

HH Judge Thornton QC: TCC. 10th January 2006

1. Introduction

1. Plymouth and South Devon Co-Operative Society Ltd changed its name to Plymouth & South West Co-Operative Society Ltd ("Plymco") on 18 October 1999. It was founded in 1860 with the object of carrying out the business of a general retailer. Architecture, Structure & Management Ltd ("ASM") is a limited company carrying on the business of professional architects. The practice was formed in about February 1985 and in about 1988 it promoted the formation of a limited company carrying on the business of professional quantity surveyors, QSM Ltd ("QSM"), which provides its services principally to ASM. Plymco's flagship store, Co-operative House, is located at Derry's Cross in the centre of Plymouth and ASM and QSM are based in Bristol.
2. This action arises out of the redevelopment of Derry's Cross in the 1990s. ASM was the architect for this redevelopment project and although it was successfully completed, that completion was at considerable cost to Plymco since it considers that there was an overspend of at least £2 million in excess of Plymco's estimate of what the works should have cost, namely about £6.3 million. Plymco alleges that much of that additional cost could and should have been avoided had ASM performed its services professionally and with reasonable skill and care, particularly in the way it obtained tenders, arranged for the terms of the building contract and monitored the cost and operated cost control procedures whilst work progressed. Plymco now claims much of that alleged overspend as damages for breach of contract arising out of ASM's alleged negligent performance of its professional services.
3. The procedural history of this action before and during the trial has been unduly complex and prolonged. The trial itself took thirteen working days but was extended over two periods, the first in March 2005 over six days and the second in September 2005 over seven days. The two-stage trial with a six-month gap between the stages is explained by the need that arose to adjourn the trial after the fifth day so as to enable both parties to complete their investigations and pleadings. By the time that those steps had been completed, the earliest convenient return date was nearly six months after the trial had been adjourned.

2. Factual Background

4. **Plymco.** Plymco was founded in 1860 by ten tradesmen and by 2002 it had grown to a membership of 138,000. At the date of the trial, Plymco had 50 food stores, 26 funeral stores and chapels of rest, 1 department store, 3 out of town durable non-food outlets, 5 hairdressing salons, 2 other small non-food outlets and associated warehousing. In 1996, it had the same number of food stores but only 9 funeral stores and 2 out of town durable non-food outlets. The Board of Plymco throughout the relevant period were lay members who acted as non-executive directors. The company was run, on a day to day basis, by a Management Executive who reported with recommendations to the Board on a regular basis. Membership of the Management Executive whilst the Co-Operative House project was being planned included the Chief Executive, the Financial Controller, the Society Secretary, the Management Services Controller and the Property Manager.
5. The principal members of the Management Executive who played a part in the development were the Chief Executive, Mr Douglas Fletcher, who gave evidence at the trial, and the Property Manager, Mr Peter Ryland, who submitted a witness statement but who was unable to attend to be cross-examined. The leader of the Plymco Co-operative House redevelopment team was, until he was moved away on health grounds, Mr Ryland. On moving, Mr Ryland was succeeded by Mr Ian Williams, who was head of the maintenance department.
6. Mr Fletcher joined Plymco in 1973 as a management trainee and he worked his way up through a variety of posts until he became Deputy Chief Executive in September 1995 and Chief Executive in December 1996 when his predecessor, Mr David Greener, retired. Mr Ryland is a general practice member of the RICS. He qualified in 1981 and worked for Plymco between 1984 and 1999. He became Property Controller in the mid-1990s with overall responsibility for investments and property developments and maintenance. In this post he was a member of the Management Executive reporting directly to the Chief Executive. Unfortunately, he was on sick leave for six weeks in March and April 1997 and on his return was moved on health grounds away from his role in the Derry's Cross development project. He retired from Plymco in 1999 when his ill-health reoccurred and, although he submitted a witness statement, he was not called to

give oral evidence at the trial. His role as the leader of the Plymco development team was taken over by Mr Williams who had previously been the principal manager working on the development under Mr Ryland.

7. **The origins of the Co-operative House redevelopment project.** Plymco's original principal building was located at Derry's Cross in the centre of Plymouth. This building was burnt to the ground in the Blitz in 1941 and the new Co-operative House was built in four phases on the site between 1950 and 1958 and was opened in 1952. Plymouth City Council owned the freehold of Co-operative House as part of its acquisition of the freehold of the entire city centre using its compulsory powers granted after the war to enable it to ensure the regeneration of the blitzed city. Plymco held four different leasehold interests in the site from Plymouth City Council, all of which had about 55 years to run in 1996. The building has five floors spread over a basement, ground floor and three upper floors and Plymco used the lower four floors for trading and the top floor for its central offices. The site is an island bounded by four roads, Royal Parade, Raleigh Street, New George Street and Courtenay Street and Co-operative House itself is L-shaped with the balance of the island site, in its north-east corner, being taken up by the CIS building. This building is connected to the Co-operative House building with linked access at second and third floor level and the CIS has sub-leased much of the CIS building back to Plymco.
8. By 1993, Plymco decided that it needed to redevelop the site. The retail area was too large for Plymco's needs as a result of the growth of out of town stores, the store was in need of modernisation and refurbishment to allow it to compete with out of town stores, additional storage facilities were required on site and, if parts of the store areas were let out to other outlets, the store could generate significant funds with which to help fund the redevelopment. A further factor was the perceived need to rationalise the leases by replacing them with the acquisition of a long lease of the entire site occupied by Plymco from Plymouth City Council. Overall, there was a perceived need to use the refurbishment of Plymco's central premises as the means of relaunching the Society from a period of trading decline.
9. From that early stage, therefore, the bare bones of the intended redevelopment project began to crystallise. When finalised, the project involved Plymco surrendering its leasehold interests in Co-operative House to Plymouth City Council and simultaneously being granted a long, 125 year, lease of Co-operative House by Plymouth City Council. Sub-leases would then be granted to trading tenants of parts of the refurbished premises and a refurbishment project would create a rationalisation of the entire premises including a re-arrangement of the shared entrance with the adjacent CIS building. The tenants would occupy self-contained shop units within the store curtilage and the refurbished store would include a new restaurant and other facilities such as a Post Office and Travel Centre. The development would be partly funded by a sale and leaseback of Plymco's interest in the site to a financial institution and from the revenue generated from the leases granted to trading tenants. The balance of the cost of the project would be funded from borrowings and by future increased trading income generated by the development and what was perceived to be the re-launch of Plymco. Since the store would continue trading throughout the refurbishment work and given the other complexities, the project could be seen from the outset to be an extremely difficult and challenging one to design, cost and implement.
10. **ASM.** Plymco has had a longstanding professional relationship with ASM and its predecessor practice, CWS Architecture and Interior Design Group ("CWS"), over many years starting in the 1970s. In 1985, Mr John Mitchell, who was in charge of CWS's Bristol offices, took over those offices on the splitting up of CWS and formed that part of the CWS practice into ASM who took on the majority of CWS's existing workload including its working relationship with Plymco. ASM was set up so as to be able to provide a package of construction professional services including architectural, structural and quantity surveying services through separate but linked companies.
11. The architect who led for ASM in relation to most of ASM's Plymco work was Mr Digby Gibbs. By 1993 he had been registered for 17 years. He had worked for CWS for a short period following registration and he joined ASM in April 1985 when it was formed. He continued to work for ASM until August 2001 when he left to form his own practice. Mr Gibbs estimated that about one third of ASM's turnover was derived from Plymco in the early and mid 1990s. ASM was involved in most of Plymco's major developments. Plymco continued a regular flow of refurbishment developments over its large stock of food, retailing and funeral stores throughout this period. From 1983 onwards, the major projects involving CWS and then ASM were

the development of a large out of town superstore on a site that had previously been a brick quarry and rubbish dump called Transit Way, the extension of a superstore, five further store projects and a refurbishment and extension of the Transit Way superstore which was completed in 1996. Mr Gibbs worked with Mr Ryland on the last two of the store projects and the Transit Way refurbishment project prior to the Co-operative House redevelopment.

12. In view of ASM's longstanding relationship with Plymco, no formal engagement was ever entered into for the Co-operative House redevelopment. The initial proposals and outline project design work was done on an ad hoc basis between 1993 and 1996. When the development had got underway, Mr Gibbs wrote to Mr Ryland a letter dated 6 September 1996 which put forward a fee proposal based on an estimated contract value of £5 million for the three types of professional service to be provided. This gave rise to an overall composite fee of 12.5%. The proposal was accepted and was modified later, in immaterial respects, in letters from Mr Gibbs to Mr Fletcher dated 23 September 1997 and 22 January 1998. The services to be provided involved the design of all elements of the development except the mechanical and electrical work, advice and the implementation of tenders and contract procurement, cost control and certification procedures and general liaison with the contractor on programming and cost planning matters. The management of the project was left with Plymco although ASM provided the services of a Resident Engineer for the critical period of the works.
13. **Co-operative House.** Co-operative House is a steel framed concrete-cased structure with precast prestressed concrete floor planks. The overall size of Co-operative House is about 220,000 square feet. The result of the conversion work was that separate units were created for Argos, a catalogue trading company; JJB, a sports goods retailer; Regent Inns, a licensed food outlet and Orange, a mobile telephone retailer. The largest outlet, of 25,000 square feet, was let to Argos. This premises has its own entrance on the Royal Parade frontage and the Argos store included a part of the basement used for storage and a large retailing area on the ground floor. JJB has an entrance on the ground floor and an escalator up to its retail premises on the first floor. Orange and Regent Inns also have separate entrances on the ground floor. Three new entrances for Plymco's store, a newly laid out basement area, a new restaurant and a Post office on the ground floor were all created. The other areas were refurbished and a new escalator and new high quality air conditioning and heating plant were installed. Finally, new rear entrance arrangements in association with the adjacent CIS building were also created.
14. **The evolution of the redevelopment project.** The redevelopment project grew out of Plymouth City Council's planning for the overall redevelopment of the entire city centre. By 1987, these proposals had produced a report, entitled "Tomorrow's Plymouth", which proposed the redevelopment of an area next to Co-operative House and selected a preferred developer to progress and implement those proposals. Plymco, in parallel with this work, started to plan for the related redevelopment of Co-operative House. However, the recession that occurred in the late 1980s and early 1990s led to the abandonment of the grand design that Plymouth City Council was seeking to implement and it withdrew its support of the preferred developer.
15. Plymco then, in the period from mid-1993 until May 1995, began to work out how Co-operative House might be redeveloped. This involved Plymco in arranging for a series of outline plans and feasibility studies to be prepared for illustrative purposes with the assistance of Healey & Baker as its property consultants and ASM as its architects. In this period, ASM's role was limited to preparing a series of sketch designs and budget costings at Plymco's request to illustrate Plymco's changing thinking about the contemplated development. Initially, three options were produced in December 1993 with budget costs ranging from £6.3 million to £8.8 million. These options incorporated sub-units for sub-letting to other retailers. Then, in February 1994, a further option was produced involving a full redevelopment of Co-operative House with a budget cost of £7.65 million. Then, between May and July 1995, a further option, involving sub-units, was produced with a budget cost of £6.9 million. This project also provided for new escalators, a new entrance and remodelled food halls. This option was used as the basis for Plymco's planning application submitted on 13 July 1995. However, both options were rejected because Plymco considered them too expensive and the overall likely cost of implementation too high.

16. In October 1995, Plymco was advised that Argos had a wish to find a city centre trading location to enable it to relocate from its inadequately sized city edge location. Plymco discovered that Argos was very interested in taking about 12,000 square feet, subsequently increased to 25,000 square feet, on two floors let as a shell unit for Argos to fit out. By August 1995, Plymco was prepared to issue Argos with a letter of intent, particularly as Argos by that time wanted possession in the early part of 1996. Terms were provisionally agreed in October 1995 that included a provision that Argos would take possession on 29 April 1996. Unfortunately, Plymco then felt it necessary to withdraw from negotiations with Argos because of the views of some of its retailing management that also led to the redevelopment project being put on hold to enable Plymco to review its capital spending programme.
17. The review was short lived because Plymouth City Council established a City Centre Partnership in November 1995 with the purpose of directing future strategy and courses of action for the regeneration of Plymouth city centre. This led to an action plan and other initiatives and to Plymco's decision to proceed with full speed to develop its own redevelopment project. The planning for its redevelopment project was assisted by Plymco's decision to re-open discussions with Argos and then finding that it was able to reintroduce the consensus it had previously achieved with Argos in October 1995. As a result, Plymco and Argos reached draft heads of agreement on 15 April 1996 whereby Argos would take 25,000 square feet on the basement and first floors at a rental of £280,000 per annum with possession to be offered by 21 April 1997. A rough outline budget of the project that emerged from this planning process was included in a report prepared by Healey & Baker. This budget suggested that the cost of refurbishment and refitting works would be about £5 million.
18. The result of this planning work was put to Plymco's Board and this led to Plymco's Board deciding, on 20 April 1996, to seek to redevelop Co-operative House. The resolution read: *"we seek to redevelop and sub-divide Co-operative House to include the CIS building by way of various lettings to other retailers with the sale of the completed development to a third party funder/investor with the Society taking a lease for the offices and retail space covering the whole of the third floor for offices and approximately 75,000 square feet for retail. That we seek to negotiate with Plymouth City Council either the purchase of the freehold of Co-operative House or a new Ground Lease with a term of at least 125 years."*

The Board was informed that the likely premium for a new Ground Lease would be in the region of £1 million.

19. **Appointment of ASM.** ASM's appointment to undertake architectural services in connection with the redevelopment of the Co-operative House building at Derry's Cross, Plymouth occurred very soon after the decision of the Board to proceed in principle with the redevelopment. Following that meeting, Healey & Baker was instructed to give advice as to the overall feasibility of the project, a building survey of the Co-operative Building was commissioned and both ASM, as Architects and Quantity Surveyors, and the Helix Services Consultancy ("Helix"), as mechanical & electrical consulting engineers, were instructed to undertake initial design and costing advice. ASM's instructions were confirmed by Mr Ryland in a letter dated 16 May 1996 to Mr Gibbs which stated, in part: *"There has already been a drift in the timescale with respect to the above and I would like to ensure that the project is brought back on line. Time is of the essence, as you are fully aware, and the preliminary programme is very tight to achieve the Society's ultimate goal."*

The letter then instructed ASM to advise on the necessary Planning Application, elevational sketches, ceiling height dimensions and a brief specification for what would be provided for each of the proposed shell units.

3. Witnesses

20. The witnesses called by Plymco were Mr Fletcher, who gave both written and oral evidence, and Mr Ryland, who gave written evidence. Mr Ryland was too ill to attend court to be cross-examined. That meant that Mr Ryland's evidence could not be given the same weight as it would have carried had he been cross-examined and I only relied on his evidence where it was corroborated or supported by other evidence. The witnesses called by ASM were Mr Gibbs and Mr Nicholls. Plymco's expert witnesses were Mr Cleveland, an architect, and Mr Jervis, a quantity surveyor. ASM's expert witnesses were Mr Hudson, an architect, and Mr Symonds, a quantity surveyor. The trial was made extremely difficult due to the absence of so much documentation normally to be expected in a building dispute involving detailed

questions of and the need for all witnesses to give evidence about events that had mostly occurred some 9 years previously.

4. Contract Formation and Scope of ASM's Duty

ASM's Contract

21. **Terms of ASM's contract.** I have already explained that ASM and its predecessor practice had had a longstanding and close working relationship with Plymco going back over many years. Most projects that Plymco undertook, and which ASM were engaged to assist in, involved the refurbishment of stores and other premises and were not projects of any size, cost or difficulty. Plymco's work was managed by its services department which was run, until his retirement in 1995, by Mr Derek Curtis, the services divisional controller at which point Mr Ryland replaced him and was formally appointed Property Controller. Most of ASM's contact with Plymco, certainly once Mr Ryland was appointed Property Controller, was through Mr Ryland.
22. It was not the custom for any of ASM's engagements to be set out in a formal written contract or for the RIBA Conditions of Engagement to be signed or to be incorporated into the engagement. It was clear that the parties treated each project or refurbishment site as a separate contract. In relation to the Co-operative House project, the contract of engagement was entered into on or soon after Plymco's Board resolved in principle to embark on the project on 20 April 1996. Initially, the contract was formed by Mr Ryland requesting Mr Gibbs, in May 1996, to prepare a planning application, elevational sketch drawings, ceiling height dimensions and a brief specification and a budget estimate. This work was stated to be, and was understood by Mr Gibbs to be, work to be undertaken as part of the implementation of the Co-operative House redevelopment project.
23. Mr Gibbs was provided at the same time with Plymco's proposed timetable for this redevelopment whereby the building contract would be entered into in July or August 1996 and the building work completed and the shells of the units ready for occupation by Argos by 21 April 1997 and the other, as yet unidentified tenants, in about January or February 1997. Plymco's budget figure for the building work was also provided to ASM and was a maximum of about £5 million.
24. The services to be provided by ASM were understood by Mr Ryland and Mr Gibbs to be all the necessary architectural and structural engineering design and procurement services and quantity surveying costing and valuation services required to enable the project to be implemented and completed. ASM was not retained to provide any mechanical and electrical or any project management services which would be provided, respectively, by Helix as mechanical and electrical engineers and Mr Ryland.
25. This engagement was confirmed retrospectively by Mr Gibbs in a letter to Mr Ryland dated 6 September 1996 in which he confirmed ASM's fees for the alterations and improvements project at Co-operative House as being a composite fee of 12.5% of the assumed contract value of £5 million to include 7.35% for architectural services to equate with Category 4 – Works to Existing Buildings; 2.85% for quantity surveying services; and 2.3% for structural engineering services. These fee scales were subsequently modified in letters dated 23 September 1997 and 22 January 1998.
26. In summary, therefore, ASM's engagement required it to use reasonable skill and care to provide for the Co-operative House redevelopment project the services of architectural and structural engineering design and quantity surveying in relation to design, budgeting, procurement and costing.
27. Although the contract relating to ASM's involvement in the Co-operative House redevelopment project was only finalised and entered into in May 1996, ASM had been involved in assisting Plymco to formulate, and then to decide to try and implement, the redevelopment of that site for some years. In consequence, Mr Gibbs was aware that the project was critically dependent on outside funding with a building cost that, in May 1996, was not to exceed about £5 million to £5.5 million. ASM also knew that the project was dependent on meeting very tight deadlines that would require its design, the obtaining of planning permission and its procurement and execution to be completed in about 12 months with the store continuing to trade around the refurbishment work and with the site located in a difficult central location. Finally, ASM also knew that the project had to produce, for Argos, as the principal tenant, a large ground

and basement shell by Easter 1997 and, for further tenants as and when these were obtained, other shells to accommodate them.

28. **No formal written engagement.** Plymco's architect expert, Mr Cleveland, commented on the absence of any document produced by ASM which set out or confirmed ASM's terms of engagement and the scope of the services it was to perform in relation to Co-operative House. Mr Cleveland was of the view that this failure contravened the two codes of conduct that governed ASM's professional architectural practice, being those of the Royal Institute of British Architects and the Architects' Registration Board. ASM's response to this complaint was that since ASM had worked for Plymco so frequently and on so many different projects on a similar basis in the past, it had not been necessary for it to enshrine any particular engagement with Plymco or its scope into a written contract.
29. I am not satisfied that there was a breach of either code, given the written evidence of the contract created by Mr Ryland's letter of 16 May 1996 and by the other documents brought into being by Plymco's earlier work on sketch and budgetary exercises in relation to the feasibility planning work undertaken by Plymco. Moreover, the breach was venial at worst, given ASM and Plymco's long previous history of working together on similar terms.
30. However, whether or not there was a breach of the provisions of either code of conduct, I am not concerned in this case with ASM's professional misconduct in a disciplinary sense but only with possible breaches by ASM of the professional duty it owed to Plymco. In that context, it is pertinent that ASM did not comply with good practice in failing to provide Plymco with a clear and definitive statement of the scope of its engagement and of the terms on which that engagement was to be undertaken. Furthermore, ASM did not at the outset indicate to Plymco in writing what the critical project milestone dates were nor what major outstanding design decisions remained to be taken by Plymco and the dates by which these would be needed if Plymco's intended completion and occupation dates were to be fulfilled.
31. The desirability of this good practice is obvious. A clear written statement of these matters produced at the outset of a project will greatly assist both parties to plan and work together on the project so as to ensure its satisfactory outcome. Thus, the absence of clear and definitive advice on these matters from ASM is an early indication of its possible breach of duty in relation to procurement advice, project planning and the production of timely designs and details.

ASM's Previous Experience of Working with Plymco

32. **Plymco's previous knowledge and experience of redevelopment projects.** As would have been known to Mr Gibbs, Mr Ryland's redevelopment experience was limited. He had previously qualified as a general practice surveyor but his surveying experience had been confined to a passing involvement in earlier somewhat limited refurbishment work on four different sites, two of which Mr Gibbs was involved in. One of these was a new build project of a supermarket on a virgin out of town site involving little difficulty and the other a fitting out project of an existing shell.
33. ASM sought to rely on Plymco's general experience of shop refurbishment work in general and of Mr Ryland's experience in particular and to contend on the basis of that suggested experience that Plymco was a client who was both knowledgeable and experienced in the procurement, design, planning and execution of shop refurbishment work who did not require or expect to be advised on how to control costs and limit cost escalation, on what a two-stage tendering process involved and on what such a procurement method was intended to achieve.
34. However, there was nothing in that earlier history of working that indicated or suggested that a course of conduct had developed that altered or adapted the usual professional relationship and scope of duty applicable when an architect, particularly one who is registered, was providing normal design and related services for a client. The previous relevant commissions performed by ASM for Plymco were undertaken by Mr Gibbs or under his supervision. In each but the last two or three, Mr Gibbs had worked almost exclusively with Mr Curtis. Each project involved relatively simple and straightforward refurbishment work and gave rise to a separate commission for ASM which was always treated as a separate and distinct commission. ASM's role, in each case, was confined to design and valuation work since the management of each project was left to Mr Curtis. There is no evidence that the nature of each or all of these successive

refurbishment projects was such that they provided Mr Curtis in particular or Plymco in general with any particular expertise in property development or in the planning, design, procurement, cost control and expenditure monitoring involved in a complex construction project where both time and money will have to be tightly controlled.

35. In those circumstances, particularly since Mr Gibbs had not built up a pattern of working with Mr Ryland and since the Co-operative House project was so different in terms of complexity, scope of work and financial risk, the scope of ASM's services and the terms of its contract with Plymco for this project were not modified or affected by ASM's previous dealings with Plymco or by any previous refurbishment work it had carried out for Plymco.
36. **Transit Way.** ASM sought to rely on the recently completed Transit Way project as indicating that Plymco was aware of and experienced in working with a two stage tender process similar to that used on the Co-operative House project. Transit Way was the name given to the refurbishment project undertaken in 1995 and 1996 on a superstore originally built by Plymco in 1983. The refurbishment work in 1995 involved the extension of the superstore by means of adding a homemaker unit and individual shops and the refurbishment of a single storey store on a large site which was about ten years old. The 1995 work was undertaken using the same type of two-stage tendering process as that used at Co-operative House. Mr Gibbs considered that the Transit Way project was as complex and extensive as the Co-operative House project which was commissioned, in May 1996, whilst the Transit Way project was in its closing stages, involved as large a proportion of provisional and unascertained work at the outset as its successor involved and was, in monetary terms and in terms of the changes to its work scope, again similar to the Co-operative House project.
37. It is not necessary, and I was not provided with sufficient evidence, for me to undertake a detailed comparison between these two projects. Such evidence as I was provided with showed that there was little relevant similarity between them save that both used the same procurement method of two-stage tendering process.
38. At Transit Way, the two-stage tenders produced sums of, respectively, about £2 million and £2.48 million and a final account of about £2.82 million. Thus, in overall terms, the project increased in cost by about 38%. The Prime Cost ("PC") sums amounted to 64% of the contract sum and the work was completely remeasured on completion. The contract sum and final cost on the Co-operative House contract were an order of magnitude larger than the corresponding sums at Transit Way and the over-spend was, on any view, significantly greater. The work was not subject to remeasurement at Co-operative House. Furthermore, the proportion of PC sums in the contract was significantly smaller on the Co-operative House contract than on the Transit Way contract. Overall, the scope of work and its timescale and relative complexity meant that the Co-operative House contract was very different to, and much more complex than, its predecessor.
39. It is also the case that Mr Ryland was not involved to any significant extent in the early stages of the Transit Way contract nor in any decision-making leading to the adoption of, and working with, a two-stage tendering process. Mr Curtis was the Plymco representative who was involved in those matters. Mr Ryland, and not Mr Curtis, was however the Plymco representative involved in the pre-contract procurement, costing and design decision-making stages of the Co-operative House contract.
40. I conclude that the Transit Way contract did not shape or modify the scope of ASM's duty owed to Plymco and it did not provide those involved for Plymco on the Co-operative House project with any meaningful experience or knowledge of two-stage tendering processes or of the workings of a contract as complex as the Co-operative House contract. Overall, I accept Mr Ryland's evidence that: *"As regards the different methods of procurement, I would say that my experience was limited to the fact that I knew that there were different methods of procurement and what the most commonly encountered of them were. However, I did not know the pros and cons of each or what each involved in any detail and therefore how to apply that knowledge to deciding which would be best suited to the project. I therefore relied on ASM for this advice."*¹ Note 1 Witness statement, 5A/6/1920/29.

5. Breach of Duty – Procurement, Tendering and Contract Formation Stages

Introduction

41. Plymco's complaint as finally pleaded, was helpfully summarised in its opening statement as follows:
"ASM should have advised about the cost risk involved in a contract which contained so many and such substantial prime cost and provisional sums. They should have advised Plymco to place a contract for part of the works (known as the Argos works) as a separate contract and not place a contract for the balance of the works until their design had been progressed."
42. It follows that Plymco makes two substantial complaints about ASM's pre-building contract services namely that it failed to identify the cost risk to Plymco of entering into a firm building contract using a two-stage tendering procedure with much of the work provisional in both design and cost terms and it failed to give appropriate advice as to how that risk could be reduced to satisfactory limits. This second failure is one of both commission and omission. Thus, it is alleged that ASM advised Plymco to enter into a contract for the entirety of the refurbishment work prematurely and it is also alleged that ASM failed to advise that Plymco should have postponed all but the Argos shell-construction work for a period of months and entered into a second contract for that second phase of the works once it had been fully designed.
43. ASM's answer to these allegations is, in summary five-fold. Firstly, ASM contends that the cost risk that it is contended should have been advised upon in the period between May and November 1996 has been greatly exaggerated by Plymco. Secondly, sufficient advice was given about the actual cost risk. Thirdly, Plymco fully understood and accepted the cost risk involved. Fourthly, the advice to proceed with the entirety of the works using a truncated two-stage tendering procedure and with a significant amount of the work still in provisional and provisionally costed form was the only reasonable advice that ASM could have given. Fifthly, and in any event, Plymco would not have accepted any other advice, had it been given. Instead, Plymco would have proceeded in the same way that it did, even if it had received the contrary advice that it is now suggested ASM should have given.

History of the Design Development of the Co-operative House Project

44. **ASM's knowledge of project in May 1996.** The details of the project that had been formulated for inclusion in the budget drawn up by ASM for approval in May 1996, following the decision in principle to proceed taken in April 1996, were no more than a very broad outline. Furthermore, at no stage before the decision to proceed, during the various outline projects that had been produced and costed and then superseded, had any finishings, standards or detailed layouts detail been discussed save in the broadest outline. Indeed, until design work started in earnest in late May 1996, the principle involvement in the Co-operative House project, on ASM's side, had been Mr Nicholls, the senior director of QSM and the quantity surveyor who led the QSM quantity surveying team working with ASM for Plymco on both this project and the Transit Way project. Mr Nicholls worked closely with Mr Greener and Mr Ryland in the period leading up to the critical decisions taken in May 1996.
45. Mr Nicholls was instructed by Mr Ryland to prepare a budget in April 1996 which Mr Ryland stated should not exceed £5 million, being the figure that the Plymco Board had recently approved. The budget was to be based on the then existing project shown on three outline project drawings and it would incorporate a mechanical services budget to be prepared by Helix. At that stage, the project envisaged a shell to be provided to Argos of about 25,000 square feet, five further shells and with no provision for a restaurant. By the date of the production of the first layout project drawings in early June, the number of units had been reduced to four. The restaurant, which was to be designed by other designers appointed directly by Plymco, was first provided for in early July following Plymco's decision to incorporate such a restaurant taken a little earlier.
46. **Early stages.** As has already been stated, Plymco had been evolving the redevelopment project for several years before the decision to proceed was taken in principle in April 1996. That evolution had included several outline projects to which had been added a provisional budget cost. The most recent of these budget costed projects was the project produced in July 1995 and the further preliminary work that had been done by Plymco and ASM to flesh out the details of that project which had not been completed when Plymco temporarily halted further planning work in October 1995.
47. It followed that some initial preparatory design work had been carried out which would be used as the basis for the further necessary design work. The project would provide for the creation of shell units for sub-tenants and the refurbishment of the store to a high standard and so as to include the possible location

of a restaurant on part of the second floor and a post office and at least one other trading location within the ground floor of the store. The timescale had been provisionally fixed and the overall cost was intended to be no greater than £5 million. The store would remain open for trading and the refurbishment work within the store would be carried out in phases around and within the store's remaining trading areas.

48. Plymco had not arranged funding by May 1995 and the only one of the four sub-tenants that had been agreed, in principle and subject to contract, was Argos. Plymco was advised by Healey & Baker that it would be difficult for Plymco to arrange commercial funding terms until the potential funder could be informed of, and be satisfied about, the identity and financial return to be obtained from the sub-tenancies. Plymco was also advised that it would be difficult to persuade potential retailer sub-tenants to commit to taking space in the refurbished development unless the date for being granted possession was no more than a few months into the future.
49. In those circumstances, ASM's brief was to prepare as much detail of the refurbishment project as was possible in the few months available before a contract would have to be entered into. This was not, in principle, too difficult a task since Plymco's requirements and the decisions it would have to make as to the details for the refurbished store could, in principle, be finalised and resolved and the absence of committed sub-tenants would not preclude the detailing of the work needed to provide the contemplated shell units within which each sub-tenant would undertake its own shop fitting and other internal decorative work.
50. The timetable for the project was clearly set out in Healey & Baker's letter to Mr Ryland dated 19 April 1996 which formed part of the material used by Mr Greener and Mr Fletcher to put the recommendation to the Board to obtain the decision in principle to proceed with the project that was made on 20 April 1996. The relevant passage reads: *"The programme is tight even to satisfy Argos's requirements for possession on 21 April 1997. Digby [Gibbs of ASM] is endeavouring to provide plans within 2 weeks to reflect Ray Guy's [of Healey & Baker who was marketing the shop units for Plymco] requirements for the shop units and subject to Ray's agreement, this hopefully will trigger the planning application. Assuming 3 months for determination and, in Digby's estimates, a further 4 months for the building contract, one envisages completion of the works at the earliest by January/February 1997. In the meantime, Ray anticipates an exchange of agreements with Argos in the next 2 months and, subject to marketing the units fronting New George Street next month, conclusion of those lettings by September this year. I would not recommend approaching the general market to fund this development until the lettings are concluded ...*
Subject to commencing marketing in September, I would expect a legal commitment to fund the development by the year end.
51. The timetable proposed by Healey & Baker and adopted by Plymco envisaged the immediate marketing of the remaining shell units, the finalisation of conditional contracts with the sub-tenants by mid-September 1996, occupation by the sub-tenants of their shell units in January 1997, save for Argos who would take occupation of its shell on 21 April 1997, and completion of the works in July 1997. ASM advised at an early stage that this timetable would require the building work to start in November 1996 at the latest with some preparatory work starting in October 1996.
52. One of the first things that ASM did was to prepare a budget estimate for the proposed sub-division of the department store and its refurbishment. This is dated May 1996 and the overall budget figure it provided for was £5.65 million. The budget included sums for the services installations that Helix provided in a services budget dated 21 May 1996 and it excluded external works including any work to entrances, canopies or the roof and work to the Mezzanine floor and the existing lifts.
53. This budget was prepared by Mr Nicholls. His starting point was what instructions he understood to be Plymco's starting point, namely that the overall cost of the work should not exceed £5 million. There was very little detail available on which to base any detailed or costed budget figure. Mr Nicholls used the two current outline drawings as the guide to what would reasonably be anticipated as being required and also used his experience of previous Plymco developments. He then calculated the cost of the structural works involved in providing an escalator and five shell units and then allocated budget sums to the remaining headings of work that he anticipated would be required from the basic outline of the intended works he was using. He used a reasonable cost per square metre as a yardstick in preparing these budget sums. This

led to his overall budget figure. Mr Nicholls was clear in the advice he gave Mr Ryland in May 1996 that he could tailor the development to meet that price.

54. Although no formal approval of this budget was given by Plymco, it was clearly adopted by Plymco once it was provided. It is clear that it was of overriding importance to Plymco that the budget figure was not exceeded since the entire funding and financing of the project was dependent upon the cost of the work being in the region of £5 million - £5.5 million. The other key instructions relating to the timetable for carrying out the works, phasing of the works to link with the trading of the store and the scope of works were based upon this overall cost limit and were, if absolutely necessary, capable of being adapted to enable the cost limit to be maintained.
55. **Timetable.** The introduction into the redevelopment scheme of self-contained units to be let out to retailing tenants followed the advice of Healey & Baker, Plymco's property and marketing consultants who gave further advice on this topic in April 1996, once Plymco had taken the decision in principle to proceed with the overall refurbishment project. This further advice was set out in Healey & Baker's letter dated 19 April 1996 which was written by Mr Stuart Pearce who was one of their team acting for Plymco. He stated: *"My recommendation is to keep the funding of this development as simple as possible." [This would be reflected by negotiating funding by two payments, one when Plymco acquired its long lease from Plymouth Council on making a substantial premium payment and the second on practical completion of the work involved in making the self-contained shells].*
"The programme is tight even to satisfy Argos's requirements for possession on 21 April 1997. ... one envisages completion of the works at the earliest by January/February 1997. In the meantime [we] anticipate an exchange of agreements with Argos in the next two months and, subject to marketing the units fronting George Street next month, conclusion of those lettings by September this year.
I would not recommend approaching the general market to fund this development until the lettings are concluded ... Subject to commencing marketing in September, I would expect a legal commitment to fund the development by the year end."
56. It followed that obtaining tenants was an integral and core part of the project. Plymco was advised that it was necessary to have a reasonably clear idea of the rental income and the nature of the tenants before finance was arranged since any funder would want to have details of these proposals when assessing whether to provide funding for the project. Moreover, the rental income that would be provided was an essential part of the planned funding of the project. An outline of the tenants' requirements was also needed to enable the details of the project to be finalised and costed.
57. Thus, Mr Ryland produced an outline proposed timetable of milestone events in June 1996. This was discussed with Mr Gibbs and it showed that the relevant decisions on space use and upgraded features had to be taken in June and July, that the marketing of the units would likewise occur in that period, that the definitive scheme would be finalised in August, that preliminary works on the Argos unit would begin in August and that the marketing of the investment to obtain financing would take place in October and November. The shop units would be fitted out in the period April to August 1997.
58. It was, from the start of the planning process, a requirement of Plymco's which was accepted and understood by ASM that the work to the proposed Argos shell unit would be the first to be started and that the completion of the Argos works had to be achieved by the end of April 1997. These requirements were imposed by Plymco so as to enable Plymco to fit in with Argos's requirements. Plymco was particularly keen to finalise a letting with Argos and did not want Argos to break off negotiations because of a possible delay to their proposed works. This was because the income to be generated from a letting to Argos was regarded as critical to the success of the project, because it would be unlikely that another tenant would be prepared to take over any part of the basement area that Argos was to take and because any further delay or set back could cause Argos to walk away, particularly given the unfortunate hiatus caused by Plymco's temporary decision in the Autumn of 1995 to withdraw from negotiations with Argos and the difficulty that subsequently occurred in persuading Argos to re-open those negotiations.
59. **New lease granted by Plymouth City Council.** Plymco entered into negotiations with Plymouth City Council in April 1996 with the aim of reaching agreement whereby it surrendered its various holdings in Co-operative House and, in return, it would be granted a long head lease of the entire holding for a

consideration of about £1 million. These negotiations produced the desired outcome without much difficulty and an agreement in principle was reached in August 1996. This was effected by Plymco surrendering its various leasehold interests to Plymouth City Council and entering into an agreement for a lease on 30 August 1996 and being granted a 125-year lease at a peppercorn rent, for a consideration of £960,000, on 30 August 1997 with the term commencing on 30 August 1996.

60. **Negotiations with prospective tenants.** The four tenants who ultimately entered into tenancy agreements with Plymco for each of the four self-contained shells were, as already stated, Argos, JJB, Regent Inns and Orange.
61. **Argos.** Argos was the first prospective tenant with whom Heads of Terms were agreed. Plymco was keen to obtain Argos as a tenant, partly for commercial reasons and partly as a result of the commercial embarrassment Plymco caused itself by having agreed in principle with Argos in 1995 for Argos to be granted a lease and then having had to temporarily withdraw from that agreement whilst the whole project was re-evaluated in the latter part of 1995 and the early part of 1996. The Argos Board agreed Heads of Terms in late May 1996 and an agreement for lease was signed on 10 October 1996. This provided for Plymco to carry out certain landlord's works to the shell comprising a large part of the basement, being over 20,000 square feet, and about 2,000 square feet of retailing area on the ground floor. Argos, being a catalogue retailer, required a much greater storage area and a relatively smaller retailing area than most other retailers. The contract provided that Plymco was to use its best endeavours to complete the lease, and hence the landlord's works, by 21 April 1997.
62. **JJB.** JJB's method of trading frequently involved it in taking a small shop front at street level with an escalator taking all shoppers up to a retailing location on an upper floor or floors. Plymco therefore had JJB in mind as a possible tenant from the start, particularly since a tenant like JJB would maximise its ability to let out retailing units at street level. By late May 1996, Healey & Baker had established from JJB's agents interest in taking Unit A, comprising 15,000 square feet on the first floor with an escalator installed by Plymco leading up to that unit from street level. This interest crystallised into an agreement for lease entered into on 28 January 1997. The specification for the landlord's works incorporated into this agreement expressly allowed Plymco to phase its refurbishment and other work so as to enable this to be carried out once JJB had obtained access to its demise.
63. **Regent Inns and Orange.** Regent Inns, a licensed food outlet and Orange, a mobile telephone retailer. These units were let after the work was finished, in the case of Regent Inns the lease was signed on 17 August 1998 and, in the case of Orange, on 29 October 1998.
64. **Sale and leaseback.** Plymco only had one agreement for a lease, with Argos, agreed in principle when it started the exercise of obtaining finance and a sale and leaseback arrangement to fund the project. Funding was arranged in two stages. An initial interim funding arrangement was made with Plymco's bankers to provide bridging finance as necessary. This was replaced by a sale and leaseback arrangement that was agreed in principle with Freehold Portfolios Plymouth Limited ("FPPL") in October 1996. The sale agreement was dated 2 July 1997 and the consideration was payable in four stages and was in part dependent on what lettings were achieved. Although the overall consideration was approximately £19 million, only approximately £15 million was paid in two tranches in July 1997, payments that related to the parts of Co-operative House and the associated buildings that were occupied by, respectively, Plymco and Argos. The remainder of the consideration was paid in three further instalments in October 1997 and August and October 1998.
65. This change in the details of the project, whereby funding was arranged and the long term funding arrangement finalised with only one of the four lettings arranged, occurred because Plymco was unable to finalise its letting arrangements prior to the need to embark on its funding negotiations. Moreover, it was clear that interim funding could be arranged on satisfactory terms and that it was not necessary, given the staged and complex funding arrangements that were negotiated, for the letting agreements to be in place prior to the signing of the funding contract.
66. **Timing of lettings.** Plymco contended that it should have been advised to carry out the work in two stages by postponing to a second later stage all work save for the Argos shell fitting out work. ASM contended

that this would not have been possible because Plymco would not have been prepared to adopt this method of working, were committed to starting work in November 1996 because of its agreement with Argos and could not have undertaken the project using this two phase approach given its need, for funding and general commercial purposes, to have had all lettings in place before financing could be arranged and work started.

67. ASM's contentions were based on a selective reading of fragmentary references to the need to obtain lettings in the contemporary correspondence and documents. The starting point was the advice received from Healey & Baker in April 1996 that I have already summarised. That advice, which was based on Plymco's then current outline thinking about the structure of the forthcoming redevelopment project, clearly envisaged that the project would start with a critical path which was made up of lettings arranged and contracts exchanged followed by the marketing and finalisation of the sale and leaseback funding arrangement, followed by the design of the units so as to incorporate tenant's requirements, followed by the drafting of the first stage tender documents and concluded by the remaining procurement and contract stages of the project. The other documents relied on amounted to no more than Plymco, from time to time, urging Healey & Baker to seek to conclude letting arrangements for all the intended units.
68. However, Plymco's redevelopment strategy was, as was shown by events, much more fluid than ASM suggested. The overall intention was to achieve a satisfactory redevelopment as soon as possible within an overall cost ceiling, for the building and redevelopment work, of about £5.6 million. Certain of the other building blocks were more firmly set than others, particularly the wish to start the Argos works as soon as was necessary so as to achieve completion of the shell by the end of April 1997. What materialised was the discovery that obtaining committed tenancies for all four units was more difficult than anticipated but that obtaining acceptable long term funding was not critically dependent on the prior obtaining of tenants. Moreover, Plymco found that short term bridging finance was both possible and affordable.
69. Plymco's evidence confirmed that there would have been no difficulty, in commercial terms, in adopting the two-phase strategy that I have outlined and, moreover, it would have adopted this method if advised that it was necessary in order to achieve the desired cost limit for the project overall. Mr Fletcher stated in evidence that Plymco both could and, if advised on good ground to do so, would have separated out the refurbishment and renovation work for the Argos unit from all other work and embarked on a two-phase refurbishment project. I will consider later whether Plymco would have undertaken the project in this way had it been advised to do so.
70. ASM placed particular significance on the position of JJB as showing that a two-phase approach was not commercially viable since, it contended, JJB would not have agreed to the delay in taking possession that that approach would have entailed and JJB was an essential cog in the overall project so that Plymco would not have risked losing JJB as a tenant for the sake of six months delay in the completion of the building work.
71. JJB made its initial offer in early July 1996 and this was an attractive offer because JJB wanted to take space on the first floor which Plymco wanted to let but which few prospective tenants would be interested in renting. It was also attractive because JJB's offer in relation to the rent was higher than the rent that Healey & Baker had advised Plymco would be appropriate. JJB was, however, keen to open by the spring of 1997 and Healey & Baker advised Plymco on 19 July 1996 that its perception at that time of JJB's reaction to learning that the opening was to be delayed until October 1997 was that it would be inevitable that JJB would withdraw and seek alternative opportunities within the town centre. By the end of September 1996, ASM's work developing the drawings and specification for the shell to be occupied by JJB had advanced but its agents communicated to Healey & Baker a wish to receive full architects' drawings and the specification of Plymco's works to enable JJB to discuss the details of the proposed shopfitting work with its shopfitters. These were not forthcoming and, on 7 November 1996, JJB wrote to its agents asking them to try and obtain these details since their absence was delaying JJB's final decision-making as to the details of its shopfitting works on site. On 12 November 1996, Healey & Baker wrote to ASM stating that the absence of these details was delaying JJB's final decision to proceed to a contract. These details were finally produced and agreed in January 1997 and JJB signed an agreement with Plymco on 28 January 1997 that provided that Plymco would use its best endeavours to obtain completion of these works by 28 July 1997.

72. It is not possible to deduce from this history that JJB would not have accepted a delay in the proposed completion of the shell it was to occupy of about five to six months, which is what a two-phase approach to the project would have entailed. These dates, for signing an agreement and for finalising the works, are nearly two months and five months respectively after the dates that Plymco set as the target dates for these events in its June 1996 programme of its desired target dates and a two-phase approach would not have delayed completion by a significant further extent. It has to be remembered that JJB would not have been informed of this possible delay until November 1996 and would have been mollified by being provided with detailed drawings and a specification of works soon afterwards. The communications from JJB, as opposed to Healey & Baker's advice in the summer of 1996, do not threaten to withdraw from the project even though it was experiencing delays in being given details of the proposed shell it was to occupy. Overall, there is no reason to doubt Mr Fletcher's evidence that it would have been commercially possible to postpone the start of all work, save for the Argos work, until April 1997. That view carries with it the consequence that JJB would have accepted, however reluctantly, a proposed further short delay beyond the completion date of 28 July 1997 which it had accepted in January 1997.
73. I therefore accept Plymco's evidence that there was no compelling commercial necessity for Plymco to first conclude agreements for a lease with all prospective tenants and only then to embark on the refurbishment work nor for the entire refurbishment work to be undertaken in one overall phase. It would have been possible to restructure the project into a two-phase one with the Argos works being started first and the remaining works starting as a separate phase about six months later in about April 1997.
74. **Design development.** The tender documents for the first stage of the two-stage tendering procedure that was adopted by Plymco on ASM's advice were dispatched on 13 September 1996. Thus, the design process that gave rise to these documents had been undertaken in a four-month period between May and early September 1996. The design that is referred to involved all stages of the design and detailing of the work. The mechanical and electrical work, which formed a substantial proportion of the cost of the work, was designed by Helix but ASM's duty included the co-ordination of Helix's designs into its own design work so that the mechanical and electrical work was compatible with the remainder of the work both in relation to the end product and to the necessary methods that would be needed to install the work being designed by ASM. Thus, ASM's design work involved finalising, with Plymco's assistance, the overall intended use of space and of the existing building and the allocation of functions to each part of the overall space being refurbished; the decisions as to what stripping out and opening up would be needed; the decisions as to the services, finishes and features that would be needed; the detailing of each area and component part of the works; co-ordination of the works being designed by different designers; the production of the necessary production or working drawings; the detailing of any necessary sequence or phasing of the work; the preparation of the necessary specifications and the finalisation of a complete and coherent set of contract documents to form the contract to be entered into by Plymco and the refurbishment contractor.
75. ASM's case was that Plymco changed the overall design and many of the details of the work repeatedly in the whole period between first receiving instructions in April 1996 and the completion of refurbishment work in August 1998. By the time that the tender documents were prepared in early September 1996, no part of the design had been finalised and much detail had not even been started. Plymco's case was that this slow evolution of the finished design occurred because ASM was slow in providing the necessary instructions and was also constantly changing its mind. Plymco would accept that there were some significant changes in the overall outline of the project but would otherwise contend that the instructions it gave were necessary to enable the details to be worked up, were part of the inevitable design development process of a complex project involving high standards of finish and were largely issued by them when instructions were sought by ASM to meet the needs of the moment. In other words, Plymco contended that it did not constantly change its mind but, largely, it reacted to the requests to finalise and freeze its requirements when such instructions were sought by ASM.
76. The scheme started, in April 1996, as one involving the maximisation of lettable ground floor areas, to be achieved with six separate retailers including Argos. The area of the refurbishment, including these units, was about 9,335 square metres. The completed development provided four units and an overall refurbished area of 10,263 square metres. This final refurbishment varied the scope of the refurbishment,

therefore, by reducing the areas of lettable units and increasing the overall area being refurbished by about 10%, a new restaurant, changed configurations to the entrances, a new escalator for JJB's use taking customers from the ground to the first floor, the addition of a new Post Office and Travel Shop and less significant variations to the second floor. Two important factors must be borne in mind when considering these variations. Firstly, many of them were provided for in the scope of work sent out for tender in September 1996 and, secondly, that many of them could have been accommodated at no additional cost since they amounted to a change by way of substitution rather than an additional feature to the refurbishment.

77. It is not possible to determine what was the true cost of changes to the scope of work instructed by Plymco after the initial budget cost had been approved nor what those changes were nor what part of the apparent increase in cost arose from work necessitated by the original scheme which had not been provided for in the original budget. This is because the outline of the work to be undertaken was in such a rudimentary form when the budget was prepared that it had not been possible to make adequate allowance for all work that would be required, it was not possible to identify with any precision what work could be said to have been included within that budget and the subsequent instructions that were issued all related to the detail of the work and it was not possible to identify which were instructions which added to the scope of the work and which were instructions that had to be issued so as to enable the detail of the original work scope to be fleshed out and constructed without amounting, additionally, to instructions which altered the scope of the work.
78. What can be determined is that the design of the work, with its scope in the state existing in September 1996, was in a very rudimentary form. The only detailed design that had been undertaken related to the specification of the Argos landlord's works, this document having been finalised before the first stage tender documents were sent out for tender. The design of the mechanical and electrical services was also in a rudimentary state. The overall effect of the design was that, as it was put by Mr Nicholls, it was "100% provisional". This passage from his evidence highlights the very incomplete nature of the design. He stated:
- "Q. ... Can you look [at] ... a letter from you to Mr Fletcher dated 30th September 1997 ... it says:
'The overall position continues to change, which is to be expected on a contract which started as 100 per cent provisional, ...'.
What did you mean by saying 'on a contract which started as 100 per cent provisional?'*
- A. I was drawing to the attention of Mr Fletcher an element, an aspect of the project which although it had been well-known to Mr Ryland he may not have been aware of, which was the implication of proceeding with a project of this nature when it is largely provisional – yes, virtually it is, yes, 100 per cent provisional.*
- Q. Would I be therefore right in assuming that you think a fair way for people to think about this contract as being a contract which was 100 per cent, more or less entirely, provisional? Is that a fair way for us to think about it? ...*
- A. Yes, it is a fair way to consider it as a largely provisional contract as the parties understood from the beginning ...".*
79. The Argos design work took a long time. This work involved major structural works at basement and ground floor levels, lowering the level of part of the loading dock to create a ground floor sales area for Argos and constructing new external walls and a roof for this area. Within the unit, a new lift shaft and pit, an enclosed mezzanine floor and staircases and structural openings for goods conveyors between floors and compartment walls, fire doors and shutters and major alterations to the store entrance off Royal Parade were all created. Planning applications were submitted in early August and on 11 September 1996 for this work and bills of quantities and a series of drawings were finalised to cover this discrete element of the works. It was always envisaged that this work would be started first and that the other work would be programmed around the need to complete the Argos works first by, as originally planned, the end of April 1997.
80. For the other parts of the work, ASM embarked upon a series of design development meetings with Plymco in late April 1996. Each floor was worked on individually and final floor layout plans were prepared.

Building Contract

81. **Tender documents.** The procurement method that ASM had advised should be used was one involving a two-stage tender process leading to a contract incorporating the 1980 edition, 1995 issue, of the JCT Private with Approximate Quantities standard form of contract. A two-stage tender process involves obtaining an initial tender from a number of contractors based on an overall, incomplete design and awarding the contract to the tenderer considered to have submitted the best tender. The design process will then be completed during the second stage with the assistance of the contractor and the contractor's tender will be adjusted to reflect the completed design. That adjusted tender, and the additional and changed documents outlining the work to be performed, will then be incorporated into the finalised building contract.
82. The purpose of a two-stage tender process is clearly set out in a document produced in June 1994 by the National Joint Consultative Committee for Building ("NJCC") entitled Code of Procedure for Two Stage Selective Tendering. It was accepted by the expert architects and quantity surveyors that this Code set out the generally accepted practice with regard to two stage tendering in 1996. The Code provided:
- "1.1 This Code has been prepared for use by all who commission building work, whether in the private or public spheres.*
- The most appropriate method of obtaining tenders for the majority of building contracts is by means of single selective tendering ... On contracts where it is desired to secure the early involvement of the general (main) contractor before the scheme has been fully designed two stage tendering procedures as described in this Code may be adopted.*
- This Code is concerned solely with tendering procedure and not with the possible involvement of the general (main) contractor in responsibility for design. ...*
- This Code assumes that the employer's professional team retains responsibility for design and site inspection although the advice of the contractor or proposed specialist sub-contractor(s) may be obtained during the development of the design. ...*
- 2.3 ... *The purpose of this Code is to set out procedures for the selection of a contractor by means of a first stage competitive tender based on pricing documents related to preliminary design information, and which provide a level of pricing for subsequent negotiations, the production of a second stage tender by pricing, in accordance with the first stage tender, bills of quantities reflecting the completed design.*
- 2.4 *The procedure is more suited to large or complex schemes where close collaboration with the contractor during the design stage could be advantageous in that it enables the professional team to make use of the contractor's expertise and during the same period gives the contractor an opportunity to become involved in the planning of the project. Two stage tendering is sometimes seen as a means of achieving earlier commencement of the works by a reduction in the tendering period. ...*
- 9.0 Second Stage Procedures**
- 9.1 *The second stage is the process of finalisation by the employer's professional team in collaboration with the selected contractor of the design and development of production drawings for the whole project and the preparation of bills of quantities for the works priced on the basis of the first stage tender resulting in an acceptable sum for inclusion in a form of contract.*
- 9.2 *It will be advantageous if any prime cost sums included in the bills of quantities are based on quotations using JCT basic or alternative methods obtained concurrently with the preparation of the bills of quantities. ... In pricing the bills of quantities on the basis of the first stage tender, account must be taken of any change in the circumstances affecting the works such as any modification in design or change of the anticipated contract period. The total of the monied out bills of quantities should be recommended to the employer for acceptance as the contract sum.*
- 9.3. *A contract will not be entered into nor works started on site until the second stage procedures have resulted in acceptance by the employer of this sum."*
83. It can be seen from these extracts that the purpose of the two-stage tendering procedure is to accelerate the date when a project can be started on site where a delay in completing the design drawings is envisaged, particularly where a potential contractor can assist in the completion of the design stage and in keeping costs down by advising on ways that the project can be implemented that will save time and money. However, the two-stage tendering process was not intended to give the potential contractor any role in the design stage and it was intended that, by the time that the contract was finally entered into at the end of the

second stage, a full and detailed set of bills of quantities, allied to a fully detailed building project, would have been produced and included within the scope of the finalised building contract.

84. ASM's objective, in advising Plymco to use this two-stage tender process was broadly the same as that envisaged by the Code of Procedure. Mr Nicholls explained that it was known from an early stage that the design would not be completed by the time that tenders would have to be sent out and that Plymco was not prepared to enter into a building contract in which the contractor had design responsibilities so that a contractor's design and build option was not feasible for this project. He considered that the two stage-tendering process would enable Plymco first to obtain competitive tenders in relation to Preliminaries, overheads and profit and on measured rates for areas where the design was already finalised and for the remaining work based on provisional quantities and then to finalise the design and the contract price during the second stage using the prospective tenderer's input and advice in relation to matters of programming, working methods and project management. This input would be particularly useful given the complexities that would be involved in carrying out the work in and around Plymco's continuing use of the store and the complex phasing that that would necessitate.
85. Mr Nicholls clearly envisaged that the whole project would not be fully detailed by the end of the second stage of the tendering process since ASM advised that the Approximate Quantities form of contract should be used. This form of contract is appropriate where clearly defined sections of the work have not been fully detailed but are sufficiently clear that the provisional scope of the work is known and defined. Those sections of the work are then included as provisional items in the bills of quantities and the contract envisages these work items will be replaced by fully detailed work items which will first be priced using equivalent rates from the contract and then executed. However, the provisional sections are intended to be clearly defined chunks or pieces of work and are not intended to form more than a small part of the overall work package which, otherwise, will be fully detailed and billed in the contract.
86. Mr Nicholls also explained that the objectives intended by him in advising on this method of procurement were not fulfilled. He stated: *"The two-stage tender was not completed in the way, or the second stage was not completed in the way that we had anticipated in May...."*

Q. Perhaps we should look at [your statement] to start with:

'The purpose of the first stage tender was to establish a competitive basis for pricing preliminaries for the entire project and providing costing parameters for measured works as represented by the detailed measurement of early sections for which design proposals were well advanced. ... By the time of the first stage tender, the design of escalators in Argos had essentially been finalised. Whilst I had originally expected more of the design to have been finalised by that stage, this had not occurred due to the fact that Plymco had still not decided what they wanted in respect of the remaining areas.'

Now, are you saying that less had been achieved by the time that the first stage tender was sent out, or are you saying that less was achieved between the first and the second stage tender?

A. By the time the first stage tender was sent out I had anticipated, when we discussed this in May, that the design would be an ongoing process, that I would be fed packages that I could pass on to my measuring surveyors to produce sections, bills of quantities sections that would go towards the second stage. When we had selected a contractor from the first stage we could then say to him: oh well, you know here is the plastering on the first floor and here is the suspended ceiling and here is the alterations to form this unit. I would expect to have been able to pass that on in packages.

Q. You could not?

A. No, we could not. ^[2] Note 2 Transcript D8/86/15 - /88/1.

87. In summary, Mr Nicholls was of the view that much of the finalised detail to be anticipated prior to the first stage tender being sent out had not been finalised at that stage and that, during the second stage, little of that anticipated detail, and little of the further detail that it was also anticipated would be finalised in this design window between tenders, was finalised. As a result, the work overall was in a very much less detailed or designed state, by the end of the second stage, than it was anticipated it would have been at the beginning of the first stage.

88. **First stage tender.** ASM had interviewed prospective tenderers in June 1996 and the tender documents were prepared in the period July to early September 1996 on the basis of the then state of the design. This design, save for the Argos works, was only designed to the barest outline. As submitted to the four chosen tenderers on 13 September 1996, the works were all provisional save for the Argos works. Thus, the only description of the required work was to be found from the outline drawings, the general passages in the specification and a list of provisional items contained in the bills of quantities. The flavour of the then state of the design may be seen from considering the very general item descriptions contained in these provisional bills. Thus, the domestic subcontractors builders work bill described the work with such items as "wall and column claddings"; "plant rooms, plant supports and bases"; "forming new retail units" and "remodelling Raleigh Street entrance and staircases". The mechanical and electrical work was also included as a series of provisional sums.
89. The tender documents identified eight separate sections into which the work was divided and also that the section of the works occupied by Plymco would be the subject of shared occupancy with a phased programme of carrying out work in that section which would enable the contractor to obtain single occupancy of the section on a piecemeal phase by phase basis. The tenderer was invited to submit a programme which showed how and between what dates each section would be worked in. The phasing of section 8 could not have been programmed since it depended on reaching agreement with Plymco as to how, when and in what sequence individual trading areas would be released to the contractor for its sole occupation.
90. The precise boundaries and areas of each individual section had been agreed in discussion between ASM and Plymco. A preliminary programme showing phasing diagrams was produced by ASM for discussion purposes for the Project Review meeting held on 2 August 1996 and this formed the basis of the proposed sectional completion arrangements provided for in the tender documents, particularly on Drawing No 3 dealing with phasing.
91. One of the tenderers was Exeter Building Company Ltd ("EBC") who submitted a tender along with three other prospective contractors' tenders. These were opened at noon on 7 October 1996. There was no clear winner. ASM analysed each tender in detail and reported to Plymco on 10 October 1996. The tender figure, which was of course mainly made up of provisional sums, ranged between £4,831,072 and £5,272,162 with EBC's tender being the second lowest, when corrected, at £4,881,871. The intended start date provided for in each tender was 1 November 1996. ASM's recommendation was: *"The effect of these factors is that taking a notional value of £5 million Pearce Construction [the lowest tenderer] is the most favourable tenderer, but because they have offered a higher "fixed cost" element they will become less competitive if the value is reduced. Conversely, if the fixed value of the project increases substantially, EBC Construction will become less favourable and Pearce Construction will represent better value."*
92. Mr Ryland and Mr Gibbs then met with each of the two most favourable tenderers and Plymco decided to choose EBC and its tender was accepted subject to a satisfactory agreement being reached following the second stage tendering process. This decision was communicated to EBC on about 22 October 1996.
93. **Second stage tender.** The second stage of the tender process was a very short process since Mr Gibbs wrote to EBC, on 1 November 1996 as follows: *"Further to your tender for the above works and our subsequent meeting with your colleagues on 28 October 1996 I write to confirm our Client's intention to enter into a contract for the works with your Company subject to finalisation of the stage 2 documentation. In view of the timescales involved, I would ask you to accept this as a letter of intent to enable you to enter into arrangements to lease the office space from CIS and to place on order the materials needed for screens and hoardings for the first stages of the works. We would also request that you make arrangements to commence site investigation works as needed ..."*
94. ASM contended that this letter did not amount to a true letter of intent in the sense of creating a contractual obligation on Plymco to pay for such work as was carried out following and as a result of the letter. It is not necessary to resolve that question since all relevant parties proceeded from 1 November onwards on the basis that there was a contract in place and, in consequence, the actual building contract was not signed until sometime in January 1997. Possession of the first stage was provided to be 9 December 1996 but the effective start of work was on 6 January 1997 following the Christmas and New Year holiday.

95. The only changes between EBC's first stage tender and the contract were those that were discussed at the meeting on 28 October 1996. These largely related to sectional completion and phasing arrangements and resulted in a two page addition to the Specification. This provision inserted dates for possession and completion for each of the eight sections of the work. The contract bills of quantities have been amended in some minor respects to take account of relatively minor additional details prepared by ASM since the tender documents had been prepared and the contract sum was very similar to the tender sum at £5,036,061. It follows that there was not, in reality, a second stage to the tendering process and that the contract, as entered into, was the tender subject to relatively minor amendments.
96. A very substantial part of the contract sum was provisional and related to work which was described in the contract as being provisional and which was not detailed save in outline. There was no agreement as to what percentage of the work was provisional but Plymco's suggested figure of 87% of the contract sum which was not priced against an itemised bill of quantities and was the subject of provisional or prime cost sums is one which I accept as sufficiently conveying the full extent of the provisional nature of the contract. However, to this uncertainty must be added the uncertainty as to how and in what sequence and to what timescales the phasing of the work would be organised and arranged, particularly in section 8 which comprised most of the area and was the area that Plymco would continue to occupy and trade from whilst EBC's work proceeded.
97. **Phasing.** It was clear from the start of planning and design work that the execution of the work would be both difficult and potentially disruptive because the work was to be undertaken in and around the store which was to remain fully open for trading. It was also clear that this would involve the work being divided into sections which would be subject to different start and completion dates and into phases within sections where Plymco would be trading in and around the work. It is important to emphasise the difference, in the context of this project, between sectional and phased arrangements. A contractor is ordinarily entitled to exclusive possession of any area in which building work is being carried out, under the standard contractual arrangements applicable to significant quantities of work. Very often, the overall site will be divided into sections or smaller areas and the contractor will obtain exclusive possession of each area on a different date and will complete the work in sections. Each section will, however, once given to the contractor, remain in its exclusive possession whilst work proceeds in that section. However, the employer will often wish to retain joint possession of all or part of a section, or to take joint possession prior to completion of the work in any section. The contract conditions provide a detailed procedure to allow for this. Although the term is not used in the standard contract, this arrangement was referred to as "phasing" in the Co-operative House project.
98. The Co-operative House project involved a complex inter-relationship between sectional and phased working. This is because there were discrete areas where the individual shells were to be constructed, which would not be shared with Plymco and which had to be worked on at a different rate and out of sequence with the remaining work and a large residual area where both Plymco and the contractor would be working and trading. In this residual section, the intention was that the work would be phased into small sub-sections so that the contractor's work would proceed in each sub-section separately and in sequence. This would allow trading on a particular floor or in the store in general to continue but with particular areas temporarily given over to the contractor. Plymco's and the public's access to those sub-areas and any trading in them would be restricted whilst the contractor proceeded with its work and any trading activity there would be decanted or relocated to another area and when the contractor had finished in that sub-section, the phasing arrangement would move onto another sub-section in the overall shared area.
99. The contract documents did not provide any detailed or clear provisions to cater for the phasing arrangements that would be needed, it merely provided clear provisions for the sectional working arrangements, including a general overall date for starting and completing the various sections which were to be shared by the contractor and Plymco. It also provided in general terms that the existing buildings would be occupied and/or used during the contract as follows: *"Third Floor Offices – Throughout the Contract All other locations – Prior to Phased Commencement and following section completion."*

In other words, the contract envisaged that the phasing arrangements would be agreed between the contractor and ASM, as supervising officer and employer's representative, as work proceeded. However, the contract conditions did not allow for phasing within sections. Once possession of a section had been given to the contractor, the employer could only retake possession, prior to practical completion, by taking partial possession under clause 18 of the conditions. Although this condition allowed the parties to share possession, the effect of taking partial possession was, in accordance with clause 18, to treat that part of the works as being practically complete. Thus, it was essential for any phasing or temporary sharing arrangements of any part of an individual section, particularly section 8, to have been finalised and agreed between Plymco and the contractor prior to the contract being entered into and for those arrangements to be expressly built into the contract as an adjunct to the provision for shared possession contained in the bills of quantities that I have already set out above.

100. In fact, neither a stipulated programme nor any proposed phasing arrangements were provided to EBC with the first stage tender documents or agreed with it by the time that the letter of intent was sent on 1 November 1996. In consequence, EBC's tender programme provided a continuous bar line for section 8, where most of the phased activities would be carried out, for the whole period that that section would be in its possession. Thus, at that stage, EBC was indicating that it was planning to be working continuously through the whole section through the whole period of the contract. In the absence of any other indication of how the contemplated "phased commencement" was to be operated, EBC could have done little else.
101. Events moved quickly following the letter of intent, understandably because the intended start date had been stated to be 9 December 1996. This led to a contract programme being issued by EBC dated 9 December 1996 which was replaced by a second contract programme issued on about 22 January 1997. The phasing arrangements shown on these programmes were not sufficiently detailed to allow for Plymco's trading requirements or for the work actually required as it was fully detailed as work proceeded. This led to four substantial changes to the phasing arrangements shown on the programme, in June and October 1997 and twice in December 1997. However, of greater significance were the many smaller changes, which led to sub-sections or small areas not being given over to EBC at the time programmed and to many changes within phases to accommodate the huge number of detailed drawings issued as work proceeded and Plymco's updated trading requirements. or changed at short notice, will inevitably give rise to much localised delay and disrupted
102. The phasing and shared working arrangements, particularly when issued working conditions and to significant increases in the cost of executing the work. All four experts, albeit in different terms, shared this view, set out by ASM's quantity surveying expert, Mr Symonds, in his first report: *"No contract however procured and implemented is able to cope with changes of this magnitude in terms of phasing without a significant impact on the cost. As reference to the drawings reveals, the phases tended to get smaller as the work progressed, meaning loss of efficiency and volume discounts. These costs are reflected in the substantial out of hours working, together with temporary screens to enclose the working areas. It also accounts for the volume of dayworks in addition to the out of hours working. The changed working environment meant that even those areas procured at a cost per metre square rate in the appropriate BQ could not be valued in the same way and EBC and their domestic sub-contractors justifiably (i.e. as provided for in the contract) were able to claim daywork rates."*

Cost and Cost Control

103. **Overall cost.** Only three separate and overall costing exercises relating to the work were carried out prior to the work starting. The first, in April 1996, and the second in May 1996 have already been described. These amounted to no more than budget costing exercises unlinked, save in the most general of terms, to the detailed work that would be required or to the working conditions under which that work would be executed. The third was undertaken by each of the four tenderers when submitting their individual tenders. Given the lack of detail about the scope and detail of the work to be executed and the phasing and working arrangements that would be required, it is not surprising that all these tenders, in overall terms, produced costings similar to the May 1996 budget exercise undertaken by Mr Nicholls. This is because the two exercises were being carried out, broadly, on the same basis in terms of work scope, timing and working conditions. Indeed, Mr Nicholls' evidence in effect acknowledged that since he stated that the

primary purpose of the first stage tender was to fix the preliminaries and certain basic rates for use in negotiating the second stage tender. Of course, these negotiations never took place in the two week period between the acceptance of EBC's first stage tender and the dispatch of the first letter of intent on 1 November 1996 which culminated the second stage tender process. Indeed, such negotiations never took place thereafter as the full extent of the scope of work evolved.

104. **Cost discussions and advice.** The only minuted discussions about the overall cost and the reliability of the budget or tender cost as a guide to the overall actual cost of the work occurred at three meetings held in November 1996. At the first, held on 5 November 1996, ASM discussed with Plymco the outcome of the tendering process and the discussions that had recently been held with EBC. This meeting had been preceded by a letter from Mr Nicholls to Mr Ryland suggesting that the Contract Sum should be £5,131,871, being the first stage tender figure provided by EBC to which should be added three further provisional sums totalling £250,000 to take account of Plymco's more recent (that is since the preparation of the first stage tender documents in August 1996) requirements for a new restaurant, roof repairs and additional work to the low level canopies. This letter can be seen as a confirmation that nothing of significance occurred by way of design development between the first and the second stages of the tendering process. The letter continued: *"Although much of the work has yet to be detailed, this figure represents the best assessment of the full value of the project based upon current information, and the expenditure against provisional amounts will be closely monitored and reported as work progresses."*
105. The meeting was one of the regular Project Review meetings. At the end of the meeting, attended by six senior Plymco representatives and Mr Gibbs and Mr Nicholls and three other consultant professionals, a discussion about costs took place. As minuted, Plymco expressed concern at the amount of provisional sums within the bills of quantities. Mr Nicholls replied that these sums covered the areas of work where the design had not been carried out and represented cost targets which would be continuously monitored as the design evolved and the uncostered elements were costed. The subject of the budget costs was again discussed at the Meeting on Developments held on 14 November 1996. The meeting did not have available to it the promised budgeted cost figure but it was informed by Mr Nicholls that the final figures would be available shortly. However, during the discussion, Mr Nicholls' evidence was that many of the provisional figures were no more than allocations from the overall budget figure since the design details for that work were largely unformulated. Mr Nicholls then reassured Plymco that ASM proposed to monitor actual expenditure against these cost allowances and if it transpired that greater costs were being spent than budgeted for on some of these allowances, savings from other allowances would then need to be made by Plymco once it had been informed of the increased expenditure.
106. The third meeting at which the budget costs were discussed was the Pre-contract Meeting held with EBC on 21 November 1996 attended by Mr Ryland, Mr Williams and Mr Radford of Plymco; Mr Gibbs and Mr Nicholls with six further professionals and by Mr Wood and Mr Jude and three colleagues on behalf of EBC. It was minuted that Mr Nicholls informed the meeting that cost control and cost management would be very difficult and that ASM and EBC would work closely together to enable cost reports to be issued regularly relative to established cost targets. So far as payment and variations were concerned, the meeting agreed that there would be monthly valuations with a full re-measurement of all work and a valuation of all re-measured work as the work proceeded. It was also agreed that, wherever possible, estimates would be prepared for each area of work or a pre-measurement of the work would be undertaken before work started.
107. In summary, therefore, at the time that the parties entered into what they accepted was the contractual arrangement between them to govern the execution of the work, Plymco was informed that almost the entire work was subject to a contract sum which was no more than a budget forecast because the design work needed for costing and construction purposes had not yet been carried out. In order to ensure that the work was constructed so that that budget forecast was not exceeded, the costs being incurred would be monitored against the budget and if any element of cost showed a tendency to exceed the relevant budget cost, cost control measures and cost savings from other parts of the work would be implemented so as to ensure that the overall cost remained within budget. The relevant cost control measures would be of two kinds, proactive measures based on estimates of the work to be prepared before that part of the work was

executed which would curtail expenditure before it was incurred and reactive measures based on regular cost reports of the cost of the work being carried out which would lead to cost savings elsewhere or to cost control measures for the future which would enable future relevant expenditure of a similar kind to be reduced.

108. Plymco considered, in the light of this advice, that its current plans and proposals could be implemented at a cost which would, within reason, equal but not exceed the budget cost notwithstanding the lack of design and the budget and provisional nature of the entire work. Plymco also understood that careful monitoring and cost control measures would be implemented by ASM with EBC's assistance. These would enable any cost increases to be identified in sufficient time to enable effective cost control measures to be taken so as to curtail the potential cost increases and to bring the project back within budget. These measures would include the making of cost savings elsewhere and ASM would advise Plymco of possible cost increases and on savings that should be taken where necessary on a regular and timely basis since any cost saving measures needed some time to formulate and implement. However, Plymco was warned that it should be ready speedily to react to such cost savings advice. In my judgment, Plymco understood ASM's advice given during the course of these exchanges in November 1996 and would reasonably have understood that advice in the sense that I have just summarised.

Building Contract Cost Control Machinery.

109. **Bills of quantities.** ASM selected the JCT Standard Form of Building Contract with Approximate Quantities. Ordinarily, the With Quantities JCT Standard Form of Building Contract would be used with a two-stage tender process since the objective of the process is to enable a definite and designed set of work to be produced and incorporated into a lump sum contract by means of priced bills of quantities. However, the choice of this form of contract turned out to be a suitable one since, although this had not been intended at the time that the two-stage tendering procedure was recommended or embarked upon, the work was still almost entirely provisional when the contract was entered into, was incapable of being taken off and described in bills of quantities and consisted almost entirely of provisional sums. ASM never discussed with Plymco what form of contract would be suitable for the work and, had it done so would have been bound to explain that the form of contract was only suitable because the two-stage tendering process had not produced firm and defined work capable of being billed and firmly costed.
110. Where work has been fully designed it can be described in bills of quantities and accurately measured and priced. This is because the work is taken off the drawings and broken down into small work packages which are described and defined using a standard procedure defined in the relevant Standard Method of Measurement. The relevant Standard Method that would have been used for preparing bills of quantities for use with the JCT set of Standard Conditions in 1996 was the Seventh Edition of the Standard Method of Measurement of Building Works which was published by the Royal Institute of Chartered Surveyors and the Building Employers Confederation in 1988. The document described, in its General Rules section, what its purpose was. This was to provide a uniform basis for measuring building works. The bills of quantities prepared in accordance with these rules will fully describe and accurately represent the quantity and quality of the works to be carried out. This is done by use of quantities and items of work which describe the work in a standard way and so as to incorporate or refer to any necessary work required as an adjunct to the work being described. The necessary rules for all categories of work are then set out in detail in the document. This enables the work to be costed and the rates used for costing purposes will also usually be applicable for costing any alterations to the works. The procedure of designing and detailing work in sufficient detail to enable bills of quantities to be prepared that fully describe the work has the obvious advantage of enabling a firm cost of the work to be established before work starts. This greatly assists the contractor from incurring unforeseen costs.
111. The Standard Method also defined provisional sum work. Such work was defined as follows: *"Where work cannot be described and given in items in accordance with these rules it shall be given as a Provisional Sum and identified as for either defined or undefined work as appropriate."*

Undefined work, which was what the provisional sum work in the Co-operative House project was, was work where it was not possible to provide information as to the quantity or quantities of work sufficient to indicate the scope and extent of the work. For such work, unlike defined work, the contractor will not be

taken to have made due allowance for it in programming, planning and pricing preliminaries. Thus, the recoverable sums for preliminaries will increase once the provisional sum work has been identified.

112. It followed that very little of the work would be subject to the cost controlling mechanism provided for by a firm bill of quantities or the lesser but still real cost controlling mechanism provided for by the use of defined provisional sum work items.
113. **Cost control.** The contract contained detailed provisions governing the undertaking and costing of provisional work. Essentially, provisional sum work was not to be carried out at all unless and until the Architect, that is ASM, instructed the expenditure of such work. Such an instruction was defined as a variation instruction. Once such an instruction has been given and the work has been "expended", it is to be valued as a variation. That requires the work to be valued using the rates and prices for similar work executed under similar conditions contained in the bills of quantities. If the work was similar to billed work but was not executed under similar conditions, the bill rates and prices should be used as the basis of the valuation. Otherwise, the work should be valued at fair rates and prices. Since so little work was billed originally and since the provisional work was undefined, it would follow that most if not all of the work would have to be valued at fair rates and prices, particularly as the work would be carried out under phasing arrangements which were different from those used to value the relatively small amount of billed work.
114. This approximate quantities form of contract had been chosen at a time when it was envisaged that much of the ill-defined and under-designed work contained as provisional items in the first-stage tender bills of quantities would be firmed up into defined and billed work in the contract bills of quantities following the second-stage of the tendering process. Indeed, the introduction to the section of the bills of quantities containing the provisional sums stated that it was anticipated that that work would be executed by domestic subcontractors and that: *"The Contractor will, in conjunction with the appointed consultants, upon finalisation of the design and where possible prior to the agreement of the second stage tender, secure a minimum of 2 No competitive quotations from companies/organisations of his own choice and select and appoint a suitable subcontractor in conjunction with the appointed consultants."*
115. This procedure was clearly intended to provide the basis of ensuring that the cost of executing the provisional sum work was reasonable since the estimates it referred to would need to be based on bills of quantities prepared for that section of the work. Since no competitive quotations were able to be obtained during the second stage tendering process, this provision, if operated, would have provided the only effective mechanism for controlling costs. Had it been operated, it would have worked as follows. The relevant section of the work would be designed and a bill of quantities prepared. This would have been sent for tenders to at least two prospective domestic subcontractors. Once the tenders were available, ASM would consider whether to instruct the expenditure of that provisional sum and, if instructed, would instruct that the work be executed by the most favourable of the tenderers. The relevant tender prices would then be used as the basis of ascertaining a fair value for the work. It was this procedure that ASM informed EBC at the Pre-contract meeting would be used with regard to the execution and valuation of provisional sums.
116. The reality was that the only means provided for in the contract for the monitoring and controlling of the cost of executing provisional sum work was the procedure set out for provisional sums whereby that would only be instructed following the obtaining of suitable tenders from prospective domestic subcontractors by EBC and would then be valued using fair rates and prices based on the approved tender. There was no mechanism provided to deal with the situation which arose where the provisional sum work was not capable of being made subject to a tender because it was designed and instructed in such a piecemeal way that that procedure could not be implemented.

ASM's Advice about Cost, Cost Control and Method of Procurement for the Co-operative House Project

117. **Introduction.** Plymco's principal complaint against ASM is that the cost of the project escalated unnecessarily because, on ASM's advice, the project was contracted and organised on erroneous bases. In particular, the work was insufficiently designed and programmed prior to the contract being entered into to allow its cost to be firmed up before the contract was entered into and the work was carried out.

118. Plymco contends that these errors occurred because ASM erroneously thought that the cost could be controlled by the adoption of a two-stage tendering process and an approximate quantities form of contract. This would allow, so ASM thought, the work to be sufficiently firmed up and costed in three stages: initially prior to the first stage tender, then during the second stage tendering process and finally as work proceeded by using the procedure for instructing the expenditure of provisional sums. It is clear from the evidence of the expert quantity surveyors that, for that overall process to have any prospect of successfully controlling costs, it would have been necessary to complete the design and programming work in accordance with a strict timetable including the provision of all necessary instructions from Plymco relating to its wishes with regard to layout, work content, finishes and phasing arrangements. That timetable for all necessary decision-making and design work would have had to have been such that much of the design and programming work would have been completed prior to the first stage tender, the bulk of the remaining design work and all the programming would then have had to have been completed prior to the contract during the second stage tendering process and the remaining design work completed sufficiently early in the contract to allow all remaining provisional sum work to have been detailed, billed, tendered, priced and then instructed without interrupting the pre-planned and pre-programmed progress of the works.
119. Plymco then focuses on the stage in the project just before the contract was entered into, or at the very least at the point when Plymco and EBC proceeded on the basis that they had a contractual relationship governing the entirety of the work. This point was on or just before 1 November 1996. Plymco's case is that ASM made a fundamental error at that point. It advised Plymco that it could safely proceed to enter into a contract with EBC on the then state of design and programming work and costings and complete the project as intended, namely at a cost of approximately £5.6 million. There was, in reality, no prospect of that being achieved and ASM should have realised this and should have advised Plymco at that time that it had one of two options. It could proceed on the intended overall basis but at an overall cost which could not at that point be identified but which would greatly exceed £5.6 million or it could adopt a different strategy whereby only the so-called Argos works proceeded at that point and the balance of the work would not proceed for at least five months and, in the meantime, all necessary design and programming work would be completed to enable a firm contract to be entered into for that work in about April 1997. That second contract could be tendered first or it could be entered into with EBC as a second, negotiated contract.
120. In short, Plymco alleges that ASM negligently failed to advise it on or just before about 1 November 1996 that it should adopt a two-contract solution, which was dubbed the "Argos first" solution as the only viable means of achieving the completion of the project at a reasonable cost.
121. It is important to appreciate that this way of addressing Plymco's case means that it is not necessary to determine who was responsible or culpable for the fact that so many decisions remained to be taken and so much design work remained to be finished at the stage when Plymco was about to enter into the overall building contract. Plymco contends that even if it had been wholly responsible for, and culpable in relation to, this state of affairs, it should still have been advised to enter into a two-contract method of construction at that point. In fact, Plymco points to a series of failings prior to that point by ASM, principally failures to advise it on the need to finalise most of the design in accordance with a timetable which would have enabled costs to be finalised during the two-stage tendering process. These failings might have provided Plymco with further, albeit overlapping causes of action. However, Plymco has elected to focus on the core failing, as it sees the situation, whereby ASM allowed Plymco to embark upon, and did nothing to prevent Plymco from embarking upon, the wrong method of proceeding with the work in the circumstances prevailing on 1 November 1996 when the fateful decision to proceed with the one-contract method of undertaking the work was taken by Plymco on ASM's advice.
122. Since any piece of advice is given in a particular context, it is necessary to consider what advice ASM had given Plymco about cost, design decision-making, procurements methods and cost control prior to the fateful decision being taken so as to put any absence of advice about these matters at the critical time into context.

123. **General including written advice.** Plymco's complaint relates to ASM's role as the professional responsible for cost control and cost advice, acting in conjunction with QSM. Plymco's overall instructions to ASM were clear, the refurbishment project was to be undertaken at a cost which should not exceed the approved budget figure or, in financial terms, about £5.6 million. This figure was based on ASM's advice that the project could reasonably be expected to be undertaken for this figure. Thus, ASM was, in undertaking its design work, to keep in mind this figure and should take all reasonable steps to enable that figure to be achieved. The cost of the project was dependent on the work to be performed, the working conditions under which it was to be performed and the charging rate for that work executed under the conditions provided for that EBC could charge. The most effective way of ensuring that the cost was controlled would be to have settled all designs and the contract programme in advance, to have obtained a realistic cost for that scheme and then to have allowed that scheme to have been implemented without any change or interruption.
124. It followed that Plymco needed to be provided with detailed, clear and definite advice as to what decisions and instructions it had to provide and the timescale for the provision of those instructions. A client will know in general terms that it must settle what work is to be undertaken and the timescale that is required but will need constant reminders of the decisions that it must take and the deadlines for those decisions. It is one thing for a client to know that it must decide on layouts, locations, finishes and on the phasing arrangements it requires, it is another to actually pin down a client and get the necessary decisions from it.
125. Thus, an architect in ASM's position needed to give Plymco clear advice as to what instructions it needed and a timetable for the giving of those instructions so as to ensure that the relevant design work had been completed in time for the preparation of the first stage tender, for the further design development needed during the second stage tendering process and in the early stages of the execution of the work. Plymco also needed clear advice as to how reliable the budget cost exercise was and what the potential cost implications were in relation to any provisional sum or provisional cost. In particular, it needed to know how reliable the contract sum was as a guide to the overall cost and what it had to do and when it had to do it if there was to be any realistic prospect of that contract sum being achieved.
126. In general terms, it would not suffice for an architect to adopt the position that such detailed and continuous advice need not be given or could be scaled down because the client was experienced in development work or knew already the cost consequences of delayed or varied instructions or had worked with the architect on previous projects or had used the two-stage tendering procedure and provisional sums procedure before. Moreover, it would not suffice for an architect to adopt a less formal or detailed method of advising a client because it was perceived that the client was experienced or familiar with the type of contractual arrangements or building work contemplated on any particular project. It would only be permissible for an architect to scale down the nature or extent of advice that would be given to an inexperienced client or one who had not worked with that architect previously if the client expressly instructed the architect to scale down its advice services having taken an informed decision that that reduced service was all that was required. It would not be sufficient for an architect to assume that its client did not require or need the full service, such a decision to provide less than the full service could only be made after receiving express and informed instructions to that effect.
127. ASM adopted a different approach to this project. Very little of the advice it gave was given or confirmed in writing, whether in correspondence or meeting minutes. ASM regarded Plymco as an experienced developer who had worked with provisional work and quantities before, particularly on the Transit Way project, knew its own mind and would not take kindly to being advised as to what it had to do and when it had to do it. It also considered that Plymco wished the working relationship on this project to proceed in the same informal manner as it regarded its working relationship as having proceeded on the many previous projects that the two organisations had worked together on over a lengthy period of time. Thus, Plymco was taken to have been aware of, and to have accepted, the cost risks involved in embarking on an ill-defined project. Moreover, ASM appeared to leave it to Plymco to decide when it would take any particular decision, for example as to the phasing arrangements it required. ASM's role was, broadly, a reactive one, that is to await instructions and then to implement them.

128. However, Plymco disputed that this approach was one that ASM should have adopted or that it required. I have already found that Plymco did not have the experience of development work that ASM suggested that it had or that the Transit Way project provided any relevant experience that enabled ASM to scale down the nature or extent of the advice that it should otherwise have given. Moreover, Plymco needed to be given a clear and continuously updated timetable setting out the decisions that it had to take and communicate to ASM to enable its overall objectives as to the timescale for the project to be fulfilled. Furthermore, as I have already found, the Co-operative House project was wholly different from, and far more complex and difficult than, any store refurbishment or building work it had undertaken with ASM previously.
129. **Procurement and contract advice.** Both Mr Gibbs and Mr Nicholls insisted that there had been several detailed discussions with Mr Ryland about the form of contract and the method of tendering and that Mr Ryland had been advised that the two-stage method of tendering was desirable given the need to start the tendering process before the design work would be complete since Plymco was determined to start work in the Autumn of 1996 so as to ensure that the Argos works were completed in accordance with its wishes by April 1997. However, the only documentary evidence of any discussion about the procurement method is found in the agenda for a meeting held on 23 May 1996 for which there are no surviving minutes. Mr Gibbs arrived late at that meeting and had no recollection of what was said. The only person who had any recollection of the discussion about procurement was Mr Nicholls. He stated that he advised that the two-stage tender process offered considerable advantages to Plymco in that it would allow for a competitive tendering process before the design work was well advanced which would produce acceptable preliminaries, overheads and profit costings and competitive rates for the work that had been designed. These could be used to provide a means of pricing the balance of the works that would be designed during the second stage of the process. He also stated that he stressed that this process would need Plymco to take all necessary decisions and give all necessary instructions in time to enable the design process and pricing negotiations to be completed during that second stage of the tendering process.
130. The decision to adopt a two-stage tendering process was taken at an early stage in the design process and it is likely that it was actually taken at this meeting. However, it is clear that there was no considered discussion about that method of procurement. I am satisfied that Mr Nicholls briefly explained why that method of procurement was the only appropriate one for Plymco on the Co-operative House project in terms similar to those I have summarised and Mr Ryland accepted that advice without demur. However, I am clear that no-one in Plymco appreciated the significance of the adoption of this form of tendering, namely that it required all necessary decisions about design and programming to have been taken, with ASM's assistance, well before the end of the first stage of tendering since these would be needed to enable Plymco's design and programming requirements to be worked up into detailed design and programming documents and for the necessary cost negotiations to be finalised during the second stage of the process which would only last for about three to four weeks. Thus, most of the decision-making and programming work would have to be completed before that process started. Plymco would need detailed advice as to what decisions it had to take and the dates by which those decisions needed to be taken and ASM needed to prepare internal programmes and drawing production schedules which provided the means of bringing the design and programming together and the costing decisions taken in that three to four week window of opportunity in October 1996. What is clear from the evidence is that there were no further discussions and no advice about the procurement method, it was merely accepted by everyone that the two-stage tendering process would be adopted.
131. **Other relevant advice.** It is therefore necessary to examine the advice that ASM gave Plymco as to the timetable that it would need to conform to when giving ASM all necessary decisions and instructions to enable the design and phasing programming work to be completed in accordance with the two-stage tendering process objective of completing that work in the second stage of the tendering process. It is also necessary to consider what advice ASM gave in relation to any possible increase in the overall cost and what measures should be adopted by Plymco to enable adequate cost controls to be adopted.
132. ASM had always considered that it would be difficult to prepare a firm cost for the work required to implement the project. Thus, in September 1995, at a Plymco Developments meeting, Mr Gibbs reported, in

relation to the scheme then being considered that was superseded by the 1996 scheme actually adopted, that it would be difficult to prepare a tender document for Co-operative House. Despite that concern, ASM never spelt out to Plymco in any detail the critical need to devise a decision-making strategy which identified what decisions had to be taken, by whom they had to be taken, the means to be adopted to arrive at those decisions and a detailed timetable of the decision-making process that enabled the design process and all programme and phasing planning to be undertaken as intended. This would also have needed, but did not get, a timetable from ASM setting out the dates by which each group of decisions and instructions had to be taken and given by Plymco.

133. Indeed, the absence of advice from ASM on these matters was coupled with what can only be described, on reading the documents years later, as an approach which lulled Plymco into a false sense of security. Thus, on 4 July 1996, only about one month before all phasing decisions should have been taken, Mr Nicholls wrote to Mr Ryland in these terms: *"I enclose three copies of a programme for the Argos project, which I believe confirms the time parameters discussed.*

You will see that there is no reference to the internal movement of retail departments and their fittings, stock etc and I have assumed that they will programme themselves around the requirements of the building programme and the phasing drawings.

I will prepare a further programme for retail units and associated remodelling of the department store when proposals have been firmed up a little more."

134. In fact, as Mr Fletcher stated in evidence, there were no detailed discussions about phasing arrangements with ASM or EBC until a meeting on 18 November 1996. Plymco had started internal discussions about phasing in August but these were not undertaken with any structure or in accordance with any timetable until after the start of the contractual arrangement with EBC in November 1996.

135. Mr Fletcher and Mr Ryland's evidence about advice about, and requests for, instructions about phasing and design decisions was to the like effect. These passages in Mr Fletcher's evidence were well supported by the totality of the evidence and were, as I find, correct statements of the factual position in the months leading up to November 1996: *"... I can quote no definitive examples of when such chasing [for decisions on specifications and finishes] happened, to whom [ASM] made their requests, what information they were requesting and what the response of [Plymco] was. Their files do not record that information. If there were significant problems of this kind at the time, I would have expected to have been made aware of them and I was not. They are professional people. If they realised there was a problem and that [Plymco's] employees were not conducting themselves as they should, then why was that matter not referred to the highest level with an explanation of the implications for the project and to [Plymco] and with a recommendation? ...*

I was not made aware that an increase in the number of phases would lead to an increase in the costs. I have no recollection of such advice being given until 1997 when I started to question ASM generally about why the costs of the Project were getting out of control. At that point, one of the reasons given to me for the cost escalation was the phasing. I was not told before. ... If ASM had advised me that the phasing etc had to be settled and set in stone to avoid additional costs of (%), then I would have acted on that advice. ... all I can say is that in 1996 and during the early part of 1997 and indeed at any time through the project I was not advised or made aware by ASM that changes in phasing could have anything like the sort of implication. ... In terms of what we could and could not have done in terms of making space available, there was flexibility. We, as retailers, wanted the open store to have representation of all its departments at all times but there was no particular requirement about space which is where the flexibility could have come in."

136. **Advice as to an alternative strategy.** Since there was no material advice recorded in writing, it is necessary to consider the evidence of Mr Gibbs and Mr Nicholls with some care. Mr Gibbs stated that, in 1996 in the pre-contract phase of the design and procurement of the work, cost was an overriding consideration. He also stated that the proportion of provisional sum work set out in the bills of quantities should have been materially reduced during the second stage of the tendering process. The fact that that did not occur, he accepted, was a failure. This failure to address cost led, he stated, to a consideration of alternative methods of monitoring and stabilising the cost of the project to the two-stage tendering process. Those alternative methods never included consideration of the so-called Argos first, or two-stage contracting, method. This proposal was never thought about because, as Mr Gibbs saw it, Plymco would have regarded it as

unthinkable. However, when pressed about the consideration that was given to alternative methods, he accepted that they amounted to no more than general unminuted discussions, from time to time, about the risk that costs could rise and the uncertainties created by the provisional sums in the contract. Any further and more specific advice had been given by Mr Nicholls on occasions when he was not present.

137. In relation to phasing, Mr Gibbs stated that there was no discussion between himself and Plymco until after EBC had been accepted as the contractor, in November 1996. The phasing arrangements were left to EBC to make suggestions to Plymco within the framework of the programme that EBC had produced once work had started.

138. Mr Gibbs' evidence as to the advice that he gave Plymco can be summed up by reference to this passage in his cross examination:

"Q. Can we then, please, take stock to see whether we can reach agreement about the following. When the decision to place the contract with EBC had been taken, we have not seen, have we, any written advice about progress or lack of progress in respect of design?"

A. Not written, but these matters were discussed in meetings.

Q. Would you agree that there is no record of advice about the progress or lack of progress in respect of provisional sums?"

A. Again, I mean it was something that was known about by virtue of constant meetings that were taking place with all parties. There may not be written advice about the progress or lack of progress in respect of phasing?"

Q. Would you agree that there is no record of advice about the progress or lack of progress in respect of phasing?"

A. At that stage, yes."

139. Overall, the sum total of the advice given by Mr Gibbs on all questions of design progress, programming, phasing, provisional sums and cost control was, as he kept insisting, given by way of these matters being discussed in meetings which were minuted but whose minutes do not, save occasionally in passing, refer to such discussions.

140. Mr Nicholls' evidence did not differ from Mr Gibbs' evidence save on the important question of "Argos first" advice. On this question, Mr Nicholls' evidence was subject to what can only be described as organic development. In his witness statements, he referred to the meeting on 23 May 1996 at which ASM's advice that Plymco should adopt a two-stage tendering process was accepted by Plymco by stating that: *"we had previously discussed with Peter Ryland the option of a two-stage tender ... this option was considered by Peter Ryland to be impracticable."*

That statement is clearly stating that the Argos first possibility had been discussed and dismissed as a possible strategy before and on an earlier occasion to the meeting on 23 May 1996 and was never raised as a subject for consideration thereafter.

141. In his second witness statement, served just before the trial started, Mr Nicholls referred to two occasions on which the Argos first solution was discussed with Mr Ryland in informal conversations. The possibility of Plymco adopting this solution was, he stated, dismissed out of hand. No advice was apparently given by Mr Nicholls on this subject on either occasion.

142. When giving evidence in chief, Mr Nicholls firmed up his evidence about the advice he had given on the question of Argos first. The subject was first discussed at a meeting early in the relationship and was rejected summarily by Plymco who gave two related reasons for rejecting the possibility. These were, firstly, that it would be very difficult to carry out the work in this way because it could not readily be isolated from the other work to be carried out. Services were to be shared by both parts of the works and some features such as staircases and access corridors, were also common to both parts. Secondly, the necessary decanting of departments could not easily be undertaken in two stages, initially to accommodate the Argos works and, later, to accommodate all remaining works. Mr Nicholls then referred to the second occasion on which the subject was discussed. This was in July 1996 when Plymco asked Helix to prepare a discrete budget for the services element of the Argos works and he was asked to provide a similar budget for the associated builders' work. He stated that he asked Mr Ryland whether this exercise was being undertaken as part of an exercise of doing the Argos works separately but he replied that that was not the

case, there was no such possibility. Mr Ryland explained that the budgeting was purely for cash flow planning purposes.

143. Finally, in cross-examination, Mr Nicholls again developed his evidence about Argos first advice in two respects. Firstly, the discussions in July 1996 appeared to have more structure and to have been fuller than he had previously suggested. However, the result of those discussions was the same. He stated: "... it was more an idea that was floated rather than formal advice and it was an idea which did not really have any legs, no one seemed to think it was viable."

The second respect in which Mr Nicholls' evidence developed related to discussions with EBC between the first and second stage tenders. Mr Nicholls thought that he could remember one of EBC's managers, Mr Jude, raising the possibility of an Argos first solution during discussions about phasing. This was one of several possibilities being banded about and nothing came of the suggestion.

144. Taking Mr Nicholls' evidence in the round and setting it against all the other evidence, I conclude that "Argos first", as a method of executing the works, was never considered in any detail and at no time did ASM evaluate this possibility or consider giving advice to Plymco that it should itself give serious thought to it as a possible method of proceeding. There may have been a brief discussion on or before 23 May 1996 and, had there been, it is likely that Mr Ryland would have brought the discussion to a close on the basis that that method of proceeding did not fit in with Plymco's then plans. What did not occur, at a later stage, once it would have been clear that the two-stage tendering method would not result in a contract with most of the work detailed, firmly costed, phased and programmed, was an independent evaluation by ASM of this as a method of working round the difficulty that had arisen and ASM should then have given firm and clear advice given to Plymco that it should carefully consider this option since otherwise there would be real, and possibly insurmountable, difficulties in controlling costs.
145. It is also clear from the totality of the evidence that Plymco was relying on ASM to advise it throughout the pre-contract and contract stages of the work on what decisions it had to take and the dates by which it had to take those decisions to enable the work to be sufficiently designed and for the phasing arrangements to be sufficiently settled by the time the contract became effective to enable the work to be carried out within budget and so as to prevent avoidable additional costs arising from any factor associated with the late development of the design or phasing arrangements to accommodate Plymco's wishes.
146. **Contract Procedures.** As I have already found, ASM made general statements at the meetings held in November 1996 to the effect that careful monitoring and cost control measures would be implemented by ASM with EBC's assistance to include the making of cost savings elsewhere when necessary that ASM would advise Plymco about. Apart from that, ASM gave Plymco no advice, before or for many months after the contract was entered into, as to how its proposed cost monitoring exercise would be carried out. It also gave no advice as to the steps that Plymco should take to finalise its design and phasing requirements or as to the programme or timescale within which these steps should be taken; as to what savings Plymco should consider; as to what reliance, if any, Plymco could place on the costs and provisional sums inserted in the contract; or as to what possible level of cost increase Plymco should be considering might arise.

Breach of Duty

147. **Introduction.** In the light of the fact that the two-stage tender process culminated in a prospective contract which was virtually entirely provisional in scope and cost, I must consider whether ASM should have advised Plymco, in late October 1996, to adopt at short notice a two contract approach to the project and whether its failure to do so amounted to a breach of duty. This question must be answered in the light of the following key findings that I have already made. These are, in summary:
- (1) Plymco's overriding requirement was that the cost of the work should not exceed £5 million - £5.5 million.
 - (2) Plymco had no expertise in property development or in the planning, design, procurement, cost control and expenditure monitoring involved in a complex construction project where both time and money would need to be tightly controlled.

- (3) ASM never gave Plymco any advice as to the procurement method to be adopted or as to what was involved in a two-stage tendering procedure. ASM's advice that such a procurement method was the only appropriate method to use was merely accepted by everyone without further discussion or debate.
 - (4) Plymco relied on ASM to advise it throughout the pre-contract and contract stages of the work on what decisions it had to take and the dates by which it had to take those decisions to enable the work to be sufficiently designed and for the phasing arrangements to be sufficiently settled by the time the contract became effective to enable the work to be carried out within budget and so as to prevent avoidable additional costs arising from any factor associated with the late development of designs or phasing arrangements to accommodate Plymco's wishes. ASM did not give Plymco any appropriate advice in relation to these matters.
 - (5) ASM gave Plymco no advice as to the steps that Plymco should take to finalise its design and phasing requirements or as to the programme or timescale within which these steps should be taken; as to what savings Plymco should consider; as to what reliance, if any, Plymco could place on the costs and provisional sums inserted in the contract; as to what possible level of cost increase Plymco should be considering might arise or as to what steps it had to take to ensure that the cost of the project was adequately controlled.
 - (6) The Argos first method of executing the works was never considered in any detail and at no time did ASM evaluate this possibility or consider giving advice to Plymco that it should itself give serious thought to it as a possible method of proceeding.
 - (7) ASM never considered whether the state of the under-designed and ill-planned phasing arrangements in late October 1996 was such that the cost of the work would not be capable of being controlled or whether additional or alternative steps should be taken with regard to the scope of work and its manner of execution so as to enable costs to be controlled.
148. **Experts' views.** ASM's expert architect was Mr Hudson. He expressed a critical opinion about ASM's obligations. In answer to the complaint that ASM failed to advise Plymco that the contract with EBC was a high risk contract because there was no effective cost control mechanisms in place so that the out turn cost was unpredictable and likely substantially to exceed the contract sum, Mr Hudson stated as follows: *"If the court determines that Plymco's priority was for absolute cost certainty, then I am of the view that ASM should have advised not placing a contract with EBC until all decisions had been finalised by Plymco as regards the project scope of works and all production information had been prepared by the consultants. This scenario would have led to a later placement of contract and therefore a later start on site."*
149. Plymco's priority was for cost certainty subject to a reasonable margin. Despite that, no advice of the kind suggested was given even though the scope of works remained provisional by the end of the second stage tendering process with there having been no progress towards certainty during that second stage. Had such advice been given, I am clear that Plymco would, reluctantly, have accepted it and would have postponed all but the Argos works until late April 1997 when the Argos works were scheduled to be completed. This postponement would have allowed the design of the works to be sufficiently completed and the phasing arrangements to be sorted out to allow for cost certainty. At that point, either EBC with a second negotiated tender or a group of tenderers with competitive tenders would have provided a tender which would have provided the basis for a second contract for the remaining works.
150. There is, on the basis of my findings, no real dispute between the experts. Both were of the opinion that if cost certainty was the objective and if Plymco lacked sufficient experience of this kind of work that it needed to be advised as to what instructions in what timescale were needed to allow for a detailed work scope to have been finalised by early November and for the details of the phasing of the works in each section to have been agreed and established by that time, that ASM were in breach of duty. On that basis, ASM should have advised that the Argos first solution should have been adopted.

ASM's Alternative Case

151. **Plymco has greatly exaggerated the cost risk.** ASM contended that the cost risk that Plymco contended should have been advised upon in the period between May and November 1996 had been greatly exaggerated by Plymco. It was, therefore, not necessary for ASM to have considered advising Plymco on

an alternative Argos first contractual arrangement. ASM developed this case somewhat belatedly, largely in its closing submissions. It attempted to show that the proportion of the contract that was truly provisional was about 30% since only the provisional builders work was to be regarded as being provisional.

152. This case was not supported by the expert evidence nor by ASM's views. All this evidence accepted that the scope of works and the phasing arrangements were so vague at the stage when the contract relationship started that effective cost estimation was not possible. ASM had mounted a case to the effect that it had given suitable advice throughout but that Plymco, as an experienced developer, had been the author of its own misfortune in not providing the necessary details and instructions in time to allow ASM to translate these into bills of quantities and drawings sufficient to allow appropriate firm costings to be carried out.
153. **Sufficient advice was given.** ASM also contended that sufficient advice was given about the actual cost risk. Since, effectively, no advice was given about the actual cost risk, this defence is clearly unsustainable. What is particularly noteworthy is that ASM never identified what work was included in any of the provisional sums, it never sought to provide for a design freeze whereby all relevant instructions would be provided by defined dates and no further instructions would be accepted thereafter and it never appreciated that there was no prospect of any design advancement occurring in the few days that would elapse between the acceptance of the first stage tender and the acceptance of the second stage tender.
154. **Plymco understood the risks.** ASM contended that Plymco fully understood and accepted the cost risks involved. There is no evidence that this was the case. It is hardly surprising that Plymco did not understand the cost risks involved since ASM itself appeared not to understand them and, at the critical time in November 1996, advise Plymco to the effect that with careful cost control and cost monitoring during the contract, the cost limit would not be exceeded. This was not a feasible point of view given the uncertainties as to the scope of the works and their phasing and the lack of any detailed prices in the contract to allow for firm pricing of the provisional items once they came to be expended.
155. **ASM's November 1996 advice was reasonable.** ASM contended that its advice to proceed with the entirety of the works using a truncated two-stage tendering procedure and with a significant amount of the work still in provisional and provisionally costed form was the only reasonable advice that ASM could have given. This case is not supported by its own expert, by the facts of the situation as they existed in late October 1996 nor by any reasonable view of the situation confronting ASM at that time. ASM had advised that much of the remaining detailed design would be undertaken during the second stage tender and it is to be taken to have considered that only a relatively small part of the scope of works would remain provisional following the execution of the contract. However, it would have been obvious from an early stage, and would certainly have been obvious following the end of the period of a few days during which the second stage tender process took place, that no firming up would or did take place during the second stage. Therefore, even on its own case, its advice to proceed, in effect, using the first stage tender cannot on any view have been reasonable.
156. **Plymco would not have followed the advice.** Finally, ASM contended that Plymco would not have accepted any other advice, had it been given. Instead, Plymco would have proceeded in the same way that it did, even if it had received the contrary advice that it is now suggested ASM should have given. Plymco was firm in its evidence that it would have accepted advice, had it been given in November 1996, that it should proceed with an Argos first solution. I have already found that Plymco's evidence was correct that there was no compelling commercial necessity for Plymco to first conclude agreements for a lease with all prospective tenants and only then to embark on the refurbishment work nor for the entire refurbishment work to be undertaken in one overall phase. It would have been possible to restructure the project into a two-phase one with the Argos works being started first and the remaining works starting as a separate phase about six months later in about April 1997.
157. ASM was disposed to argue that it was not technically feasible to divide the works into two discrete stages but the two expert architects reached this agreement in their CPR 35.12 statement: *"We agree that Argos First could have been carried out as a separate contract subject to the resolution of technical issues and practical*

considerations such as decanting of departments located in the area to be taken by Argos. Technical aspects that would have had to be considered would have included, for example:-

- (a) the M & E Services;*
- (b) entrances and fire exits;*
- (c) fire escape routes.*

"Argos First" would have delayed the balance of the remaining works until such time as a further contract was let."

It emerged in the evidence that the three respects in which a technical solution would have been needed to allow for an Argos First solution were readily capable of being satisfactorily dealt with at no significant additional cost.

158. It follows that the Argos First solution was both commercially and technically feasible and is one which I find Plymco would have adopted had it been suggested in October 1996 with the necessary detailed explanation as to why the proposed method of contracting left too much uncertainty as to the final cost outcome, given the then state of the design and phasing details.

Conclusion – Breach of Duty

159. I find that ASM was in breach of duty in not advising Plymco to adopt an Argos First solution in late October 1996.

7. Causation

Progress of Works

160. **Timescale of works.** The works were carried out between 9 December 1996 and 6 June 1998. The overall contract period was, therefore the same as that provided for in the contract. However, the progress of the works was not smooth, almost entirely because of the uncertainties created by the absence of so much of the detail and of the intended phasing of the work within sections. This led, from the start, to the contract proceeding on what can only be described as a hand to mouth basis, that is the production of design information and the taking of phasing decisions on a piecemeal basis so as to provide the necessary instructions for work in the locations it was proceeding at any one time so as to prevent or reduce immediate delays and disruption. Furthermore, although ASM was unable to provide detailed updated costings or cost forecasts, it became obvious from an early stage that costs were running out of control. That led to attempts, at Plymco's request, to identify cost savings and many items of work intended by Plymco were omitted from the project during the course of the construction phase.
161. This cost savings process started when EBC wrote to Mr Fletcher on 13 March 1997 a personal letter outlining the difficulties that EBC was encountering following a meeting held the previous day. The material parts of this letter read as follows: *"We discussed other matters of concern which we feel need addressing, enabling us to progress the works in a proper controlled and economic manner:*
- 1. Vacation of areas of the Store by Plymco to enable commencement of various works to agreed dates.*
 - 2. Decisions on key materials and various issues are not being taken in good time to enable our programme to be met, consequently materials and subcontractors are not being procured economically.*
 - 3. Adequate construction details and drawings for Section 4, which should have already commenced, have not been issued. Likewise, we should be planning works in Section 5, again no construction details have been received. Delays to JJB Sports unit are therefore likely already.*
 - 4. Instructions are being issued verbally, piecemeal or in part form, preventing us acting in a planned and correct fashion. We recommended a resident representative from the Architect may help this difficulty.*
 - 5. Certain key subcontractors selected by Plymco are not acting under our direction, as required. Instructions are passing direct to these and other nominated subcontractors without reference to us".*
162. This letter and the preceding meeting occurred at the same time as ASM provided the first effective cost report for the works up to the end of February. This recommended a cost outturn of £5.84 million, an increase provided for by a series of what were described as major variations to the contract including £554,000 for electrical work. As a result, ASM was instructed to take all reasonable steps to provide EBC with such information, details and instructions that were needed to put and then keep the contract on track and to investigate and report on any reasonable cost savings that could be adopted. At a meeting on 7 May 1997, a number of cost savings were discussed and, amongst those discussed at that meeting which were

subsequently omitted, were a staircase at the Raleigh Street entrance, loading area columns, canopies refurbishment, a balcony canopy and roof repairs.

163. The full effect of the lack of cost control did not emerge for some months. This is because it was not possible for ASM to keep an accurate up to date record of expenditure and it was never possible to relate expenditure that was occurring to the provisional sums and prime cost sums contained in the bills of quantities. Thus, between April and August 1997, the projected cost outcome remained stable at about £5.8 million, this jumped to £6.3 million in September 1997, no further reported figure was provided until January 1998 when the figure leapt to £7.4 million and by July 1998 it had risen to £7.6 million. The final account figure was ultimately settled at £7,791,256.36.
164. Towards the end of the contract work, Plymco had become so concerned at the huge increase in costs which was not being stemmed by omissions that it decided to remove some of the work from EBC's contract and to arrange for its own maintenance department to undertake the work itself. This work was ultimately undertaken at a cost which was put by Plymco at about £686,000.
165. **ASM's explanation for cost increases.** ASM has never been able to provide any detailed explanation for the cost increase of about £2.2 million over a projected expenditure of £5.6 million. The balance of the cost increase is regarded by ASM as an unexplained but acceptable marginal increase which is to be expected on a large project even if substantial steps are taken to avoid cost increases. By way of example, a substantial unbudgeted and unforeseen volume of asbestos had to be removed once its presence had been discovered on site. The best explanation that can be done was summarised by ASM in its defence as follows: "*[The alleged cost overrun] takes no account of increases in cost caused by matters outside ASM's control which as a matter of law were not caused by the matters complained of. Further, the overall cost of the project increased for, inter alia, the following reasons:*
- (1) *Plymco's failure to give EBC timely and unrestricted access to the site. It was originally planned that work would commence on site on 1 November 1996. In the event, some access was provided to EBC from 25 November 1996, and access was increased as from January 1997. Even at that stage, EBC was not given full access.*
 - (2) *Decisions by Plymco to change the phasing of the works. EBC's original programme allowed for a small number of phases. At Plymco's request, the number of phases was increased with an inevitable loss of efficiency and consequential increase in out of hours working.*
 - (3) *The late provision of information/requirements by Plymco.*
 - (4) *The execution (on the instructions of Plymco) of works of greater quantity and of higher standard than was allowed for in the May 1996 estimate. Changes/variations to the works generally.*
 - (5) *Failure on the part of Plymco to omit work.*
 - (6) *The requirement to remove an unforeseen quantity of asbestos.*
 - (7) *EBC's claim under the building contract for loss and expense arising from the foregoing."*
166. **Approach to identifying cost increases.** These allegations were not substantiated in any detail by ASM. Its position at the trial was that it was for Plymco to establish what additional costs it had been caused by a failure to adopt the Argos First method of contracting. Unless and until it could establish that the sole or principal cause of any particular cost increase was that failure, the claim failed both on grounds of causation and proof of loss. In other words, ASM contended that Plymco had to establish what loss was incurred and, in doing so, had to show that that loss was primarily caused by the non-adoption of the Argos First method.
167. ASM's approach is correct as a general statement but it requires much elaboration in this case. The remarkable feature of this case is the almost complete absence of relevant documents. This arose because of the absence of a composite list and description of what works Plymco were to be taken to be requiring as the initial scope of works before any variations were instructed; the absence of a comprehensive set of survey drawings and other documents from which the initial state of the works at the point when the contract started could be identified; an ill-defined scope of works at the outset of work starting; the absence of any detailed breakdown of what work was being provisionally costed in the provisional sums and PC sums contained in the bills of quantities; the absence of any definitive list of contract rates and prices used as the basis for costing the bills of quantities; the absence of any definitive list of instructions ordering both the expenditure of provisional sums and variations and of documents showing the detail of the work

instructed under these headings; the absence of sufficient documents showing how sums certified in favour of EBC were costed and made up; the absence of a fully detailed final account containing a full build up of all items it contained; and an absence of a full set of as-built drawings and other details showing what work was actually executed.

168. It was part of ASM's duties to produce all these documents. A few, particularly part of the missing final accounting documentation, appear to have been lost or mislaid. However, all the rest of the documents were not available because they were never produced. This problem arose from two related sources. Firstly, the provisional nature of the work at the outset and the need to run the contract in a reactive way by producing information for the contractor as and when it was needed necessarily precluded much of the detail being produced in documentary form. Secondly, ASM chose to value the works during and after their completion in a somewhat ad hoc manner rather than by taking off quantities from drawings and then applying to those quantities agreed or fair rates, which was the procedure provided for by the contract and agreed in advance by ASM with both Plymco and EBC as the procedure it would adopt on this contract.
169. A further matter to consider is the advice that ASM gave Plymco at the November 1996 meetings to the effect, as I have already found, that Plymco's plans and proposals could be implemented at a cost which would, within reason, equal but not exceed the budget cost notwithstanding the lack of design and the budget and provisional nature of the entire work; that careful monitoring and cost control measures and advice as to possible savings would be implemented by ASM with EBC's assistance and reported on regularly and timeously to Plymco; and that these cost control measures and savings would enable any cost increases to be identified in sufficient time to enable effective cost control measures to be taken so as to curtail the potential cost increases and to bring the project back within budget. It follows that Plymco contended that it was sufficient for it to show what it was advised the works could be implemented for and what it cost and to deduce that, in the absence of any contemporaneous advice or subsequent particulars to the contrary from ASM, the resulting cost increase arose from a failure by ASM to implement appropriate cost savings.
170. Thus, Plymco cannot be reasonably blamed for any failure to produce a more detailed case as to its loss since the documents it would need to do so were not available due to ASM's default in undertaking its professional services and since ASM had not provided any detailed advice during the work advising Plymco on what decisions it had to take and when these should be taken or on how the provisional sums were increasing in size as a result of Plymco's ordering of variations or instructing changes to the phasing arrangements.
171. **Variations.** ASM contended that Plymco instructed many variations which added to the cost of the work and kept changing its mind with regard to the work content of the work it wanted EBC to execute for it. This generalised allegation can only be assessed once the contractual provisions for variations have been analysed. The contract defined a variation as:

"13 Contract Bills : The quality and quantity of the work included in the Tender Price shall be deemed to be that which is set out in the Contract Bills.

14 Measurement and Valuation of work including Variations and provisional sums

14.1 The term 'Variation' as used in the Conditions means:

14.1.1 the alteration or modification of the design or quality of the Works including

.1.1 the addition, omission or substitution of any work,

.1.2 the alteration of the kind or standard of any of the materials or goods to be used in the Works,

.1.3 the removal from the site of any work executed or materials or goods brought thereon by the Contractor for the purposes of the Works other than work, materials or goods which are not in accordance with the Contract;

14.1.2 the imposition by the Employer of any obligations or restrictions in regard to the matters set out in clauses

14.1.2.1 to **14.1.2.4** [which immediately follow] or the addition to or alteration or omission of any such obligations or restrictions so imposed or imposed by the Employer in the Contract Bills in regard to:

.2.1 access to the site or use of any specific parts of the site;

.2.2 limitations of working space;

.2.3 limitations of working hours;

.2.4 the execution or completion of the work in any specific order; ...

14.2 The Architect may, subject to the Contractor's right of reasonable objection, ... issue instructions requiring a Variation ...

14.3 The Architect shall issue instructions in regard to:

14.3.1 ... the expenditure of provisional sums included in the Contract Bills ...

14.4 ... all work carried out ... in pursuance of the Architect's instructions under clauses 14.2 and 14.3.1 shall be valued by the Quantity Surveyor with the provisions of clauses 14.5.1 to 14.5.6 [providing for the valuation of variations] ...

14.5.5 If:

as a result of compliance with any instruction requiring a Variation work shown on the Contract Drawings and included in the Tender Price is not executed and such instruction, or

compliance with any instruction as to the expenditure of a provisional sum for undefined work, ...

substantially changes the conditions under which any other work is executed, then such work shall be valued [as a variation]."

172. The effect of these provisions was that all work relating to provisional sum work, including provisional sums included in PC sums for the mechanical and electrical work, could only be undertaken pursuant and following an instruction from the architect requiring the expenditure of the relevant sum. Once that instruction was given, the resulting work was to be valued in the same way as, and as if it was, a variation. Furthermore, a variation in the strict sense was defined as constituting any change in the quality or quantity of work set out in the contract bills and covered any manner of change including changes to the defined phasing arrangements. Thus, since all work was both provisional and very ill-defined, and since the phasing arrangements were both ill-defined and effectively provisional, most of the work that was carried out was a variation and it would not be possible to ascertain, save for very significant changes, what work was a variation and what work was to be taken to have been included. No very significant changes were identified. The upshot was that all work was treated as, and rightly treated as, a variation and it made no meaningful sense for ASM to suggest that Plymco issued instructions requiring a variation. Such instructions as were referred to, and there were not many, could not be seen to clearly amount to a change in the quality or quantity of the work defined in the contract bills but all were instructions relating to the expenditure of provisional sums. They were, therefore no different in effect to any of the other instructions that were, or were to be taken as having been, issued in relation to the provisional sums in the contract.
173. The conclusion is, therefore, that unless a particular requirement instructed during the course of the work could be shown to have been of a kind that it related to work which, on no view, could be seen to have been included in, or to be considered as being covered by, any provisional sum, it could not reasonably be described as a variation which, as a result of Plymco's voluntarily imposed requirements, added to the cost of the work. Moreover, any increase in cost resulting from the expenditure of provisional sums, including cost flowing from the execution of work detailed after work started to flesh out the work requirements of a provisional sum, was a cost flowing from a variation in the broad sense but was not extra expenditure voluntarily incurred by Plymco as work proceeded.
174. **Valuation of the works.** The works produced over 7,500 variation instructions. This amount of variation instructions arose as a result of the way that the work progressed and the detail of the work was issued by ASM. Both ASM's experts accepted that this large number of instructions arose as a result of the need to detail the work and to flesh out the phasing requirements as work proceeded. They were constrained by the instructions given to them by ASM that these instructions arose as a result of Plymco's wish, both before and during the contract, to issue instructions in this piecemeal and late manner notwithstanding ASM's advice to the contrary. In fact, all these variation instructions arose in relation to the expenditure of provisional sums and as a result of the ill-defined nature of the work at the outset, as can be seen from the way that the work was valued as it proceeded.

175. Mr Nicholls explained in great detail how the works were valued. The works were valued by EBC submitting each month a list of the work it had carried out in the previous month set out in documents which were intended to confirm instructions relating to the expenditure of provisional sums. The list was accompanied by supporting detail recording every work item and the volume of work or the hours of work spent in relation to that item. This way of proceeding was necessitated by there being an absence of detailed drawings or bills of quantities and by the necessary detail being issued in very localised and small chunks either just before the work started or whilst the works were proceeding. This meant that no bills of quantities were ever prepared and that it was not possible to relate any one of the confirmation documents to any specific provisional item.
176. The valuation of each confirmation of a variation instruction, or CVI, as these documents were called, was done on a document by document basis and by means of a negotiation on a document by document basis. Mr Nicholls was not able to explain how each individual rate was chosen or negotiated since he was not personally involved in this laborious exercise since it was his team of quantity surveyors undertook that work. Moreover, the rates that were used were largely negotiated on site on a CVI by CVI basis. This was because there were no adequate rates to be taken from the tender and, in any case, the conditions under which the work was being executed varied so significantly from those on which the tender was to be taken to have been prepared, given the lack of detail available at the time of tender. Most of the rates used had built into them an element to reflect the disruption and the changed working conditions under which the work was executed. Since there was not available, or indeed produced, a set of as-built drawings, it was not at the time nor has it been since, possible to check the work content of the CVIs against the work actually undertaken.
177. This method of valuation was very different from that provided for in the contract or from that agreed to by ASM with EBC at the pre-contract meeting. However, it was dictated by necessity. There was no way that ASM could have issued in advance of work to any section or provisional item sufficient detail for that work to be costed and priced before it was executed. Moreover, ASM could not have issued the drawings for whole sections of the work in advance of the work in any area starting given the time constraints it was working under. ASM never produced a drawing release schedule showing when drawings would be issued nor did it keep a definitive drawings register recording when every drawing was issued. Critically, it never issued instructions relating to the expenditure of any particular provisional sum. All these apparent failings arose because the parties had embarked on a contract with such ill-defined details that there was never thereafter the time or the means of complying with the contract niceties with regard to the ordering and valuing of provisional sums or for monitoring costs. EBC was forced to adopt the CVI procedure it did otherwise it would not have been paid for much of the work it carried out and the ad hoc valuation discussions and negotiations that were adopted were the only means of valuing the work in the time available.

ASM's Contentions as to Causation

178. **The advice ASM should have given Plymco.** ASM contended that Plymco would not have acted on any advice to the effect that an Argos First method of contracting should have been adopted. It first contended, however, that there should first be identified the precise advice that ASM should have given but did not give, the time that that advice should have been given, the person to whom that advice should have been given and what it is that Plymco would have done differently had the relevant advice been given in those circumstances.
179. In the light of my findings already made, it is clear that ASM should have advised Plymco, specifically Mr Gibbs and Mr Nicholls should have advised Mr Fletcher and Mr Ryland, on or just before 1 November 1996, at the end of the second stage of the two stage tendering process, that the detail of the design and the phasing arrangements were insufficiently advanced to enable a contract to be entered into at that time. This was because the scope of the work, save for the Argos work, and the conditions as to access and phasing were too uncertain to allow a firm cost of the works to be finalised. The proposed contract was still almost entirely provisional and there was no reliable or sufficiently certain way of controlling costs during the work to enable the cost outturn to be kept to about £5.6 million. Realistically, if the contract was to be

entered into in its present form, the foreseeable cost out turn would significantly exceed that figure and could exceed that figure by a very large, albeit unpredictable, amount.

180. They should also have advised, however, that there was an available solution to this problem, namely to defer the provisional works to allow them to be designed and detailed sufficiently to allow for a predictable cost outturn. However, the Argos works were needed urgently and had already been detailed and priced in a way that allowed for predictability of cost outturn. Thus, the works could and should be divided into two phases. The first phase, limited to the Argos works, should start immediately. The balance of the works should be postponed and all necessary detailing completed as rapidly as possible. The work should then be turned into bills of quantities and retendered in that form. The second phase of the works should then proceed. The retendering process should be with a group of tenderers and the best tenderer should be selected and appointed to undertake this second phase. It would be possible, as an alternative, to negotiate a retender with EBC, using its expertise of the work and its goodwill generated during the first phase. The decision as to who should be asked to tender could, however, be taken later. The second phase of the works could and should start as soon as possible. The earliest date for starting these works, to allow for their detailed design and for the necessary billing and tender preparation work and the tendering process, was about six months from early November 1996. This would be a convenient period, since it would allow the work to start at the end of April 1997 which was when the Argos works would be completed. This would provide the added advantage of allowing for continuity of work on site. The overall delay to the completion of the project would not, however be as long as six months since programming them would be very much easier once they had been fully detailed and all then capable of being ordered in advance of requirements.
181. The conclusion that should have been recommended was that, if this two phase method of construction was adopted and if the necessary design and other pre-contract work were both completed within a timescale of about four months, the cost outcome ought not greatly to exceed £5.6 million.
182. **Plymco would never have adopted an "Argos first method.** The starting point in considering whether, on the balance of probabilities and without reliance on the benefit of hindsight, Plymco would have accepted and adopted such advice had it been proffered is to consider Plymco's evidence. This was given by Mr Fletcher, who would have been the person who would effectively have taken the decision to adopt it. It is true that the official deciding body was the Board, but it invariably took the advice of its officers on important questions of expenditure and policy and, therefore, if Mr Fletcher was convinced of the necessity of changing tack in this way, the Board would have followed that advice. It is true that Mr Fletcher only officially became Chief Executive in December 1996 but such a critical decision as to whether to follow ASM's advice would have been left largely to Mr Fletcher by Mr Greener since he would have had to oversee its implementation and to live with the consequences of either accepting or rejecting the advice. Mr Fletcher's evidence was unequivocally that he and Plymco would have accepted and adopted that advice had it been tendered. He stated: *"I cannot recall any advice being given at any stage between May 1996 and November 1996 of alternative options that we could consider, for example to carry out the Argos works only (the only obligation the Society had when we entered into the Building Contract ... was under the terms of its agreement for lease with Argos) ... I would remember such advice being given to me ... I do not accept or believe that ASM ever advised myself or anybody in the Society of the possibility of just carrying out the Argos works starting in November/December 1996. Had we been warned of the uncertainty over the outturn costs and advised of the possibility of just carrying out the Argos work starting November/December 1996 whilst we continued to develop the rest of the scheme, the Society would have acted on that advice and insisted that the balance of the scheme was fully developed to provide us with cost certainty and to allow us to carry out the works for a competitively tendered sum."*
- Mr Fletcher repeated this evidence in other passages in his written evidence and in cross-examination. Nothing in Mr Ryland's evidence contradicted that evidence.
183. ASM contended that that evidence should not be accepted and that it was developed almost entirely as self-serving evidence to bolster what it regarded as Plymco's hopeless case. This could be seen by considering Plymco's contemporaneous view that there was an overall urgency to complete the work as soon as possible and that nothing should stand in the way of such early completion since the funding of

the project, the obtaining of tenants, the development of the store and the overall commercial necessity all pointed to the overriding urgency of completing as soon as possible.

184. Advice of the kind I have identified would have been very hard for ASM to give and would have been unexpected, unpalatable and unwelcome. Initially, there would have been angry recrimination as to why and how the project had got into the state that required such a fundamental change of tack at such a late stage in the tendering process. There would, of course, have been urgent reference to the needs of the other tenants, the bad publicity that the deferral would create, the possible difficulties in achieving a deferred starting date in late April 1997 and several other potential difficulties.
185. However, once the heat had died down and rational analysis of the situation started, the logic of accepting this advice would have been seen to have been overwhelming. The parties had been working to an early start date with an ill-defined work scope and Plymco had adopted the two-stage tendering procedure on the basis that the works would end up fully designed, but only at the end of the second stage of the tendering process just before the contract was entered into. It was always accepted that this outcome had to be achieved, albeit as a result of the second stage of tendering. It would also have been obvious to anyone to whom the difficulties of achieving a certain cost outturn with ill defined initial designs were explained that the works had to be deferred. Plymco was a co-operative and a savings vehicle for its members not a speculative developer and any course involving risky potential increased expenditure for little return was something Mr Fletcher and the Board would have shied away from faster than from anything else. For Plymco, cost limitation really was the overriding objective during the development.
186. I conclude, therefore, that had the facts and appropriate advice been given clearly to Plymco in late October 1996, the Argos First solution would have been adopted. Any statement in the contemporary documents which suggested that Plymco wished for all speed was made without Plymco having received advice as to the financial difficulties that pushing on with full speed in early November 1996 would create.
187. **Postponement was unfeasible.** ASM contended that the funding position, the need to obtain and retain tenants and the need to preserve Plymco's commercial reputation would all have dictated a rejection of the Argos First solution. Moreover, the solution was not technically feasible, or would have been perceived in this light. Thus, the advice would have been rejected on these grounds. It is obvious that there were a number of competing difficult and complex considerations that would have required to be explored. It is also now clear, admittedly after much detailed investigation for the purposes of the trial, that it was feasible to postpone the bulk of the works for about six months and that none of the possible objections would have stood in the way. I have already determined that there was no compelling commercial reason for Plymco first to conclude agreements for a lease with all prospective tenants and only then embark on the refurbishment work nor for the entire refurbishment work to be undertaken in one phase. I conclude that, on the balance of probabilities, Mr Fletcher was correct in his view that Plymco would have accepted advice that it should adopt an Argos First solution had that advice been proffered in late October 1996.
188. **Impossibility of completing the tendering process by late April 1997.** ASM also contended that there was insufficient time to complete the design and tendering process in the five-month period from early November 1996 to late April 1997, particularly as the Christmas and New Year break would have intervened. This was a surprising submission given that, on ASM's advice, the original design process for both stages of the two-stage tendering procedure was to have been five months from June to October 1996. Thus, there is no reason to suppose that an equivalent course would have been impracticable, particularly since some of the necessary work had already been started, and could have been built on, during the ill-fated two stage tendering process earlier in the year. It is clear that four months, including the Christmas/New Year break, would have sufficed for the design work and two further months for the tendering process. It has to be remembered that the debacle caused by the deferral would have concentrated everyone's mind and all would have been determined not to allow a second hiatus. In short, too many reputations were at stake to allow for another deferral. I conclude that the proposed timescale was feasible and that work could have started on the second phase by the end of April 1997.
189. **No programme of work presented for a deferred second phase.** ASM also contended that no programme of work showing how the second phase could have been completed was provided. This is not a fatal objection to Plymco's case. Clearly, it was feasible to undertake the work, the contract would have been

similar to the project that was undertaken with the Argos works omitted at an early stage. There is no reason to suggest that this truncated project would have taken any substantially different length of time, any substantially additional cost or any substantially different problems than those envisaged for the original scope of works or encountered in practice. Indeed, the work would have been easier to undertake since it would have been substantially designed from the outset and it would not have been subject to any substantial variations or omissions since everyone would have been conscious of the need, and would have prepared, for a trouble-free contract without problems.

190. **No loss and contributory negligence.** ASM finally contended that Plymco would not have been saved, to any substantial extent, the costs it incurred which it now claims as damages. The pleaded submission has already been set out. The submission, boiled down, amounted to an argument that the increase in costs was caused by a combination of delayed access, increased phasing, the ordering of variations in the sense of changes and improved standards, the late provision of necessary information and a failure to make obvious and feasible cost savings.
191. I have already demonstrated that it was not possible to identify or establish any variations of a kind amounting to increased work scope and cost. Furthermore, the work was bedevilled by late instructions provided by ASM in relation to the detailing out of the provisional sums. The delayed access and increased phasing problems were not caused by changes of mind by Plymco but by the inability to plan for what was always to be required by Plymco in an economical manner because the so-called changes of mind were only notified at a late stage of the works. Finally, ASM failed to demonstrate any obvious cost savings or late provision of information that Plymco had been asked for specifically and which it then failed to provide. Thus, very little, if any, of the cost overrun had resulted from matters outside ASM's control or for reasons which did not flow from the failure to give the vital advice to Plymco in the first place.
192. There clearly were, embedded within the mass of detailed work, some genuine variations causing cost increases. For example, asbestos removal increased substantially above what was anticipated. However, the identity and cost of such additional works were not established by ASM and do not appear to have been substantial. Moreover, in the circumstances of this case the burden of establishing them was on ASM. Finally, ASM had promised a system of cost monitoring which would have allowed any desirable cost increases from variations to be off-set against cost savings elsewhere. The method of executing the works, which was solely dictated by the ill-designed nature of the works at the outset, precluded such monitoring and cost saving opportunities and much of the additional cost from variations. Thus, any unnecessary or substantial cost increases caused by variations in the true sense resulted from ASM's breach of duty.

Conclusion

193. I conclude that the entirety of the cost overrun resulted from the ill-designed nature of the works and none of it can be attributed to any contributory negligence on the part of Plymco, indeed no contributory negligence was established.

8. Loss – Argos First

Introduction

194. Plymco has had considerable difficulty in establishing what the additional costs were that can reasonably be attributed to the failure to adopt an Argos First approach. The reason is that few of the relevant documents, drawings, cost breakdowns and accounts were prepared or were available that would ordinarily be needed for this purpose. However, by the time the evidence gathering stage of the trial had been completed, the parties' expert quantity surveyors had, by dint of prodigious work and uniquely detailed CPR 35.12 statements, reduced the dispute as to quantum to a few remaining but relatively isolated issues.
195. In summary, two principal methods of calculating this loss were advanced. Although radically different in approach, they led, on Plymco's case, to an overall claim which was substantially similar. It was suggested that I should first determine which approach was the one that should be adopted. However, since one of these approaches, the "top down" approach was the one the two experts spent most time discussing and achieving agreement for, I propose first to consider that method. I will then consider the other method, the "bottom up" method and, if it arrives at a similar overall figure, use the two figures arrived at, or some averaging process of the two, to produce the figure to be awarded to Plymco. I adopt this approach

because, in reality, there is no logic or magic in one or other approach, had there been full information available, the two approaches would logically have produced the same answer. Thus, it is appropriate to adopt, if only provisionally, the approach on which the two experts, fulfilling to the full their duty to seek to narrow disputes and reduce costs, themselves spent most time working through.

Method of Calculating Loss in Principle

196. The starting point for ascertaining the loss resulting from the late development of the detailed design and the phasing details of the work is an identification of the actual scope of work in fact carried out and its actual cost. Having done so, an exercise is necessary to identify which of those costs arose from the difficulties caused by the late finalisation of the design and by the difficulties caused by the absence of adequate phasing arrangements in the contract. Because the work content of the contract as originally detailed and the work content and price build up of the provisional sums contained in the original contract was not known and because of the absence of any detail of the variations instructed during the work, this deductive exercise was of necessity somewhat imprecise and had to be based, in large measure, on the expert quantity surveyors' respective assessments of what the cost of this work would have been had it been subject this hypothetical contract. This assessment method was both reasonable and necessary since the knowledge gap I have referred to was entirely due to ASM's breaches of contract and without an assessment exercise of this kind being undertaken, it would not have been possible for Plymco to have ascertained what loss it had suffered.
197. This method was dubbed, in the Meta language adopted by the parties for this litigation, the "top down" method. Another way to ascertain Plymco's loss would have been to assess what the cost of the work carried out should have been had there been no late design and detailing and to assess the loss as being the difference between that figure and the cost actually incurred. This method was dubbed "bottom up".

Top Down Method

198. Using the "top down" method, Plymco's net claim that it put forward in its closing submissions amounted to £1,660,655.00. In considering this figure, and in dealing with the disputed items within the calculation of this figure, I have based my findings on the contents of a convenient schedule served by ASM as part of its closing submissions which was entitled "Plymco v ASM; principal quantum issues" which was derived from the CPR 35.12 statement schedule prepared by the expert quantity surveyors as part of their fourth joint statement. This schedule divided up the items in dispute into 5 main quantum issues and 11 residual quantum issues. Once these issues have been resolved, the hypothetical cost of the works, that is the cost that should have materialised from an Argos First method, will have been ascertained using the "top down" method. It is not necessary to incorporate the contents of this schedule into this judgment.

Top Down Method – Main Quantum Issues

Issue 1 – Omitted Works

198. **Introduction.** As already described, Plymco omitted certain items of work at the end of the contract period from EBC's contract and undertook these works themselves. This course of action was not challenged as being an unreasonable one by ASM and it is now agreed that the overall cost to Plymco of carrying out these works should be taken to be £626,726. That figure has to be added to the cost of employing EBC for the works, which both quantity surveyors accepted should be £7,791,265.00 to arrive at the total cost to Plymco of the works, namely £8,477,312.00. What must be ascertained is what these works would have cost had they been executed by a contractor under the second phase of the Argos First method.
199. **External works.** 4 items of external works which were provided for in the contract as provisional sums were omitted from the work. These items involved refurbishment, renewal and repair work to certain canopies, to certain areas of brickwork and stonework and to the roof. These items were contained in the original bills of quantities in various provisional sums totalling £390,000. The actual cost Plymco of undertaking these works was £318,672. That is the same cost as Mr Symonds suggests would have been incurred during an Argos First contract. Mr Jervis's figure is the provisional sum figure of £390,000.
200. There is nothing in the contract documents or in the disclosed documents which enabled the quantity surveyors to determine, even in outline, what work was included, or taken to have been include, in the relevant provisional sums or in the work as executed. There is little indication that this work was necessary or would have been included in a fully detailed contract. Indeed, the likelihood is that this work could

have been omitted from such a contract and dealt with after the contract had been concluded by Plymco's maintenance department. In those circumstances, the likely cost of this work should be taken to be the provisional sums since, had a fully detailed contract been undertaken, the work that would have been detailed would have been such work as would cost the provisional sums. This is because ASM, in detailing the work, would have sought to ensure that the provisional sums would not have been exceeded. If there was any balance of work left to complete once the provisional sums had been spent, being work which was actually carried out which would have been omitted from the hypothetical detailing exercise, such work would have been left to have been carried out very much later by Plymco's maintenance department once Plymco had the resources to undertake such work itself having funded and completed the project. It is clear from Mr Jervis' evidence and his costing assessments, which I accept, that the hypothetical detailing exercise would not have produced a lesser sum than £390,000 for this work. Thus, these omitted works should be valued hypothetically at £390,000.

201. ASM raised a number of objections to this approach to the valuation of these omissions. It contended that if Plymco is to be taken to have completed this omitted work itself, the cost of it doing this work was a part of the cost of the project and the cost that Plymco would have incurred should be added to the actual cost of the work. However, in the hypothetical situation being considered, Plymco would not have embarked on any further work until it had completed the project and paid for it so that any cost of undertaking work to these omitted items would not have been incurred as part of the project and should be disregarded.
202. **Raleigh Street entrance and stairs.** This work involved actual expenditure of £240,555 and Mr Symonds' figure again adopts this figure. The provisional sum figure was £160,000 but Mr Jervis adopts a figure of £60,000. This work was, like the external works items already dealt with, totally unidentified in both the provisional sum and the as-build documents. The same principles apply as for the omitted external work already dealt with so that the hypothetical cost should be taken to be £160,000.
203. **Otis lift work.** This work involved actual expenditure of £59,321 and Mr Symonds' figure again adopts this figure. Mr Jervis allows nothing for this work. This is because the work was not included in any identifiable provisional sum and would not have cost Plymco anything since it would not have been included in an Argos First-type contract or, alternatively, other work would have been omitted to the value of the actual cost of the lift. I accept that this approach is correct. Thus, this work should be valued hypothetically at £ nil.
204. **CIS escape staircase.** This work was omitted from the EBC contract and not carried out by Plymco. Thus, this work should be valued at £nil.
205. **Works to ground floor.** There is no evidence that this work, whose scope remained unknown, was included in the original provisional sums. Thus, this work should be valued at £nil.
206. **ASM balancing items.** Mr Jervis contended for two further omissions of £8,223 and £27,973. There was no evidence that these items of expenditure would have arisen in an Argos First-type contract even though the expenditure did arise as part of the inadequately detailed and programmed contract. I conclude that these items of expenditure would have been avoided in the hypothetical contract. Thus, these items should be valued at £ nil.
207. **Conclusion: Issue 1.** To calculate the hypothetical cost of the works, the figure to be added to the calculation in respect of Issue 1 is not £499,000.00, the figure contended for by ASM, but £550,000.00.

Issue 2 – Electrical Installation

207. **Introduction.** The electrical installation work cost, as built, £1,343,170. This work was carried out by a nominated subcontractor and valued in the same way as the builders' work using ad hoc rates and with the cost of disruption resulting from the delays and disorganisation caused by the late and piecemeal delivery of the detailed design. Mr Jervis contended that 11.2% of the as built cost represented the sum built into the rates used for payment purposes for disruption and 12% of the increase in cost in excess of the subcontract sum, that is 12% of the difference between the subcontract sum and the final account sum. This 12% figure represented Mr Jervis' assessment of the additional element in the rates used for payment purposes to account for these rates not being contract rates, since the work was insufficiently defined for

rates to have been provided, but fair rates derived during the course of the work. The sums claimed are £207,204.

208. **Valuation.** There was undoubtedly a significant increase in the rates used for payment compared to the rates that would have been used had the work been sufficiently detailed originally to allow for the uncompetitive nature of the rate negotiations carried out as work proceeded and for disruption. Mr Symonds accepted that 11.2% was an appropriate percentage if, as would be the case, the actual phasing requirements had been agreed and finalised before the Argos First contract work had started. Mr Symonds also accepted that 12% was the appropriate percentage to allow for uncompetitive rate negotiations but only where there was what he described as "the macro situation". Since the electrical installation work was an example of "the macro situation", that is one relating to the work as a whole, there seemed to be no good reason for Mr Symonds not adopting this percentage too.
209. **Evidence.** Mr Jervis explained that there were no available documents or personnel from Helix available to either expert quantity surveyor explaining the breakdown of the sums paid for electrical installation nor of the work content of that work. What was clear, however, was that the cost of this work rose, from the PC sum in the main contract of £485,000 to a subcontract sum of £733,350.87 and, finally, to a final contract figure of £1,343,170.64. Thus, there were two substantial increases, that between contract and completion being as much as £609,819.76. Much of these increases would have been caused by disruption and by the negotiation of rates for much of the work which would have been undetailed and unpriced, save as lump sum provisional items, in the original subcontract. This conclusion is both fair and inevitable since this installation work would have been subject to detailing which would itself have been subject and subordinate to the detailing being carried out by ASM. Thus, the detailing of the electrical installation would have had to have followed on from ASM's detailing and would have been at least as delayed as that detailing was.
210. ASM contends that the electrical subcontract documentation was available but was not considered by the expert quantity surveyors. Thus, it contends, the conclusions drawn by Mr Jervis are unreliable and that Plymco has failed to prove its case. If the documentation was available, it should have been in ASM's possession since ASM was the quantity surveyor responsible for preparing the contract final account and for inspecting all documentation. No detailed final account or accounting exercise was undertaken and the absence of any relevant documentation relating to this significant issue of quantification suggests that it is no longer available. The approach taken by Plymco and Mr Jervis in seeking to establish this element of the hypothetical contract cost was, therefore, acting reasonably and, as I find, reliably. The detailed points made by ASM in attacking his calculation supporting his assessment do not affect its reasonableness and reliability.
211. Mr Jervis accepted that there had been some increase in the scope of work and that the PC sum was too low in the first place. He also took account of disruption caused by the rephasing arrangements. Mr Jervis sought to make a reasonable assessment of what part of the final contract sum represented the disruption and the non-competitive uplift in the cost of the work that was reflected in that figure, given his starting point, which I find to have been a reasonable one, that there would have been a considerable element for both items in the final contract sum. This was not an arbitrary figure but was one based on Mr Jervis' expert opinion, itself based on his detailed knowledge of the documents available to him, of the scope of the work carried out and of the basis on which that work could and should have been costed in the hypothetical scenario being considered.
212. Mr Symonds did not accept that any reduction should be made. He considered that the increase in the cost resulting from disruption and from the rating exercise that must have been undertaken during, rather than prior to, the contract resulted from difficulties from the phasing arrangements.
213. I cannot accept Mr Symonds' view. Firstly, any difficulties and resultant cost resulting from the phasing arrangements occurred because of the undetailed nature of those arrangements at the outset. Had the full phasing arrangements been known about at tender stage, the work could have been pre-planned around those arrangements and no additional disruption would have occurred. Indeed, with advance planning, Plymco could and would have tailored its phasing requirements to suit the contractor but such an opportunity was not available to Plymco during the work actually carried out given the piecemeal way in

which it was designed. Secondly, it is clear that considerable disruption occurred irrespective of the phasing arrangements and it is that disruption that Mr Jervis is attempting to assess. Thirdly, Mr Symonds was clearly reluctant to make any assessment of the cost of disruption included in the final contract sum in the absence of what he regarded as appropriate detail. However, that would deprive Plymco of damages it was otherwise entitled to since the missing documentation is almost entirely as a result of ASM's failures during the course of its engagement. Fourthly, the percentages chosen by Mr Jervis to represent the amount of disruption were, as I have already summarised, accepted by Mr Symonds in different, but what I find to be very similar contexts.

214. **Conclusion.** In respect of Issue 2, the electrical installation, a total of £207,204, must be deducted from the actual cost with the result that the approximate figure to be added to the calculation for the hypothetical cost of the works is £1,140,000.00.

Issue 3 – Daywork + BWIC

215. **Introduction.** Mr Jervis contended that the sums paid on dayworks were excessive and arose from two elements, both attributable to the under-designed element of the work. These were the large element of overtime included within the dayworks for out of hours working and the fact that a significant amount of the work carried out on dayworks could and should have been carried out as rated works provided as part of the pricing of a bill of quantities. Mr Jervis has eliminated all overtime payments and 20% of the remaining dayworks, the latter elimination to take account of the lack of opportunity to price much of the work carried out as dayworks on a conventional basis either prior to or during the contract.
216. **Findings.** Both deductions are accepted. There would have been little need for overtime had the phasing arrangements been fully sorted out in advance and such overtime as would have occurred would have had to have been authorised. No authorisation for overtime was apparently provided by ASM, certainly none came to light at the trial. Since the amount of overtime that would have been allowed had the contract been operated correctly would have been minimal, I accept that the totality of this deduction is reasonable. The 20% figure results from an application of what is generally accepted as the degree of mark up resulting from payment on dayworks rather than on billed rates. This percentage has not been applied to all the dayworks, only to the proportion of dayworks which, again, it is generally accepted exceeds the reasonable proportion of similar work which would be carried out as dayworks.
217. **BWIC.** Mr Jervis reduced the dayworks charged for builders work provided in conjunction with other work from £81,682 to £60,194. This reduction is because the attendance on PC work was provided for in the bills of quantities by a percentage uplift on the subcontract sum and it is through that route and not by the more expensive route of payment on dayworks that this item should be valued. This was not disputed on any coherent ground by Mr Symonds or by ASM in its closing submissions and the resulting adjustment to reduce this element should also be allowed.
218. **Conclusion.** A total of £546,683.00 should be added to the calculation for the hypothetical cost of the works for Issue 3. This takes account of deductions from actual cost of £217,397, £28,887 and £21,488 to reflect, respectively, overtime, disruption and BWIC payments. ASM put forward detailed submissions in its closing submissions as to why these additions should not have been made. These submissions are not supported by the expert evidence, were not addressed by the experts in their joint statements and, in any case, were not supported by the careful evidence of Mr Jervis which I accept.

Issue 4 – Premium cost adjustment

218. **Introduction.** Mr Jervis reduced the sums paid to EBC by £364,244. This sum represents 12% of the provisional sum expenditure. Mr Jervis explained this deduction as follows, in answering questions which summarised evidence he had previously given:

"Q. Judge Thornton: But I understand your evidence to be that your complaint is that the way that the work was contracted was that so much of it, so much of the builder's work, was provisional in the way it was found in the contract, that is to say global lump sum figures with very general global descriptions of the work, whereas with a bit more time it would have been possible to firm up the work sufficiently to enable a great proportion of that work to be the subject of a bill of quantities and rates.

A. Yes.

Q. Judge Thornton: It may well be that much of the work that was billed in that way, had it been billed, would not have been the final work actually required by the employer. There might well have been variations.

A. Yes.

Q. Judge Thornton: Some of the items may have been approximate quantities, some of them may indeed have been rather than provisional in the loose sense, provisional in the second clearer sense.

A. Yes.

Q. Judge Thornton: But the advantage, cost-wise, of all of that is that there would then have been a clear pricing mechanism by way of rates or analogous rates which would have been tendered for at the outset which would have enabled the work, when finally executed in whatever final version of the work, to be the subject of that kind of measurement and value?

A. That is correct.

Q. Judge Thornton: And it is in that sense that you are saying that the provisional element of the work was unsatisfactory?

A. Yes, that is absolutely right, my Lord, and I should make it clear that the premium adjustment I have made for uncompetitive pricing I have only made on the provisional sum work, on the EBC work."

219. The choice of 12% was taken from the section on Pricing Adjustment Factor in the Building Information Service - Surveys of Tender Prices Indices which show an average premium of 12% on competitively priced works for prices obtained by negotiation. The evidence supported Mr Jervis's bases of his assessment, namely that the work had not been procured on a competitive basis, that it would have been procured on such a basis on an Argos First basis of contracting and that 12% was a reasonable percentage to take as reasonably reflecting the size of the uncompetitive mark up. Mr Symonds had no effect answer to any of these points. ASM contended that Mr Jervis's opinion was based on the erroneous view that there had been no competitive tendering for the works whereas significant parts of the works had been subject to such a process. However, ASM failed to establish that there had been any significant competitive tendering. Moreover, any competitive tendering that had occurred would still have yielded prices significantly larger than these would have been had the work been properly and fully detailed in advance.
220. **Conclusion.** The sum of £364,244 should be deducted in the calculation of the hypothetical cost of the works for Issue 4.

Issue 5 – Appendix 3 Items

221. **Introduction.** Mr Jervis considered that the value of variations totalling £531,500 should not be taken into account in its entirety. Clearly, the cost of genuine variations should be added to the hypothetical cost because they would not have been included in the hypothetical contract sum. However, Mr Jervis believed that a proportion of the variations in question would have been carried out as part of a fully detailed scheme and that that proportion of the work was not a variation in the sense of a genuine addition to the hypothetical scope of work.
222. **Conclusion.** Mr Jervis's view is to be accepted, particularly as his evidence was consistently more reliable than that of Mr Symonds whose evidence did not answer these points. I also accept as reasonable Mr Jervis's figure of £497,800.00
223. The sum of £497,800 should be deducted in the calculation of the hypothetical cost of the works for Issue 5.

Balancing Item and Prelims

224. **Introduction.** ASM contended that a balancing item of £161,459 should be deducted for no better reason than that the calculation of hypothetical costs was slightly less than the actual spend. However, the exercise being undertaken did not require a strict balancing of the overall hypothetical cost and deductions with the actual spend. The exercise was attempting to determine, on the balance of probabilities, what Plymco's loss was and no balancing item is appropriate.
225. ASM also contended that the appropriate sum to deduct for preliminaries was £406,462 and Plymco £338,467. The appropriate figure depends on the final hypothetical cost. On the basis of the findings in this

judgment, the appropriate figure is £374,899.65 which represents 6% of the total of the figures which do not relate to Argos, namely a total of £6,248,327.50.

Minor Items of Dispute

226. **Introduction.** The expert quantity surveyors failed to reach agreement on a series of small items but their overall disagreement amounted to relatively small sums. It would be appropriate to conclude that the sum to be put on these items should be an average of the two quantity surveyors' figures. The items in question were those under Measured items, for which the average figure totals £936,343.00; Assessed sums, for which the average figure totals £1,114,745.50 and Cost of Argos works, for which the average figure totals £572,406.50. To arrive at the correct total for the hypothetical cost of the works, it is also necessary to add the sum of £1,827,000.00 in respect of PC sums. Subject to the premium cost adjustment, already dealt with, this was a figure which both expert quantity surveyors agreed.
227. ASM contended that one item, for £45,000, should be deducted in full because this deduction in Plymco's calculation was made in error. This error was not demonstrated in evidence and, in any case, the item is, in the context of this case, minor and readily and reasonably susceptible to the same averaging exercise I have adopted for the other minor items.

Total Cost of Works

228. **Omitted Works.** There was a dispute as to what the omitted works cost Plymco. I accept the evidence of Plymco that that cost was £626,726. There was no reason to doubt the evidence tendered by Plymco on this issue.

Bottom Up Calculation

229. On Mr Jervis's final calculations and assessments, the total hypothetical cost was £6,911,600. The evidence and contentions advanced by him in support of this figure were reasonable. Overall, the figure is so close to the top down hypothetical cost figure that it can be accepted as a valid, albeit alternative calculation.
230. I, therefore, award damages based on the top down basis of calculation and use the bottom up calculation as a check which supports and confirms the top down figure but which does not require that figure to be adjusted.

Overall Conclusion

231. The build up of the hypothetical cost of the works is as follows:

Issue 1	Omitted works	550,000.00
Issue 2	Elect installation	1,140,000.00
Issue 3	Daywork + BWIC	546,683.00
Issue 4	Premium Cost adjustment	-364,244.00
Issue 5	Appendix 3 items	497,800.00
	Balancing item	0.00
	Measured items 1 - 4	936,343.00
	PC sums	1,827,000.00
	Assessed items	1,114,745.50
	Sub-Total	6,248,327.50
	Prelims @ 6%	374,899.65
	Total excl Argos	6,623,227.15

	Argos	572,406.5
	Total Hypothetical Cost	£7,195,633.65

232. The total hypothetical cost arrived at by applying the various figures I have determined as being appropriate is, therefore, £7,195,633.65. This figure is to be deducted from the total actual cost of £8,414,431.65 to provide a total sum which Plymco is entitled to of £1,218,798.00.

9. Savings Claims

233. **Introduction.** ASM accepted an obligation to advise Plymco during the work of any cost savings that could reasonably have been made. It is clear that Plymco would have accepted and acted upon any reasonable suggestion. 7 such possible savings were put forward by Plymco as ones that should have been advised about but were not. Each is disputed. ASM's case is that since Plymco has obtained the advantage of the work provided, it cannot now complain of a failure to advise it of the possibility of making a saving. However, ASM had an express obligation to advise on any possible saving and, in respect of these 7 possible savings, it was in breach of that obligation if, and to the extent, that the relevant item was one which could reasonably have yielded a saving and was also one which Plymco, if properly advised, would have authorised a saving in relation to it.

234. **Toilet accommodation, 2nd floor.** ASM's case is that these toilets were necessary to enable Plymco to comply with the licensing requirements of the licensing justices since if this accommodation was not provided, customers would have had to use the existing facility 40 yards away. The evidence adduced was confused about this possible requirement but it is clear that Plymco regarded these additional facilities as essential. This claim fails.

235. **Quality of floor carpets.** Mr Jervis demonstrated that a less expensive but suitable quality of carpet could have been obtained in the best trading areas. These areas were ones which were clearly identified by Plymco as being the areas where, reasonably, higher quality floor carpets were needed. The saving would have been about £8.71 per square metre from the actual cost of £23.71 per square metre. I am satisfied on the evidence that an appropriate quality of carpet would have cost £15 per square metre. This claim is disputed on the grounds that Plymco actually spent £14.25 per square metre. This is based on Mr Gibbs' evidence of quotations he saw. The quality actually installed was much greater. Had Plymco been specifically advised that it was essential that the cheapest reasonably necessary carpet should be adopted, I am satisfied that that advice would have been accepted. However, I do not accept that Plymco was advised with sufficient clarity in these terms that a cost saving should be made.

236. The claim succeeds in the sum of £41,840.

237. **Suspended ceilings.** The appropriate area of ceiling, being 9,200 square metres, could have been provided with a Gyproc M/F suspended ceiling which was of appropriate quality but would have cost about £5.25 per square metre less to acquire. No satisfactory explanation as to why this contention is wrong has been put forward.

238. The claim succeeds in the sum of £50,000.

239. **Perimeter walls.** A lower quality wall finish to the basement walls, being a 19mm Gypsum plaster board, would have been appropriate. This would have saved £14,350, a saving agreed subject to liability by the two experts. No satisfactory explanation as to why this contention is wrong has been put forward.

240. The claim succeeds in the sum of £14,350.

241. **Balustrades.** A lower quality finish, which the experts agree would have saved £20,000, could have been provided for the staircase balustrades. There is no evidence that this subject was raised with Plymco at the appropriate time, despite Mr Nicholls' assertion that it was. No satisfactory explanation as to why this contention is wrong has been put forward.

242. The claim succeeds in the sum of £20,000.

243. **Reduced escalator width.** Plymco contended that it should have been advised to adopt a narrower width of escalator, namely 600mm instead of the specified 800mm. This would have saved £24,510. However, an escalator of this width would have been unacceptable to Plymco. It would not have been wide enough for a shopper and child to stand side by side, it may not have been permitted on health and safety grounds and it is not clear that the manufacturer offered an escalator of that very narrow width at that time.
244. The claim fails.
245. **Reduced quality of lighting levels.** Plymco contended that the lighting levels were of an unnecessarily high standard and that a cheaper system of lighting could have been introduced. Mr Jervis assessed the saving overall as £47,100. The lighting was chosen prior to the contract and ASM assisted in the specification and choice of the lighting levels. Although the mechanical and electrical consultant was Helix, it was part of ASM's responsibility to seek from Helix suggestions for cost savings and there is no evidence that they did so. Moreover, since ASM had participated in the lighting design process and was aware of the very high quality specification that had been adopted, it could and should have invited consideration of this item as a possible cost saving. Had ASM taken such proactive steps, the likely result would have been a cost saving advised by Helix with the assistance of the electrical supplier and, had such advice been given, I am satisfied that Plymco would have accepted it. No satisfactory alternative figure is put forward to challenge Mr Jervis's calculation of cost.
246. The claim succeeds in the sum of £47,100.

Overall Conclusion

247. The savings claims succeed in the overall sum of £173,290.

10. Judgment

248. There is to be judgment for Plymco in the total sum of £1,392,088.00, being the sums of £1,298,798.00 and £173,290.00.

Mr David Friedman QC, Mr John Virgo and Ms Lynne McCafferty (instructed by Bond Pearce LLP, Ballard House, West Hoe Road, Plymouth, PL1 3AE) for the Claimant

Mr Paul Darling QC and Mr Justin Mort (instructed by Kennedys, 10 Lloyds Avenue, London, EC3N 3AX) for the Defendant