period the civil engineering team of Ove Arup was committed to preparing for review design guidelines and the concept for each building or structure. These reviews were to take place in Hong Kong at a series of review meetings from the beginning of July 1995. Ten sessions were projected in the weeks commencing 10 July 1995, 7 August 1995, and 28 August 1995.

108. There is a further drafting note for the projected expanded contract in notes from Mr Bramhall dated 14 July 1995. The note has 'OAPIL' which would indicate the English company. This is a reference to *'where is tax liability -- how to address?'* which indicates that Ove Arup had not yet reached a conclusion as to which of its companies should be named in the proposed contract. It appears that the decision would depend, very sensibly, on where the tax advantage lay.

109. There is still no reference in the draft to a limitation on the time in which a claim could be made against Ove Arup or a cap on Ove Arup's overall liability.

110. On 26 July 1995 the first design team meeting took place. It was noted that contracts were being developed and that several aspects needed discussing with Mr Roberts on his return to Hong Kong. This item was referred to Mr Higson, Mr Fox and Mr Bramhall for action. This note is carried forward in the second meeting of 4 August 1995.

111. On 27 July 1995 Mr Fox wrote on OAPHK notepaper, giving his comments.

112. On the same day the proposed conditions of particular application for FIDIC clauses 17, 18.1 and 22 appeared in an Ove Arup draft, giving a proposed duration of liability of five years and a limitation of compensation of £4m sterling. The date for completion of the contract is put in as 31 March 1997.

113. On the 9 August 1995 under 'corrections' the duration of liability in the draft contract is to be ten years. The cap on compensation is £5m and completion is to be on 2 June 1997.

114. The Ove Arup internal financial report covering the period to 1 September 1995 sets out from its perspective the progress achieved in the concept design phase. It noted:

"ix) A draft contract prepared by Arup was submitted to CEPA on 11 August. The intention is to reach an agreement with CEPA before full commitment is made to detail design.

x) Invoices for the months of June, July and August totalling $437,819 have been submitted to CEPA on 11 August, 11 August, and 5 September respectively. The invoices for June and July should have been paid by 25 August in accordance with the proposals in the draft contract,"

115. There are two drafts of the 11 August Revision A in my papers. They are described on the second page as being *'Draft for discussion'*.

116. The first draft which only appeared for the first time shortly before the hearings has in handwriting 'issued in draft form'. The revisions page describes the draft as being from Ove Arup & Partners with the London address. Someone has added in manuscript the words *'International Ltd'*. I do not know when this was added or by whom. The second version carries a stamp with the words Arup and Sual power station and the date of 12 October 1995. The handwritten words 'International Ltd' do not appear. The drafts incorporated the FIDIC Form 1991 Revision and were largely identical.

117. The drafts start with a formal section to be filled in by the parties. Paragraph 2 sets out the documents which shall be deemed to be read and construed as part of the agreement. This section ends *'in witness whereof the parties hereto have caused this Agreement to be executed the day and year first before written in accordance with their respective laws'*. There was then a space for signature by the client and the consultant. These parts of the document remained unsigned.

118. *'Client'* is defined as 'the *party named in the agreement who employs the consultant'. 'Consultant' is defined as 'the party named in the agreement which is employed as an independent professional firm by the client to perform the services and legal successors to the consultant and permitted assignees'*. It is significant that in offering the draft contract, Ove Arup did not even fill in the section relating to parties.

119. Clause 21 of the draft conditions provided in accordance with the standard FIDIC Form:

"21. The agreement is effective from the date of receipt by the Consultant of the Client's Letter of Acceptance of the Consultants Proposal or of the latest signature necessary to complete the Formal Agreement, if any, whichever is the later."

120. A number of specific clauses link up with the conditions of particular application. Clause 17 provided that: *"Neither the client nor the consultant shall be considered liable for any loss or damage resulting from any occurrence unless a claim is formally made on him before the expiry of the relevant period stated in Part II or such earlier date as may be prescribed by law."*

121. Part II relates to Conditions of Particular Application. The draft provides: *"The Duration of liability is five (5) years."*

122. Clause 18.1 provides so far as is material:

"18.1 the maximum amount of compensation payable by either party to the other in respect of liability under clause 16 is limited to the amount stated in Part II ..."

Under Part II it is proposed as *"four (4) million pounds sterling"*.

123. Clause 22 provides that:

"22. services shall be commenced and completed at the times or within the period stated in Part II, subject to extensions in accordance with the Agreement."

Under Part II "C*ommencement shall be 3 June 1995. Completion shall be 2 June 1997."*

124. Clause 41 provides that notices shall be in writing and will take effect from receipt at the address stated in Part II. Part II confirms that "notices shall be in writing". The client's name and address is stated to be CEPAS at its address in Hong Kong. The consultant's address is given as Ove Arup & Partners (International) Ltd with its address in London. Part II also provides that English law is to apply.

125. The Annex CI Schedule of rates for additional services is left blank. In an earlier draft the level 1 design programme was described as 'to follow' but this is supplied in a later version. There is a payment schedule which has the agreed sum of £3,750,000 to be paid over a period of 24 months. Appendix C2 provides for remuneration and payment. Annex C2 designated as a level 1 design programme is 'to follow'.

126. There was a meeting on 11 August 1995. There is no record of the meeting. It is said that Mr Roberts, Mr Higson, Mr Elliott and Mr Givelin were present at the meeting. Mr Roberts gave Mr Elliott two copies of the Revision A draft contract. Neither Mr Elliott nor Mr Givelin had had any opportunity to see the draft in advance of the meeting. Mr Roberts said that although he went through the document with Mr Elliott he envisaged that Mr Elliott would take the document away, consider it with his advisers, come back with a few comments and finalise the agreement. He said that Mr Elliott did not seem to object to the FIDIC conditions. Mr Elliott is not a lawyer and his approach of taking the agreement for further consideration and advice was entirely sensible.

127. I find that Mr Elliott went no further at the meeting than to say that he expressed no immediate objection to the draft contract. It is interesting to note that although he did not come back to Mr Roberts with any of the objections over the next few months, it is not suggested on this occasion by Ove Arup that his failure to do so signified assent.

128. It is said that, at the meeting Mr Roberts showed Mr Elliott the important terms. It is likely from the subsequent advice from Mr Givelin to Mr Elliott that FIDIC terms were indeed mentioned. Mr Robertson and Mr Elliott gave evidence that FIDIC terms should form the basis of the contract and that in principle Mr Elliott regarded the conditions of particular application as acceptable. It is said that Mr Elliott did not agree to the payment schedule. There was also uncertainty about the programme.

129. It was only conceded in the course of the trial that there was no binding agreement on the basis of Revision A. Mr Higson said in evidence that the £4m cap was discussed and he thought that agreement had been reached. There is no evidence from subsequent correspondence to support this and I reject it.

130. This episode is very revealing as to the relationships between the parties. I have no doubt from the evidence that was given that Mr Elliott was and is a forceful man who took what he regarded as the big decisions leaving the detail and particularly the small print, to others. He had no reason to object to the FIDIC form as such.

131. The crucial issues in these proceedings are the following conditions of special application, the cap of £4m, the limitation of time for bringing proceedings and the end completion date. These are matters which I find that Mr Elliott left to his advisers to comment on and, if necessary, to negotiate. I am satisfied that Mr Elliott's actions were substantially influenced by the fact that as far as he was concerned he had concluded the basis for an agreement in May 1995. The important outstanding detail as far as he was concerned revolved round schedules of rates and the programme of works. In this regard he behaved in the way which one would expect a businessman to behave.

132. On 15 August 1995, Mr Roberts sent an invoice to the claimants on OAPHK notepaper for services provided in connection with the project. The letter states 'the amounts requested reflect the letter of intent between CEPAS and Arup dated 23 May and the draft contract issued to you on 11 August 1995." The two invoices are dated 11 August 1995. They are on OAPIL letterheads. The amount due is in pounds sterling to be paid in US dollars at the spot rate published in the Financial Times. The draft contract had not even been discussed with CEPAS at the time when the invoices were issued. The formula indicating that the amounts requested reflected the Letter of Intent dated 23 May and the draft contract issued on 11 August 1995 was used in succeeding invoices.

133. Mr Givelin of Frank & Vargesson Ltd, Quantity Surveyors and Construction Cost Consultants in Hong Kong, made a prompt response to Mr Elliott although there is no evidence that his comments on the draft contracts were passed on to Ove Arup.

134. On 17 August 1995 Mr Givelin wrote to Mr Elliott as follows:

"a) The basic agreement is modelled on a standard form which emanates from FIDIC which is fair to both the client and the consultant in terms of rights and obligations.

b) However particular matters are addressed by the Appendices and Annexes and I draw your particular attention to the following:

1) clause 17: Duration of liability 5 years -- is this enough?

2) clause 18: limit of compensation £4 million -- is this enough?

3) clause 31: payment of invoices within 14 days with overdue payments at base rate plus 3 per cent.

4) clause 32: currency of agreement in Pounds Sterling but currency of payment to be in US dollars therefore there is a currency risk."

135. The letter also raised queries over eight other important issues.

136. The letter must be seen in the context that Mr Givelin had actually been present at the 11 August 1995 meeting. He explains in the letter that the proposed contract emanates from the FIDIC form and his letter identifies issues

where the proposals are unfavourable to his client. There is no reference to these matters having been explained fully at the meeting of 11 August 1995. The language of the advice is inconsistent with such an explanation.

137. The comments concluded by noting that Annex CI in respect of rates for additional services had not been filled in. These points do not appear previously to have been raised with Ove Arup. The draft agreement which was referred to Mr Givelin for detailed consideration does not seem to have been progressed by the parties.

138. The design meeting on 23 August 1995 acknowledged that a draft contract had been issued and that several aspects needed finalising when CEPAS comments were known (see para 2.1 item Z50).

139. Ove Arup had an internal management review on 5 September 1995, which noted that the claimant had a draft copy of the proposed agreement which was being reviewed by Frank & Vargesson, and that if detailed negotiations ensued they would be handled by Mr Bramhall. The note said that the contract was based on FIDIC. The issue of painshare/gainshare and milestone dates still had to be resolved. It was hoped to get the agreement signed by 15 September 1995.

140. As the defendants now concede, this reaction is inconsistent with the parties having concluded an agreement in August 1995. it is consistent with a recognition that Ove Arup needed a signed agreement before being able to proceed on the FIDIC terms. This they never achieved.

141. On 14 September 1995 Ove Arup and Partners issued their first management report. It was checked by Mr Higson and approved by Mr Roberts. It reiterated Ove Arup's intention to reach agreement with the claimant on the draft contract before the detailed design stage (para 2(ix)). Under "Problem Areas", it said that this was an essential prerequisite to proceeding with the detailed design, but that to that date Ove Arup had not received any reaction to the draft contract (para 3(iii)).

142. There was a high level concept review meeting between CEPAS and Ove Arup at CEPAS offices in Hong Kong on 15 September 1995. Those present included Mr Elliott and Mr Eller from CEPAS and Mr Roberts and Mr Higson from Ove Arup. Mr Higson prepared the note of the meeting. It dealt mostly with practical matters, but at the end the note records that Mr Roberts was to contact Mr Elliott to discuss the contract and other matters.

143. The same theme was recorded at the Ove Arup progress meeting in Hong Kong and London on 26 September 1995. Mr Higson annotated item Z50 under *'Review of Action Items'*. The note said:

"Contract issued but no response yet RH (Higson) has spoken to F+V.

JR (Roberts) to arrange to meet with SWGE (Elliott)"

The annotation is "meeting possible during JR visit to HK 11-17 October."

144. In advance of the meeting Mr Roberts wrote on 6 October 1995 to Mr Eller enclosing copies of the contract programme. The letter said that

"For the purpose of completing the documentation of the contract between CEPA and Arup we have identified milestone dates for the Late Finish Programme as shown on the attached sheets. We propose that these should be inserted in the contract documents."

"Once a working programme is agreed, we will issue a corresponding detailed design programme and manpower mobilisation schedule, so that payments based on neutral funding matching the actual pace of the project can be agreed. Until then we propose to continue invoicing you on the basis of the payments schedule in our submission ...."

145. The letter concluded: *"John Roberts would also like to meet with Stewart (Elliott) next week to discuss performance, programme and resources, to progress the Arup/CEPAS contract and to resolve some payment matters."*

146. Also on 5 October *1995* Mr Roberts issued an internal memorandum which enclosed the current working programme (known as the Late Finish Programme) and the key milestones to which they would be committed if the programme was maintained. Mr Roberts noted that "until another working programme is agreed between CEPAS and GECA with input from us we will continue to work to the Late Finish Programme".

147. On 17 November 1995 Mr Higson wrote to Mr Eller at CEPAS on OAPHK notepaper enclosing change order request forms. He said: *"While it is fairly early in the design process we wish to start using the system to ensure that there is discipline and management of change and variations. We also believe that it is in the best interest of CEPAS that we advise you of any GECA variations that we are aware extend or change the scope of your works."*

This procedure for change order requests proceeded throughout the design work.

148. Also on 17 November 1995 Mr Higson, acting in the name of Mr Roberts, sent an invoice for design work. The cover letter is on OAPHK notepaper. As before it says that: *"The amount requested reflects the Letter of Intent between CEPAS and Arup dated 23 May and the draft contract issued to you on 11 August 1995."*

149. On 29 November 1995 Ove Arup sent proposals for site ground investigation. Mr Roberts said that he prepared the document, but he cannot remember when.

150. The draft starts by stipulating that:

"1. The ground investigation work described in this document shall be governed by the Client/Consultant Model Services Agreement (the main agreement) entered into by CEPA Slipform Systems Limited (CEPAS) and Ove Arup and Partners International Limited (OAPIL) for the design of the civil engineering works of the Sual power station except as modified below."

151. The draft then sets out the method of payment, the scope of the ground investigation work, the schedule of rates, the procedure for invoicing and variations.

152. On 6 December 1995 Mr Roberts sent Mr Elliott a copy of Revision B of the draft agreement. The letter was written on OAPHK notepaper. Mr Roberts now says that this was a mistake. The draft is described as a draft for discussion. The addressor is now described as Ove Arup International Limited. (Previously the printed version was simply Ove Arup.)

153. Mr Roberts identified changes from the August version Revision A. They included the overall project programme, shown in Annex 4 which now showed the start date of a detailed contract design for the civil engineering works as being at the beginning of September 1995. The role of the consultant in terms of signing and sealing drawings has been incorporated. Annex CI Schedule of Rates for additional services has been included. A payment schedule based on the design programme has also been included.

154. The letter ended: *"We have received no comments on the original draft; we would like to discuss the contract with you as a matter of priority as detail design of most of the critical path elements is well advanced."*

155. Revision B included the previous conditions of special application which seriously restricted the rights of CEPAS, namely the cap on the amount of recovery at £4m and the abbreviated time limit of four years for bringing a claim.

156. The changes between Revision A and Revision B were of some importance, although the payment schedule was at all times within the price of £3.75m agreed in the Letter of Intent. Among the changes in Appendix A, Scope of Service, a different programme was identified and the detailed design phase was reduced from 21 months to 13 months.

157. There were changes in wording in relation to site supervision. In Appendix C the wording was changed in relation to terms of payment and there were references to different programmes. The payment schedule reflected Ove Arup's proposal in its letter of November 1995.

158. A meeting took place in Jakarta between 8 and 10 December 1995 between Mr Elliott, Mr Higson, Mr Roberts and others. Mr Higson provided a note of the meeting. The meeting dealt largely with technical matters, Geotechnical Investigation, Site Formation, Boiler, Coal Systems etc. "Contract" appears as item 3 on the draft agenda, but there is no note of any discussion under this item.

159. Under Item 19 Programme and Progress there is a note for action by Arup (RL). It said: *"Progress was reviewed against the Arup level 1 contract programme and a revision of this programme indicating the current status and the proposal for future progress was tabled and discussed (note for future SWGE not happy with micro.dot programme). A marked up programme summarising the discussions and indicating the current status is attached to these minutes. This indicates that overall at the end of December the design is delayed in the order of three weeks."*

160. There is no reference in the minutes to a detailed discussion or any discussion of Revision B. There is no note in the action column indicating that the claimants were required to sign the contract. All that they were required to do was to respond in detail to the provisions.

161. This is said by Ove Arup to be because the contract was discussed between Mr Roberts and Mr Elliott on the 10 December when Mr Higson was not present. It was said in evidence that Mr Elliott expressed agreement with all items in Revision B except for the payment schedule. Mr Roberts said in evidence that he knew Mr Elliott's methods of working, and since Mr Elliott did not object to Revision B that indicated positive agreement that Revision B was agreed as constituting the contract between the parties. This evidence can be tested against the subsequent correspondence.

162. A further note in site meeting format (dated I think erroneously 8 to 9 December 1995) is similar to that of Mr Higson except that it assigns tasks for the earlier items but not for programme and progress.

163. On 13 December 1995 Mr Higson produced what he described as a "tarted up" note of the meetings. It makes no reference to contract discussions.

164. Mr Elliott said in evidence that the payment schedule was agreed in Jakarta. He said it was not intended to change the price but to provide a simpler mechanism for payment. He said that as far as he was concerned, it was all done and dusted previously. He said that what had been agreed was the bid documents for the price and the amended documents. In his evidence in chief and cross-examination, he made it clear that he regarded the payment schedule as of very minor importance compared with the agreement of the price of £3.75m. This had occurred by the time of the Letter of Intent.

165. I conclude that in fact no agreement was made in Jakarta. If there had been such an agreement, it would have figured prominently in the correspondence immediately following the meeting.

166. The meeting in Jakarta resulted in an action list prepared by Ove Arup and sent from the London Office on Ove Arup & Partners' notepaper on 10 December 1995. Although it is an Ove Arup checklist, a copy was sent to Mr Eller of the claimants. It has a section on payments and invoicing claimants. This includes "December invoice to be presented on "submission' payment schedule, ie 232,050 on 10 December payable by 24 December. Present reconciliation invoice when new payment schedule has been agreed based on above in January." There is no reference to Revision B having been agreed.

167. On 11 December 1995 Mr Eller sent the invoices to Mr Rolph at F & V with a copy to Mr Higson. It said that the invoices for September-November 1995 and for the Seismic Hazard Assessment and Investigation had been approved. The letter added the rider: *"Please note that Mr Elliott has approved these invoices 'on account' pending finalisation of the terms of contract."*

168. This again makes it clear that from Mr Elliott's point of view he had not agreed Revision B at that stage.

169. On 19 December 1995 Mr Higson (on Mr Roberts's behalf) sent a covering letter on OAPHK notepaper enclosing the invoice for December 1995. The letter states: *"As agreed at our meeting on the 10 December 1995 in Jakarta, the amount requested reflects the letter of intent between CEPA and Arup dated 23 May and the draft contract issued to you on 11 August 1995."*

170. There is again no suggestion that an agreement between the parties had been reached in Jakarta which incorporated the FIDIC terms and Revision B. The Invoice No 7 was sent to CEPAS on OAPIL notepaper.

171. The covering letter dated 16 January 1996 enclosing Invoice No 8 dated 11 January 1996 follows the same format.

172. The contract between GEC Alsthom and CEPAS had not yet been made effective. The effective date continued to be put back. It was expected that the contract between CEPAS and Arup would follow the same dates as the main contract.

173. On 18 January 1996 Mr Wright, the project manager of GEC Alsthom wrote to Mr Eller to say that "the date was not too far away".

174. It appears from Ove Arup's site report for the period 22 December 1995 to 22 January 1996 that by then the delay was 5 1/2 months from the original date and that Arup was delayed on certain work units.

175. On 26 January 1996 Mr Roberts wrote to Mr Elliott from London, saying that: *"Following our discussions in Jakarta, I have revised the payment schedule as we agreed".*

176. He went on to set out the changes, and said: *"Would you please review and agree the payment schedule as currently presented so that we may insert it into the contract documents between CEPAS and Arup."*

177. Mr Roberts went on to discuss the need to align the programme with that of the main contract with the consortium. He said that: *"I propose the payments be adjusted in the manner described in my letter of l5 November 1995 which we went through in Jakarta."*

178. There is no evidence that the payment schedule and the milestone documents were ever agreed. The letter in my view makes it quite clear that by 26 January 1996 nearly two months after the Jakarta meeting, Mr Roberts well understood that no agreement had been reached with Mr Elliott on the basis of Revision B.

179. The effective date for the main contract was fixed for 1 February 1996.

180. Arup had an internal quality control procedure which required management to fill in a form to satisfy the Quality Control Department that the contract was based on sound foundations. The form was on an Ove Arup & Partners form and gave no indication of which member of the Ove Arup Group was the contracting party.

181. On 29 January 1996 Mr Roberts filed such a form. It was said on behalf of Ove Arup that it was only a formality but Mr Roberts's answers are revealing. The comments must be read in the context that Quality Control required that the contractual documents should be properly completed. Mr Roberts must have known what was Ove Arup's understanding of the up-to-date of the contractual position.

182. The first question is -- *"Clients brief: is it clearly defined?"* The answer is *"Yes we wrote it but only currently accepted in principle by CEPAS. No written confirmation refer to letter of interest".* This is clear. The governing document is still said to be still the Letter of Intent. There is no reference to Revision B or even Revision A having been agreed but the formalities not having been completed.

183. The second question is "C*onditions of Contract: are they clear and understood?"* The response is *"No response yet from CEPAS on contract we submitted".*

184 The statement "*No response yet from CEPAS*" is a clear statement which carries with it the notion of uncertainty as to the outcome. If Ove Arup had understood there to have been effectively a concluded agreement, Mr Roberts would have said that there was a verbal response agreeing the terms but not yet a written response confirming them or even that in the absence of adverse comment from CEPAS it was assumed that an agreement had been concluded on the terms of the draft contract.

185. The third question is "*Differences between proposal and contract: are there any?"* The answer is "*Yes several*".

186. The fourth question is *"Available resources: are they sufficient?"* The answer is *"Yes could sign for this.*"

187. A further pointer to Ove Arup's thinking is contained in Mr Higson's fax to Mr Roberts of 6 February 1996 Ref/file 22. Mr Higson wrote *"SWGE (Mr Elliott) signed off verbally*" and "instructed to proceed at the meeting on 15 September 1995" ... "*I have no record of the subsequent meeting but continuing instruction came in the form of correspondence and verbal communication.*" He noted as part of the instructions and verbal communication *"We met with SWGE in Jakarta 7 to 9 December 1995".* Mr Higson of course wrote a note of that meeting although not of the meeting on 10 December.

188. Mr Roberts wrote to Mr Higson in a similar vein on 6 February 1996 at a time when Mr Elliott was acting in a way that Mr Roberts regarded as constituting a serious threat to Ove Arup's continued involvement in the Sual project.

189. In the letter, Mr Roberts acknowledged that "We started work on the Sual Power Station based on a signed Letter of intent signed by SWGE which referred to our tender documents as the basis for the future contract." He went on to note that within the last few days of February 6 1996 "*SWGE has separately told Rick Higson and John Roberts that he has not approved the concepts and that Arup is* ***"working at risk"*** and further that *"we should not be undertaking detailed design work at this stage"*. There is no mention of either Revision A or Revision B having been orally agreed. Nor is there any suggestion that at that stage Mr Roberts understood that Mr Elliott's silence could be taken as assent. On the contrary Mr Elliott's letter dated 6 February 1996 says explicitly that as far as Mr Elliott was concerned, Arup was working at risk. This appears to have been a negotiating ploy by Mr Elliott. The stance is not taken in this litigation by either side.

190. Under "*other background information relevant to the issue*", Mr Roberts said in his letter that he met with Mr Elliott over a three-day period in Jakarta in December and took Mr Elliott through the project element by element and confirmed the status of the design of each element in relation to the late finish programme. He also said that they went through the payment schedule and at the same meeting Mr Elliott authorised payment of Ove Arup's invoices for September, October and November 1995 "according to the payment schedule in our tender".

191. Mr Roberts concluded his letter by suggesting that at the end of the three-day session in Jakarta, Mr Elliott was fully aware of the progress of the work and the decisions required to maintain programme. He said that Ove Arup counselled that any further delay in making effective the GECA contract (the head contract with Alsthom) beyond mid January would adversely affect Ove Arup's work and hence the cost.

192. In neither Mr Higson's nor Mr Roberts' memo is it suggested that there was an agreement concluded at the Jakarta meeting based on the FIDIC contract, or that, as Mr Roberts now claims, there was a proposal put forward by Ove Arup which Mr Elliott was taken to have assented to by his silence. On the contrary, the case being advanced by Ove Arup is that the parties had an agreement based on the letter of intent and that Mr Elliott had "*signed off verbally*" and instructed Ove Arup to proceed at the meeting on 15 September 1995. There is no suggestion that a new contractual step was taken in Jakarta, but rather that details were being agreed in the context of a pre-existing contractual arrangement.

193. On 7 February 1996 the third version of the project quality plan was produced. It is an Ove Arup document said to be from Ove Arup & Partners (not OAPIL or OAPHK). This was a successor to plans developed on 15 August 1995 and 16 October 1995.

194. The plan showed relevant amendments. The first passage showing that the client had issued a letter of intent to the off-shore consortium partners has been amended to say that "CEPA Slipform Power System Limited has entered into a contract as of 1 February 1996 with GECA and this now forms the off-shore consortium partnership.

195. The relationship between the claimants and the defendants under the main contract remained unamended as follows: *"CEPA Slipform Power System Limited has issued a letter to Ove Arup and Partners International Limited expressing its intention to enter an agreement for the design for certain engineering works in connection with the Sual power station."*

196. Equally, paragraph 3.4 headed "Agreement with client" remains unamended.

"Form of agreement FIDIC

Client/Consultant Model Services Agreement

Part 1 standard conditions modified for SUAL project by Part 2 Conditions of Particular Application 2nd Edition 1991."

197. It then has these crucial words added to it *"Until the agreement comes into force Arup is providing the services on the basis of a letter of intent signed by the client dated 23 May 1995."*

198. On 9 February 1996 Mr Fox, listed as OAPHK e.g. in Change Order Request dated 29 February 1996, sent a memorandum to Mr Higson and Mr Roberts indicating that he thought that no agreement had been concluded in Jakarta. "Following discussions with the client last week JR (Mr Roberts) asked us to review his draft contract and revisit what we had undertaken to provide CEPAS at each stage of the project and highlight those we had not yet delivered."

199. On 22 February 1996 Ove Arup issued their formal proposal for supervision of further ground investigation.

200. On 23 February 1996 Mr Roberts wrote a covering letter on OAPHK notepaper enclosing their invoice for work done during the month of February 1996. As previously, it said that the amount requested reflected the Letter of Intent dated 23 May 1995 and the draft contract issued on 11 August 1995.

201. Later, the formulation changed to say that Ove Arup enclosed its invoice for services assessed at a particular date, "*the sum reflects progress to date as defined in the attached schedule*".

202. The question of technical site supervision which had been noted as something to be agreed in the future in the Letter of Intent and draft Revisions A and B was the subject of a formal proposal by Ove Arup on 29 February 1996.

203. On 8 March 1996 Ove Arup issued a revised proposal for site ground investigation. The previous version for client agreement had been prepared by Ove Arup on 22 February 1996. This in turn was a revision of the draft prepared in October 1995. This is an important document. One copy was signed by Mr Elliott as "OK" at his meeting with Mr Roberts on 15 and l6 March 1996.

204. I need to consider this document here in the context of whether the signing by Mr Elliott was an acknowledgement that he accepted Revision B of the contract which had been submitted to him. Later I will consider the document in relation to issues in relation to the agreement for site ground investigation itself.

205. The proposal from Ove Arup which was discussed by Mr Elliott and Mr Roberts on 16 March 1996 was headed "Agreement". It went on: *"The ground investigation work described in this document shall be governed by the Client/Consultant Model Services Agreement (the Main Agreement) entered into by CEPA Slipform Power System Limited (CEPAS) and Ove Arup and Partners International Limited (OAPIL) for the design of the civil engineering works of the Sual Power Station except as modified below."*

206. Clause 2 dealt with the method of payment. Clause 3 dealt with the scope of ground investigation work. Clause 4 dealt with the cost of the work already completed.

207. Clause 5 provided as follows:

"Task 3

We propose to provide one full-time geotechnical engineer to supervise the bore hole, trial pit and probe hole investigation. We believe that one person can supervise two drilling rigs simultaneously. However, if more than two rigs are in use at any one time an additional engineer may be required ...

We propose that Andrew (Talbot) be appointed as site engineer for a minimum of six months. As well as supervising the ground investigation work he would be able to fulfil the requirements of a site foundation engineer in such matters as approving ground conditions for foundations, confirming levels, dealing with specification and placement of backfill and checking slope stability for temporary works."

208. Clause 6 deals with the schedule of Rates for Task 3. Clause 7 deals with invoicing.

209. Clause 8 provides as follows:

"8. Variations Variations to the scope of the ground investigation services provided by Ove Arup and Partners International Limited shall be dealt with in accordance with item C3 of Appendix C of the Main Agreement."

210. Ove Arup say that the signature of Mr Elliott on the letter has a number of consequences. First they say that Mr Elliott agreed with OAPIL that it should proceed with the ground investigation work on the terms and conditions mentioned in the letter, namely, the terms in the Client Model Services Agreement Revision B which included the clauses of special application including the cap on liability. Secondly, they say that the reference to Revision B and the Model Services Agreement was an acknowledgement by Mr Elliott on behalf of CEPAS that the Model Services Agreement including the conditions of special application were in force for the design work.

211. In his oral evidence, Mr Roberts said that signing this document was consistent with the agreement which he understood Mr Elliott had made that FIDIC terms would be incorporated.

212. Mr Higson said in oral evidence: *"My understanding was that there was a development of an agreement and that that agreement became an understanding, an agreement between the two parties. I never had any doubt in my mind as to what Stewart Elliott understood as to what we had proposed to him. He would have been very clear if he had disagreed. I am absolutely convinced of that. We had worked before on a contract that had never been signed and we had settled the whole deal on a contract that had never been signed. So I was familiar with Stewart and signatures ... I never had any doubt he knew he was signing next to FIDIC."*

213. The evidence of both witnesses is that Mr Elliott understood that FIDIC terms already applied. Neither suggested that by signing the letter he was agreeing to something to which he had not previously agreed.

214. In his evidence Mr Elliott was asked by Mr Bartlett QC for Ove Arup first about the terms of the ground investigation work. He said that in putting his signature to the document he had agreed to the terms of the Client/Consultant Model Services Agreement. When asked whether this included the Conditions of Special Application, including the £4m cap, he said rather tentatively "*It would have to, yes*". He said that he believed that his signature was more than enough to bind the parties.

215. He was then asked on what terms Ove Arup was proceeding with the civil engineering works. He said that this was on the £3.75m contract in accordance with the agreement that was issued at the Jakarta meeting i.e. Revision B. This document was a proposed contract between OAPIL which Ove Arup's off-shore company and CEPAS which was the claimants' offshore company. He explained that the purpose of designating these two companies was that payments could be made in US dollars.

216. The accuracy of the answers of these three witnesses called to give evidence by Ove Arup must be tested against the documentary evidence of the events which followed.

217. The covering letter with the invoice for work for March 1996 was in the usual form. It was written on the OAPHK letterhead. It was signed by Mr Higson on behalf of Mr Roberts. The basis of the request was the Letter of Intent of 23 May 1995 and the draft contract issued on 11 August 1995.

218. The covering letter dated 19 April 1996 enclosing the April 1996 invoice was sent by Mr Higson on the letterhead of OAPIL. It said that "the amount requested reflected the Letter of Intent between CEPAS and Arup dated 23 May and the draft contract issued on 11 August 1995". In other words there was no change even after the supposed agreement which is said to have resulted from the meeting on 15 and 16 March 1996.

219. The Quality Assurance Department of Ove Arup continued to be very concerned at the lack of a signed formal contract. At the meeting of 16 April 1996 they insisted that Mr Fox should resolve the matter by the next audit on 13 June 1996.

220. There was a formal review form which was in fact signed by Mr Roberts and Mr Higson on 16 July 1996, ie after the June review meeting. The comments are important. The questions were the same as before. Question 1 asked if the client's brief was clearly defined. The answer was "OAP draft contract documents contains OAP interpretation of client brief (see 6 below)". Question 3 asked if there were any differences between the proposal and the contract. The answer was "Refer to JR memo 75027/02 dated 14 May 1995 and OAP letter Z1639/PA/RHIIVIF-3603 dated 23 May 1995".

221. Question 6 asked whether any other actions were required. The answer was *"Agree working programme with CEPAS. Obtain agreement to Draft Contract with CEPAS. Obtain agreement on revised schedule of payment with CEPAS"*. There is no reference on the review form to an oral agreement having been reached on the basis of Revision B or to an agreement having been reached at the meeting on 15 to 16 March 1996 evidenced by Mr Elliott's signature. I do not accept the suggestion by Ove Arup witnesses that such comments would have been irrelevant.

222. Thereafter, the pressure to obtain a signed agreement petered out. In his evidence Mr Higson agreed that the matter had gone to sleep. As Mr Higson put it, "*we were working quite merrily*".

223. Mr Fox commented on progress on contractual matters in a memorandum to Mr Higson and Mr Roberts dated 14 November 1996. He said that the three outstanding actions remained.

224. He went on: *"I consider that there has been no progress in getting the contract agreed and signed and limited success in achieving a full co-ordinated civil/M&E programme (despite continually pushing our own design programmes under CEPAS nose). Also the original payment schedule has now been clearly refuted by the client and the requested revised schedule dismissed. In their place we now have a percentage complete payment release system that appears to be accepted by the client although dates and milestones for gross profit payment are not (I believe) fully defined or agreed."*

225. There were further proposals that the parties should agree procedures for onsite document control design of the ash disposal area and ground water supply. The draft agreements in relation to these matters referred to those agreements being governed by the Client/Consultant Model Services Agreement between CEPAS and OAPIL described as "the Main Agreement".

226. The contractual position was discussed by Ove Arup on 13 December 1996 at a meeting of its Commercial Review Panel. It was attended by, amongst others, by Mr Roberts as the commercial manager and Mr Fox as the assistant projects manager reporting to Mr Higson. The meeting had before it a review pack prepared by Mr Roberts.

227. The perception of the contract of those at the meeting was set out at paragraph 3 of the note of the meeting as follows:

Contract

"The OAPIL offer letter was signed by Stewart Elliott on behalf of CEPA Slipform. There is no detailed signed contract although a draft FIDIC contract has been presented to the clients; this includes detailed scope. Change procedures and scope of services are detailed in letters and other documents which are cross referenced to the offer letter."

228. This was confirmed by Mr Roberts in evidence to refer to the Letter of Intent. *"Accordingly, it is believed that there is a contract in law evidenced by performance and payment. It was noted that the client will normally sign off the concept design at each stage of the development."*

229. In Ove Arup's minutes of the Sual Commercial Review Panel of 13 December 1996 they continue to refer to 23 May 1995 letter of intent and to state that "*There is no detailed signed contract. We are still operating under the letter of intent signed by Stuart Elliott in September 1995"*. It is not suggested that the draft contract was agreed orally but not in writing.

230. In April 1997 two of the foundations at Boiler House No 1 of the plant failed resulting in substantial damage. This gave the Conditions of Special Application a practical relevance.

231. Variations were authorised by a series of change requests addressed to Mr Elliott and signed by Mr Eller. There had been 75 change requests by May 1997 and they followed the procedures which had been set out in the early days of the contract in the autumn of 1995.

232. In July 1997 the legal division of Southern, in the process of taking over the contract having acquired CEPAS, asked for a copy of the 1995 draft contract so that they could review it. Mr Higson said in a memo to Mr Fox and Mr Roberts of 14 July 1997 that he could not find it. *"I find that Rev B (see attached) of our draft issued in December 1995 does not exist in HK unless it is in one of JR's (Mr Roberts) rogue files."*

233. Mr Fox said in an e-mail that he thought that Revision A was the last issue. It is fair to say that Revision B was quickly found.

234. There was a meeting between Mr Roberts and Mr McManus of CEPAS who was briefly involved in the problem. The meeting was referred to in Mr Roberts's letter dated 20 October 1997.

235. Mr Roberts was asked to provide a brief summary to the background of the contract in order that Mr McManus could obtain an understanding of the commercial status of the contract. Under item three he said:

"3. A copy of the Letter of Intent signed by CEPAS and Arup together with copies of the relevant programmes taken from Arup's final submission and unsigned agreement. I understand that Rick Higson has issued you with a copy of the Agreement."

236. The letter was accompanied by a summary, fee account. The notes to accompany the summary fee account noted that the agreed lump sum for design was £3,750,000 as stated in the Letter of Intent. It explained that the reduction in price from the submission price of £4,334,615 was achieved by reducing the scope of the work. The notes observed that these changes were incorporated in the draft agreement which was issued to CEPAS on 11 August 1995 and reissued with minor revisions following discussions on 15 November 1995. *"This agreement has not been signed."* There was no reference to any agreement or discussions in February-March 1996.

237. The letter claimed that invoices had been issued in accordance with two methods of assessment since September 1995 but that the principle of neutral funding of Arup costs raised in the Letter of Intent and embodied in the agreement had not been maintained. Arup claimed the interest due for late payment.

238. There were clearly ongoing discussions between the parties, Mr Dy in the Contract Administration Department at CEPAS wrote a letter dated 7 January 1998. The letter is not before me, but it provoked a fax from Mr Roberts on Ove Arup and Partners' notepaper.

239. Mr Roberts noted that the invoice for the balance of £3.75m had been approved. On the status of the contract he commented as follows: *"I agree with your sentiments regarding the status of our contract. Although there is a letter signed by CEPA Slipform Power System Limited cross referring to the proposal which formed the basis of the draft contract I think it would be prudent to conclude the formal arrangements even though the matter has largely become a fait accompli."*

240. Mr Reynolds, as General Counsel of Southern Company, wrote to Mr Roberts on 22 January 1998 with a proposal for resolving the dispute not resulting from the failure of the foundations of the boiler house, but in relation to the outstanding fees payable for the design of the civil engineering works and for site supervision. He proposed that CEPAS should make a final payment of USD $800,000 to Ove Arup. He also proposed that CEPAS and Ove Arup should execute an agreement in a form similar to the earlier agreement for the Pagbilao project. This was not based on the FIDIC form.

241. Mr Roberts replied on the 26 January 1998 signing himself *"Arup Energy"*. He said that:

"The background is that a letter of intent was signed by CEPAS on 29 May 1995 for our work on Sual. The letter of intent refers to our proposal Rev E dated 11 April 1995. We started work at the beginning of June 1995. Contract documents were prepared based on our proposal and issued as Rev B on 15 November 1995. Both parties have generally been working to the spirit of this (unsigned) contract ever since.

May I ask you to review this document which I consider the appropriate basis for our work on Sual."

242. Mr Reynolds replied on 2 February 1998.

"I view the FIDIC form proposed as far too favourable to the consultant and also need to restate our objections to some specific terms. The actual consistent practice between Ove Arup and CEPA (and prior to that Hopewell) was the form of contract used in Pagbilao and I want to continue it.

Ove Arup has worked on four or five jobs on the basis of the type of form used. Let me ask you the reasons why you want to change to FIDIC."

243. This fax was followed by Mr Reynolds's letter of 13 February 1998. In it he disputed that the FIDIC Client/Consultant Model Services Agreement was the basis for the provision of design services by Ove Arup.

244. It is clear that there was at this stage a possibility of negotiation. Mr Roberts wrote to Mr Reynolds on l4 February 1998 indicating that they were prepared to discuss the possibility of adapting the Pagbilao contract in a modified form even at that late stage. Mr Higson met Mr Reynolds soon afterwards. There were ongoing attempts to settle the contractual dispute. They included attempting to agree a model contract to be used in relation to the Sual project and also to govern future projects and the future relationship between the parties.

245. On 16 February 1998 Mr Higson sent Mr Roberts an e-mail reporting on his meeting with Mr Reynolds. Ove Arup wished to be paid the balance of the £3.75m balance which had been the agreed price since the letter of intent. They then wished to address the further sum due under the Change Requests.

246. There was a discussion about the FIDIC form of contract which Mr Reynolds said that Southern did not favour. There was also a discussion about whether the way out of the difficulty was to develop jointly a form of agreement which could be used in future contracts but also retrospectively on the Sual contract.

247. In talking about future tactics, Mr Higson said: *"You will have to tell me whether we are going to settle down into the FIDIC trenches if we can't resolve with Southern. I recognise that in principle as well as in law, we probably already*

have a contract (I actually mentioned this and both lawyers remain silent) (ie Mr Reynolds and Ms Baster) but we are in the early days of the Southern relationship and I am thinking of all that lovely future work we might jeopardise if we irritate the wrong man."

248. The Issues I shall deal with Issues one and two in reverse order. I shall then deal with Issue five before turning to Issues three and four.

Issue 2

249. The issue is *"did the terms of the contract include the FIDIC terms with a five-year cap on duration of liability and a £4m cap on amount of recovery?"* Since I have not yet made any findings on the parties I shall continue to refer to them as CEPAS and Ove Arup. Clearly the time when the contract is made between the parties is relevant to the identity of the parties which is why I am considering that issue later within Issue 1.

250. The defendants, rightly, no longer pursue their contention that the letter of intent signed by Mr Elliott did not constitute a binding agreement between the parties. It clearly did. The defendants do contend that it was superseded by Revision B either agreed in Jakarta in December 1995 or later.

251. The terms of the letter of intent comprised the offer, Revision C, which sets out the scope of the works, the design principles, staffing and a basis for fees. The overall fee which Mr Elliott, as a business man, rightly regarded as of paramount importance was agreed at £3 75m. It was also agreed that this should be paid in the equivalent sum in US dollars. On 11 and 12 May 1995, a work programme had been agreed. It was also agreed that the provision of technical and site supervision would be undertaken by a joint team. It was specifically agreed that the parties would seek to agree a gainshare agreement and that Ove Arup would put forward a proposal in this regard, but that the total fee would remain at £3.75m irrespective of whether or not a schedule of fees, which included gainshare, could be agreed in due course. In Ove Arup's final submissions Mr Bartlett QC agreed that *"The agreement embodied in the Letter of Intent dated 23 May 1995 was made orally at a meeting on or about 12 May when Mr Elliott and Mr Roberts shook hands on a fee of £3.75m"*. This agreement followed the pattern of past contracts. There were no restrictive clauses adverse to the claimants and none had been raised in negotiation.

252. The question of whether the agreement should be subject to FIDIC terms was not discussed. In particular, the questions of a recovery cap and a limitation on the time within which a claim could be made were not discussed. These were terms which would have been disadvantageous to CEPAS. Mr Roberts had advised at the last moment that no reference even to a FIDIC type contract should be included in Ove Arup's proposal. Mr Higson was content with this, not least because he had not previously worked with the FIDIC form of contract. There could be no date for completion of the work because the main contract, within which Ove Arup services were to be provided, was not signed and there was no date for the start of the work under the main contract.

253. It was agreed that Ove Arup would propose work scope, payment mechanism and contractual arrangements in greater detail in a more detailed draft contract. Such terms could form part of a new contract to be negotiated between the parties. I comment that they could also be agreed within the framework of the agreement evidenced by the Letter of Intent.

254. Work on a more detailed draft contract was undertaken by Ove Arup in London in June 1995. Mr Bramhall sent a draft to Mr Roberts on 21 June 1995 in which he said he was using the FIDIC form as a basis for his drafting. It was not until July 1995 that a proposal appeared within the Ove Arup internal draft offering a duration of liability limited to five years and a cap on compensation of £4m sterling. A later draft inserted the more generous figures of £5m and 10 years. The completion date for the design was then proposed to be 2 June 1997.

255. On 11 August 1995 Ove Arup proposed Revision A. The parties are now agreed that the document had no contractual effect. I find that it was shown to Mr Elliott and Mr Givelin, his quantity surveyor and advisor on the detail of contracts, at the meeting on 11 August 1995. Neither Mr Elliott nor Mr Givelin had seen the draft in advance of the meeting. I find that, in general, Mr Elliott was prepared to agree the terms of the contract (which in matters important to him were a reiteration of the Letter of Intent), but this was subject to a detailed examination of the proposed terms by Mr Givelin. I find that in this very limited sense Mr Elliott signed off on the contract on 11 August 1995 subject to a final agreement.

256. It was clear from the draft, and I so find, that in order for the agreement incorporating the FIDIC Form to be effective, the pages that were blank were required to be completed and signed by the parties. I am not persuaded on the balance of probabilities that Mr Elliott was taken through and agreed in principle the provisions of particular application relating to the cap on recovery, the length of time for duration of liability or the completion date. The problem relating to the completion date was that a date had not been agreed for the start of the work under the main contract.

257. Mr Givelin's letter of advice to Mr Elliott two days after the meeting is important. It starts by explaining in simple language that the proposed contract is modelled on FIDIC. This would be a surprising formulation if the matter had been explained in detail to Mr Elliott at the meeting two days earlier. Mr Givelin also raised specific matters which should be the subject of further discussion, although the right to payment in US dollars had already been agreed in May 1995.

258. Ove Arup's management review meeting on 5 September 1995 acknowledged that the Ove Arup draft was a subject to a review by Mr Givelin. It envisaged that if detailed negotiation ensued, it would be handled by Mr

Bramhall, the author of the draft, but otherwise not involved in the running of the contract. This would in practice entail the two quantity surveyors one from each side getting together and agreeing the detail of the contract.

259. There was no further reaction from Mr Elliott or Mr Givelin to Ove Arup's proposal and Ove Arup proposed that Mr Elliott and Mr Roberts should have a further meeting on about 11 October 1995. That meeting does not appear to have taken place. Meanwhile discussions took place on the working programme and resources.

260. There was no immediate contractual difficulty. As Mr Roberts acknowledged in an internal memorandum on 5 October 1995, Ove Arup would continue, and were perfectly able to continue to work to the Late Finish Programme until another programme was agreed between CEPAS and GECA as part of the main contract. The parties were also able to agree a mechanism for dealing with change order requests -- see Mr Higson's letter to Mr Eller of the claimants on 17 November 1995.

261. Also on 17 November 1995 Mr Higson sent Mr Roberts an invoice for design work reflecting the Letter of Intent and the draft contract Revision A. The invoice was paid and the method of payment was incorporated into the contract. I am not sure whether it represented a significant departure from the Letter of Intent, but insofar as it did, it represented a variation of the terms agreed in the Letter of Intent and not the incorporation into the agreement of the terms of Revision A.

262. On 6 December 1995, a few days before their meeting in Jakarta from 8 to 10 December 1995, Mr Roberts sent Revision B to Mr Elliott. It is clear that the meeting was taken up with practical detail relating to the work which had to be carried out under the contract. It is not until item 19 of the note of the meeting that the contractual question was raised at all. It is said, and this may well have been the case, that it was not discussed until 10 December 1995 after Mr Higson had left the meeting. There is no direct reference to Revision B having been discussed at all. Although I find that there may have been a general discussion about Revision B, I am not satisfied on the evidence that the conditions of specific application were discussed in any detail.

263. As far as the main terms of business are concerned, Mr Elliott thought he had signed off the contract in May 1995. The item, which was more than a detail to him and which was new, was the payment schedule which Mr Elliott did not agree and was to be the subject of further discussion.

264. There is no suggestion that Mr Roberts, who was a very experienced contracts manager, presented Revision B for Mr Elliott's signature. If there had been an agreement at the meeting to Revision B, Mr Roberts would have known about it and would have referred to it in correspondence. If it had been subject to the formality of the FIDIC Form being filled in and signed, he or his legal department would have written to that effect and insisted that the document should be executed.

265. Also, if the discussion had taken place and an agreement had been reached after Mr Higson had left the meeting, the first thing Mr Roberts would have done would have been to have communicated with Mr Higson to tell him that agreement had finally been reached. It would have been important for Mr Higson, as the contracts manager in Hong Kong, and the person who had most dealings with Mr Elliott and others from the claimants, to know precisely what the contractual position was.

266. It may well be that the conclusion of more detailed contractual arrangements as envisaged by the Letter of Intent was not a pressing matter for two reasons, first the main contract between GECA and CEPAS had not been made effective; and secondly the agreement on points of detail could be fitted easily into the framework of the Letter of Intent which had been agreed. This approach was consistent with the way in which CEPAS and Ove Arup had operated earlier contracts.

267. Following the 10 December 1995 meeting, Mr Higson wrote a covering letter on 19 December 1995 on Mr Roberts's behalf, enclosing an invoice for work done which said that the amount requested reflected the letter of intent and the draft contract issued on 11 August 1995. This formula was followed in the covering letter dated 16 January 1996. If an agreement had been reached in the terms of Revision B at the Jakarta meeting, it is inconceivable that Mr Higson would not have known about it, that it would not have been referred to in correspondence, and that the letter accompanying the invoice would not have been amended accordingly.

268. This view is reinforced by Mr Roberts's letter to Mr Elliott dated 26 January 1996. This refers to discussions in Jakarta about the payment schedule and the need to align the programme with the GECA contract with the consortium. There is no reference to Revision B having been agreed. Mr Elliott in his letter only remembers the schedule of payments being discussed within the context of the contract price of £3.75m. He said he was not concerned about it because it did not change the price.

269. The quality control procedure is also relevant. It makes no reference to Revision B having been agreed. If it had been agreed and awaited the formality of a signature, I have no doubt that Mr Roberts would have answered the question on the form accordingly.

270. An even greater incentive to say that Revision B had been agreed if it had occurred, came in February 1996 when Mr Elliott was being difficult about a number of matters, and told Ove Arup that they were working at risk.

271. The view that there was no current agreement based on Revision B in February 1996 is also confirmed by the third version of the Project Quality Plan of 7 February 1996, the letter of Mr Fox of 9 February 1996 and the covering letter from Mr Roberts of 23 February 1996.

272. It is accepted by the defendants that after 1 February 1996 there were no further discussions on the Revision B terms except on the timing of payments. The defendants say that Mr Roberts understood from Mr Elliott's style of working that, since he did not object to the Revision B terms at the Jakarta meeting there was a contract in place on the Revision B terms. Both parties, it is said, regarded the Revision B contract as binding upon them. That included the specific terms placing a cap on the recovery of damages of £4m and a reduced limitation period of five years.

273. I observe that it is now agreed that the Letter of Intent together with the scope of works, design principles, staffing and basis of fees constituted a binding contract.

274. The payments schedule discussed in Jakarta could in principle either form part of this agreement or be part of the new agreement embodied in Revision B which replaced the previous agreement as the letter of intent itself envisaged.

275. The defendants say that in fact since the FIDIC terms of special application were agreed in principle in August 1995 there was no need for them to be specifically agreed again in December 1995. It was enough that they were not objected to.

276. The claimants say that there was no agreement in Jakarta because there was no agreement on a payment schedule. The parties agreed that Ove Arup would go away and work up a payment schedule. Ove Arup came back with a proposal in a letter dated 26 January 1996 but it was never agreed.

277. Does the subsequent conduct of the parties indicate that they acted on the basis of a common underlying assumption that Revision B had been agreed? Despite the fact that the formalities required by the document itself had not been observed, does this matter?

278. The following factors are relevant:

(a) The invoices sent by Ove Arup subsequent to December 1995 and paid by the claimants make no reference to Revision B.

(b) The formal contract review form signed by Mr Roberts and Mr Higson on 16 July 1996 after the review meeting made no mention of Revision B.

(c) Ove Arup's contract review meeting on 13 December 1996, attended by Mr Roberts, Commercial Manager, and by Mr Fox as the Assistant Project Manager reporting to Mr Higson, had before it a review pack prepared by Mr Roberts which said "there is no detailed signed contract although a draft FIDIC contract has been presented to the client". This opinion is also the conclusion of the Sual Commercial Review Panel. If in fact there had been a clear oral agreement Mr Roberts, as an experienced contracts manager would have been the first to say so, indeed he would have been the first to have written to the claimants immediately if such an agreement had taken place to confirm in writing what had been agreed orally. This never happened.

279. Once the parties were in dispute and the conditions of special application and in particular the £4m cap became important, Mr Roberts asserted the relevance of Revision B. Even then on 26 January 1998 in a letter to Mr Reynolds he was unable quite to make the assertion unequivocally. After referring to the letter of intent and the fact that work started at the beginning of June 1995 he went on to say only that "contract documents were prepared based on our proposal and issued as Rev B on 15 November 1995. Both parties have generally (emphasis added) been working to the spirit (emphasis added) of this unsigned contract ever since".

280. It does not seem to me that even if the claimants were proved to have been working generally to the spirit of the unsigned contract that is sufficient to amount to assent to terms which substantially curtail the claimants rights to bring proceedings and reduce the amount of damages which they can recover. Nor am I satisfied that the parties acted in a way which related unequivocally to Revision B rather than to an agreement based on the Letter of Intent.

281. I also conclude that the form of procedure required under the FIDIC Form was more than a mere technicality. It was intended to ensure that a party which was having its rights restricted in terms of special application would demonstrate that it agreed specifically to such terms.

282. Although I accept that in a suitable factual context, a party's non-objection may be taken to indicate acceptance, there was no such acceptance in this case.

283. I answer Issue 2 by saying that the agreement between the parties was formed on or about 29 May 1995 by the signing of the letter of intent. Its terms did not include FIDIC terms with a five-year cap on liability, and a £4m cap on the amount of recovery.

284. Although it has not been argued in detail, if I am wrong about that I should have concluded that the parties were working to an agreement within the spirit of Revision B. ie that in general the FIDIC form applied, but not the terms of specific application including the five-year limitation and the cap on the amount of recovery, the agreement of which was not a necessary incidental to working within the spirit of the FIDIC contract form. In order for these terms to apply they must have been specifically agreed."

Issue 1: Who were the parties to the contract under which OAPIL and/or OAPHK are responsible for design of the Unit 1 boiler foundations?

285. Having concluded that the relevant contract consisted of the Letter of Intent, the offer of Revision C, the design principles, staffing and basis for fees together with payment schedules within the agreed price of £3.75m and

programme schedules which were subsequently agreed I can now consider who were the parties to the agreement made on or about 29 May 1995.

286. The claimants' case is that responsibility for the design and construction of the power station was split between the supply contract to which MACPL/CEPAS was a party and the construction contract to which Sual was a party. Sual had been set up for this purpose. Both companies, as the defendants knew, were until January 1997 part of the Hopewell group of companies. Under the terms of the construction contract, agreed on 9 January 1995, Sual along with other consortium members assumed responsibility for the construction of the power station. Mr Elliott was the managing director of both companies.

287. It is said that the works which Ove Arup undertook in connection with the design of the Sual project was work which MAPCL/CEPAS required in order to enable Sual to carry out the civil works. The work on site was within the work scope of the construction contract.

288. In evidence Mr Higson when it was suggested to him that in his own mind he made no distinction between CEPAS and Sual said: *"I did know I did not have a contract with SCC (Sual) I know that the contracts we put forward were to CEPAS. I worked with both parties. I had a working relationship with SCC."*

289. He also said that he knew that the designs which Ove Arup were undertaking were for use by SCC who were the contractors on site. It was put to him directly that he dealt with SCC on the basis that they were at all times liable for Ove Arup's fees. He replied *"absolutely not"*.

290. Later in his evidence Mr Higson emphasised that Ove Arup did not have a site supervision role at the time of the letter of intent or indeed at the time of Revision A and Revision B. The site supervision might have implied a contract with the party which had had the responsibility on site namely Sual.

291. The defendants say that the contractual structure for the Sual project divided the companies carrying out the project into on-shore and off-shore companies. This was done for tax reasons. CEPAS was the off-shore company. Sual was the on-shore company. They note that the only letter in the bundle on Sual notepaper was a reply to a letter written by Ove Arup to CEPAS.

292. On the basis of my primary finding that the contract was formed by the letter of intent and various specific agreements built into it, I have to consider the question of the parties objectively. There is no real suggestion in any of the documents either at the time when the agreement was made, that is the time of the letter of intent, or indeed later, that Sual was to be a contracting party. In these circumstances it seems to me to be clear that CEPAS alone is the contracting party on behalf of the claimants.

293. In relation to Ove Arup, the claimants say that historically the Hopewell Group had contracted with OAPHK. The work on the project was to be undertaken first in the Hong Kong office of OAPHK and thereafter in the Putney office. This office was the office of OAPIL. A great deal of correspondence also went out from the Putney office under the heading of Ove Arup or Ove Arup Limited which gave no indication of whether the contracting party was International or some other company in the group. Revision C and the letter dated 23 May 1995 was sent by OAPHK. There are numerous examples of correspondence during the project on OAPHK notepaper and also on OAPIL notepaper. For much of the time the notepaper was headed either Ove Arup or even Arup. This may well have been at the insistence of the public relations department.

294. It is said by Ove Arup that whenever OAPHK notepaper was used this was a mistake. They say it was clear that the intention was to contract with OAPIL. Mr Roberts from London was in charge of the project. The off-shore company was intended to be used since the basic currency was pounds sterling converted into US dollars and English law was to apply.

295. As far as CEPAS was concerned, the proposal of 11 April 1995 was made by OAPHK. The commercial proposal was for OAPHK to be paid in three phases based on pounds sterling. The meetings on 20/21 April 1995 and 12 May 1995 were attended by Ove Arup representatives employed by both OAPHK and OAPIL. The Letter of Intent was sent by OAPHK following the meeting of 12 May 1995. Thereafter Ove Arup were entirely careless as to which notepaper was used.

296. I conclude that, looking at matters objectively, the contract was made between CEPAS and OAPHK and OAPIL. It is agreed by the claimants that if Revision B is incorporated into the contract the parties are CEPAS and OAPIL.

297. It is convenient at this point to deal with Issue 5.

Issue 5

298. If the FIDIC terms applied, was the claimant's letter dated 2 May 2001 a formal claim within the meaning of clause 17?

299. On the basis of my findings this question does not arise. I have agreed to answer it in case this matter goes further.

300. Clause 17 of the FIDIC conditions provides: *"Neither the client nor the consultant shall be considered liable for any loss or damage resulting from any occurrence unless a claim is formally made on him before the expiry of the relevant period stated in part II or such earlier date as may be prescribed by law."*

301. Clause 41 taken with the Conditions of Particular Application provides that notices are to be effective from receipt at the offices of Ove Arup and Partners International Limited, 13 Fitzroy Street, London W1.

302. Clause 43 provides that: *"Subject to clause 17 any claim for loss or damage arising out of a breach or termination of an agreement shall be agreed between the client and consultant or failing agreement shall be referred to arbitration in accordance with clause 44."*

303. By a letter dated 2l May 2001 Mr Reynolds, General Counsel of Southern wrote to Ove Arup in the following terms:

"Dear Sirs,

Sual Power Station

We refer to negotiations which have been progressing with a respect to claims arising from the construction of the Sual Power Station namely:

. Claims arising from the failure of the boiler foundation; and

. Claims arising from the failure of the cooling water outfall channel.

We note receipt of your letter dated 27 April 2001 (without prejudice) in which Ove Arup continue to deny liability. In those circumstances and also given a specific request from John Roberts we have in this letter formally set out our claims relating to both the above matters."

304. There followed details of the claims in respect of the failure of the boiler foundations in the sum of US$66.5m. Theme follows a claim arising from the alleged failure of the cooling water outfall channel in the sum of a minimum amount of US$6m.

305. The letter ends.

"3. Summary MAP confirms that it is claiming total damages from Ove Arup in the amount of US$72.5 million and hereby demands payment of that amount."

306. The claimants say that this complies with the requirements of clause 17. The defendants say that the letter is insufficient because under English law the formal making of a claim is done not by ordinary letter but either by an arbitration notice or the issue of a claim form. On the proper reading of the clauses the defendants say that the steps required under the contract are:

"1. a claim (which need not be put forward with any formality);

2. an attempt by the parties to agree; and

3. failing agreement, a reference to arbitration, ie a formal claim.

307. Clause 43 is said specifically to be subject to clause 17. In my view this means what it says. Clause 43 is to be considered separately from and subject to clause 17. Clause 17 prescribes the steps required to make a claim. Taken with clause 41, to comply with clause 17 the claimants are required to serve a formal claim on OAPIL at their registered offices in London. The clause 17 does not prescribe (as it could have been done if drafted differently) that the claim must be either by arbitration notice or by claim form. It merely requires notification of a formal claim. In my view this purpose is achieved by the claimants' letter dated 2 May 2001 which uses the words "formally set out claims". Reading the letter as a whole, it complies with the requirements of clause 17.

308. I therefore answer this question Yes.

Issue 3

309. Issues 3 and 4 relate to the site ground investigation proposals.

310. Issue 3 is as follows: *"In so far as theme was a contract under which OAPIL and/or OAPHK had some obligation in respect of foundation excavations approving ground conditions and/or inspecting of formations for the Unit 1 boiler foundations, who were the parties to that contract?"*

311. The question can be dealt with shortly on the basis of the submissions which have been made. The parties were clearly CEPAS and OAPIL. The parties do not really contest this conclusion.

Issue 4

312. Issue 4 has been the subject of late amendment. After the hearing I received a written request that the issue should be redrafted. I agreed to do so only if there was a broad agreement between the parties. There has been such a broad agreement. I have therefore reformulated Issue 4 as follows:

313. 4(a) On the true construction of Paragraph 5 of the ground investigation proposal dated 8 March 1996 and signed by Mr Elliott (the site work agreement) was Ove Arup

(i) as the claimants contend, under an obligation to provide a site engineer who would fulfil the requirements of a site foundation engineer in such matters as approving ground conditions for foundations? Or

(ii) as the defendants contend, under an obligation to provide for the supervision of the ground investigation work an engineer who was also competent to fulfil the requirements of a site foundation engineer in such matters as approving ground conditions for foundations?

314 (b) Was the site work agreement part of the parties' prior contract for design purposes or was it a separate agreement? Are the parties correct in concluding that it was a separate agreement?

315. (c) Was the site work agreement varied in the manner or partly in the manner alleged in paragraph 43 of the me-amended defence so that Ove Arup was under an obligation to inspect specific formations subject to notice being given to Ove Arup by CEPAS or being procured by CEPAS from NSBC?

316. (d) Was the site work agreement subject (whether by agreement or by estoppel and/or by waiver) to the FIDIC conditions including the conditions of particular application contained in Revision B of the draft contract dated 15 November 1995?

317. I have already outlined the facts in some detail in the course of the main narrative. Ove Arup became concerned as the date for the start of work on the main contract came closer, that there should be a written agreement to support the ground investigation which would take place on site.

318. An early draft of the proposal had been prepared by Mr Roberts in October 1995 after Revision A had been submitted to the claimants. The proposal was re-issued as amended on 22 February 1996. It was, in essence, that Ove Arup should provide two geotechnical engineers to supervise the ground investigation which was being undertaken by Geotechnics Philippines Inc.

319. The proposal was discussed at a meeting in Hong Kong at the end of February 1996. Mr Higson said in evidence that he is sure he discussed the proposal with Mr Eller. After discussion Ove Arup had agreed to provide one engineer but with the practical consequence that, on what was a very large site, the engineer would not necessarily be physically able to supervise everything if a number of investigations on different parts of the site were taking place at the same time.

320. This led to the formal proposal which was discussed with Mr Elliott on 7 and 8 March 1996. Paragraph 3 of the letter sets out the scope of the ground investigation work comprising three tasks:

"Task 1 -- a combined geophysical and hydro-graphic off-shore investigation (now completed).

Task 2 -- an initial trial pit and probe investigation of critical areas such as the pump house and chimney (now completed).

Task 3 -- a bore hole, probe and trial pit ground investigation of the whole site including shore facilities. A limited amount of laboratory testing will be undertaken on samples recovered from the site investigation in relation to tasks 2 and 3 of the scope. The results will be summarised in an interpretive report containing recommended design values. It is assumed that these reports will provide both CEPAS and GECA with all necessary information to complete the geotechnical design of the SUAL power station."

321. Under Task 3 there is a paragraph as follows: *"GECA has requested that CEPA undertake a geotechnical ground investigation in the area of each turbine block. The scope of the request has not yet been defined. We await CEPAS instructions."*

322. The proposed qualifications and identity of the employer of Ove Arup are set out in a further paragraph:

5. Task 3 -- We propose to provide one full-time geotechnical engineer to supervise the borehole, trial pit and probe hole investigation. We believe that one person can supervise two drilling rigs simultaneously. However, if more than two rigs are in use at one time an additional engineer may be required.

The engineer proposed is Andrew Talbot; his curriculum vitae is attached.

We propose that Andrew be appointed as site engineer for a minimum of six months. He would be able to fulfil the requirements of a site foundation engineer in such matters as approving ground conditions for foundations, confirming levels, dealing with specification and placement of back fill and checking slope stability for temporary works. We have assumed that the geotechnical engineer will work 55-60 hours per week."

323. The letter deals with schedules of rates for Task 3 and invoicing. It concludes as follows:

"8. Variations--Variations to the scope of the ground investigation services provided by Ove Arup and Partners International Limited shall be dealt with in accordance with Item C3 of Appendix C of the Main Agreement."

324. It was this letter which Mr Elliott endorsed "O.K. S. Elliott" at a meeting with Mr Roberts and Mr Higson on 15 or 16 March 1996.

325. By a paragraph 43 of the reamended defence Ove Arup contends that the ground investigation agreement was varied whereby "the geotechnical engineer could inspect specific formations subject to notice being provided to Arup by CEPAS from NSBC that a specific foundation was ready for inspection."

326. I can deal with these matters quite shortly, it seems to me that on the plain words of the letter Ove Arup was, as the defendants contend, under an obligation to provide for the supervision of the ground investigation work an engineer who was also competent to fulfil the requirements of a site foundation engineer in such matters as approving ground conditions for foundations. The scope of the work is set out solely in paragraph 3 and this in my view clearly supports the defendants' contention.

327. I therefore answer Question 4a(i) No and 4a(ii) Yes.

328. With regard to Question 4(b), I agree with the parties' contention that the site work agreement was a separate agreement to the contract for design services.

329. In relation to question 4(c) I decline to answer this question which relates not to the document itself, that is the signed proposal dated 8 March 1996, but to the subsequent conduct of the parties, because I simply do not have enough information in order to make a proper and informed conclusion in relation to that matter.

330. Finally, in relation to Question 4(d) I have set out at paragraphs 195 and following, the arguments relating to the incorporation of the terms of Revision B in the main agreement between the parties. I have concluded that the terms of Revision B were not incorporated in the Contract between the parties.

331. The proposal discussed with Mr Elliott on 15 and 16 March 1996 makes a specific reference to the ground investigation work being governed by the Client/Consultant Model Services Agreement (the main agreement) which had been entered into between CEPAS and OAPIL.

332. I have concluded that in fact this was not the agreement which the parties had entered into. If it had constituted the agreement which Mr Elliott had entered into on behalf of CEPAS I agree with Mr Elliott's comment that CEPAS would have been bound by the terms of Revision B. They were not. I conclude that the words were intended to convey that the terms of the site ground investigation would be consistent with those of the main agreement.

333. Therefore I find that the site work agreement (otherwise referred to as the site ground investigation agreement) was not subject to the FIDIC conditions including the Conditions of particular application contained in Revision B of the draft Contract dated 15 November 1995.

Counsel for claimant: Mr Andrew White QC Instructed by: Masons Solicitors.
Counsel for defendant: Mr Andrew Bartlett QC Instructed by: Beale & Co Solicitors.