

Neutral Citation Number: [2005] EWCA Civ 973

**IN THE SUPREME COURT OF JUDICATURE**  
**COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE QUEEN'S BENCH DIVISION**  
**TECHNOLOGY AND CONSTRUCTION COURT**  
**His Honour Judge Richard Seymour QC**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 29 July 2005

Before :

**LORD JUSTICE PILL**  
**LORD JUSTICE CLARKE**  
and  
**MR JUSTICE RIMER**

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Between :

**Bryen & Langley Limited**  
**- and -**  
**Martin Boston**

**Appellant**

**Respondent**

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**Mr Graeme Sampson** (instructed by **Martyn Amey & Co**) for the **Appellant**  
**Mr Michael Bowsher** (instructed by **C.J.Hough & Co**) for the **Respondent**

Hearing date: 12 July 2005  
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**JUDGMENT**

## Mr Justice Rimer :

### *Introduction*

1. This is an appeal by a firm of building contractors called Bryen & Langley Limited ("B & L"), the claimant. The respondent (defendant to the claim) is Mr Martin Boston. B & L's appeal is against the dismissal on 4 November 2004 by HH Judge Richard Seymour QC in the Technology and Construction Court both of B & L's application for summary judgment and of its claim.
2. B & L's proceedings followed an earlier reference to an adjudicator. B & L had asked the adjudicator to rule upon its claim that Mr Boston was liable to pay it £65,995 due under the 11<sup>th</sup> architect's certificate issued under a building contract between B & L and Mr Boston, which B & L claimed incorporated the Standard Form of Building Contract, 1998 Edition, Private with Quantities incorporating amendments 1 to 3 produced by the Joint Contracts Tribunal Ltd ("the JCT Form"). Mr Boston's response was that the contract did not incorporate the JCT Form and so the adjudicator had no jurisdiction to adjudicate. If the premise of that case was right, then the conclusion followed. This is because the building works were to a dwelling house of which Mr Boston is a residential occupier so that the Housing Grants, Regeneration and Construction Act 1996 did not provide the adjudicator with jurisdiction. He only had jurisdiction if the JCT Form was incorporated into the contract, his jurisdiction then deriving from Article 5 and clause 41A of the incorporated terms. The adjudicator ruled in B & L's favour on the issue as to his jurisdiction and made the award on 18 June 2003.
3. Mr Boston failed to comply with the award and, by its claim form dated 16 July 2003, B & L sought an order enforcing it. Its application for summary judgment under CPR Part 24 followed on 25 March 2004. Witness statements were served on both sides. The only matters put in issue by Mr Boston with which we are concerned were (i) whether the building contract had incorporated the JCT Form; and (ii), if it did, whether he was bound by the adjudication provisions, his case being that they were unenforceable against him by reason of the Unfair Terms in Consumer Contract Regulations 1999. The judge held on the first issue that, contrary to the adjudicator's finding, the JCT Form was not incorporated into the building contract. He therefore ruled in favour of Mr Boston and dismissed B & L's application and claim. The judge also gave obiter consideration to the second issue, under the 1999 Regulations, and declined to accept Mr Boston's argument. B & L now appeals against the judge's decision, including his decision on costs. Mr Boston resists the appeal, also asserting by a respondent's notice that the judge was wrong to rule against his alternative case under the 1999 Regulations.
4. The judge regarded the answer to the first issue as turning exclusively on the true interpretation of a letter of 12 June 2001 written to B & L by Roy Welling Associates, Chartered Quantity Surveyors employed by Mr Boston. The argument before us proceeded on the same basis, but I must also outline the story leading up to and following that letter.

### *The facts*

5. On 12 August 2000, Mr Boston and his wife Orna exchanged contracts for the purchase of two flats at 4 and 5 New Cavendish Street, London W1. Their plan was to convert them into one flat, a project for which Mrs Boston was providing the funds, although it was Mr Boston who entered into the building arrangements with B & L (no point turns on that). The vendor was Newthorn Properties Limited and the original contractual completion date was 22 September 2000 by which date Newthorn had agreed to bring the flats to the first fit-out stage. Newthorn engaged McCabe Building (UK) Limited ("McCabes") to do that work. There were, however, delays resulting in a deferment of completion of the purchase. In the meantime, Mr Boston agreed with Newthorn that he would employ his own builders to

commence the later stages of the fit-out work for which he and Mrs Boston would be responsible, the plan being that the converted flat would be ready for occupation prior to completion of the purchase.

6. To this end, Mrs Boston engaged an architect, Mr Gallagher, of David Gallagher Associates, to oversee the entire building project and in March 2001 Mr Boston engaged Mr Welling, of Roy Welling Associates, to prepare a bill of quantities to be submitted to several building contractors who would be invited to tender for the fitting-out works. Mr Welling prepared the bill of quantities in discussion with Mrs Boston and Mr Gallagher and submitted it to seven building companies.
7. The tender invitation submitted by Mr Welling included Preliminaries and a Bill of Quantities as to price. The Preliminaries consisted of a list of project particulars, of which item A10 identified the employer as Mr Boston, the architect as David Gallagher Associates and the quantity surveyors as Roy Welling Associates. Item A20, headed "The Contract", provided that the JCT Form would apply, subject to variations then listed. There followed some eight pages in which references to the various parts of the JCT Form were set out and variations specified. The first part of the JCT Form incorporates seven Recitals followed by seven Articles of Agreement and item A20 identified the variations to the Recitals and the Articles that were to apply. The Articles are followed by a four-page Appendix, which contains various options and alternatives in respect of which choices are to be made, and also has certain blanks which require to be completed (for example, as to the date for completion). Item A20 also described how the Appendix was to be completed, although as regards the completion date it provided, of necessity, that it was "to be advised". The stipulated variations made it clear that Article 5 was to be left undeleted, being one providing that "If any dispute of difference arises under this Contract either Party may refer it to adjudication in accordance with clause 41A." Item A20 also provided that Article 7B was deleted. That provides:

"Where the entry in the Appendix stating that 'Clause 41B applies' has been deleted then, subject to article 5, if any dispute or difference as to any matter or thing of whatsoever nature arising under this Contract or in connection therewith shall arise between the Parties either during the progress or after the completion or abandonment of the Works or after the determination of the employment of the Contractor it shall be determined by legal proceedings."
8. Clause 41A is the condition under which disputes or differences can be referred to an adjudicator, clause 41A-1 providing that "Clause 41A applies where, pursuant to article 5, either Party refers any dispute or difference arising under this Contract to adjudication."
9. It is, in my judgment, clear that the tender invitation that Mr Welling prepared was inviting tenders on the basis of a contract which would incorporate the JCT Form, as varied by the terms of the invitation, including the provisions in it for the reference to an adjudicator of any dispute or difference.
10. Six builders tendered for the work. B & L's tender was the lowest, at £532,404, their time estimate being 16 weeks. On 25 April 2001, Mr Welling wrote to Mr Boston recommending its acceptance. At this stage, McCabes were still working on the first fit-out stage, their work being as yet incomplete, as it still was at 31 May. By then, Mr Boston, who had agreed in principle to accept the B & L tender, had asked Mr Welling to see if B & L could complete their work within 12 to 14 weeks, time being regarded by him as of the essence.

11. Negotiations about price and the works took place between Mr Welling and B & L, in particular at a meeting on 6 June. That led to the agreement of a revised price of £436,923, followed by a fax from B & L to Mr Welling on 11 June confirming the agreed price and adding that "Obviously if we are instructed to level the floor it will be a variation, and this will result in a 17 week contract period including an extra weeks prelims which we can put in with the cost of the variation." On 12 June, Mr Welling wrote the all-important letter to B & L. I will number its paragraphs for ease of subsequent reference:

"1. Further to our recent meeting, I can now confirm on behalf of our Client, Mr Martin Boston, that it is his intention to proceed with the works with your Company in accordance with your Tender and subsequent amendments as appended in the sum of £436,923 for a Contract Period of 16 weeks, possession 18<sup>th</sup> June 2001. The Contract has been varied to include the levelling of the floors – the cost of which has yet to be ascertained. Access to the site is immediately available.

2. The Contract will be executed under the Standard Form of Contract 1998 Edition, Private with Quantities and, should the project not proceed, your reasonable ascertainable costs will be recoverable from the Client but will not include any loss of profit or overhead recovery.

3. The Contract Documents will be drawn up shortly.

4. At our meeting on 6<sup>th</sup> June, Mr Boston offered a Bonus Scheme (details to be agreed) wherein he would offer payment of £2,000 for every week by which the completion date was brought forward.

5. We look forward to working with you on this project, and trust that it is successfully concluded on time, within budget, and to the required quality standard."

12. A copy was provided to Mr Boston. The appended documents referred to in paragraph 1 showed how the revised contract sum had been arrived at. B & L did not countersign the letter or write a reply by way of a formal agreement to it, but they promptly assumed occupation of the building and embarked upon the works.

13. On 28 June, Mr Welling wrote to B & L enclosing "Contract documents for the above project for your perusal and signature." He asked that both sets, when signed, should be returned to him for forwarding to Mr Boston for his signature, following which one copy would be returned to B & L. Copies of the enclosures are not before us, any more than they were before the judge. There was some delay on B & L's part in signing the documents and in the meantime, on 7 August, Mr Gallagher issued the first certificate under what he called "the contract", his covering letter to Mr Boston reading:

"Under the terms of the contract and in accordance with Valuation No. 1 from Roy Welling Associates, we hereby enclose Certificate No 1 for progress payment to the contractor in the sum of £40,850. The final date for payment is 14 days from the date of issue of the Certificate."

14. The certificate described the contract sum as £452,616 (a figure which had once been the proposed contract sum, but which had by 12 June been revised to £436,923, and I infer that this was simply a slip) and certified £40,850 (£43,000 less a 5% retention) as due for payment. Mr Gallagher was purportedly issuing that certificate under a contract incorporating the JCT Form. Mr Boston paid the certified sum.

15. On 8 August, there was a site meeting attended by, amongst others, Mr Welling, Mr Gallagher and two representatives of B & L. Two minuted items read as follows:

“3.1 Lee Ringer [of B & L] to confirm that contract has been signed by the contractor. Copies to be immediately forwarded to client for signing as B & L will not release payment to Clarity Kitchens until contract is signed.

3.2. B & L confirmed that the fit-out contract could commence next Monday 13 August 2001, with a 16 week contract period giving a completion date of 3 December. [Mr Gallagher] reiterated the client’s wish to reduce this if at all possible, and B & L undertook to examine the programme and report.”

16. The second item raises the question of what B & L had been doing on the site since June, the answer to which is that they had apparently been doing so-called shell and preparatory works that were supposed to have been carried out by McCabes, the knock on effect of which was to defer until 13 August the start date of the fit-out works for which they had tendered. The judge found that B & L had been asked to undertake these additional works, which took the overall cost over the £436,923 figure mentioned in the letter of 12 June.

17. Mr Boston was informed of the outcome of the 8 August meeting, and wrote to Mr Gallagher on 13 August, making two points to which I should refer. First, Mr Gallagher had apparently informed him that B & L had accused him of not dealing with the contract. He wrote that he had never received any draft for approval. He asked, however, for Mr Gallagher to “assure me that nothing is going to hold up the work over this, or indeed any other matter, now.” The other matter he raised was his concern as to the contract period being 16 weeks starting on 13 August 2001, adding that:

“I do feel in all the circumstances it should be at least one or two weeks less than this and I would like you to do your very utmost, together with Roy Welling, to try and ensure that this is the case in the contractual arrangements.

As I told you, we are hopefully signing today a contract to take other premises, which we will have to vacate on 15<sup>th</sup> December and we just cannot have a situation where there will be any further delays.”

18. On 28 August, B & L returned to Mr Welling both sets of contract documents signed and witnessed, saying they looked forward to receiving back one copy upon completion by Mr Boston. On 5 September, Mr Welling sent Mr Boston two copies of the contract documentation signed by B & L, asking him to sign both and return one copy for forwarding to B & L.

19. On 7 September, Mr Gallagher gave a notice to B & L, with a copy to Mr Boston, of an eight-week extension of time for completion of works “under the terms of the contract.” The reason for this was because the completion of the preparatory and shell works had taken eight weeks from 18 June, giving the revised date for the commencement of the fit-out contract as 13 August and a revised completion date of 3 December. On 10 September, Mr Gallagher wrote to Mr Boston about fees, opening with the words “Now that the building contract is up and running ...”. He said the fit-out contract sum currently stood at just over £509,000, resulting in a fee of about £58,000 plus VAT. He enclosed a schedule of payments, including those through to completion and handover, and said he would appreciate confirmation of Mr Boston’s agreement. His enclosure is not before us and nor is any response from Mr Boston. What we do have is Mr Boston’s response on 13 September to Mr Gallagher’s notice of 7 September to B & L, in relation to which he wrote:

"Thank you for sending me a copy of your letter of 7<sup>th</sup> September 2001 to Bryen and Langley but I gather from you that included within the contract is the fact that if Bryen and Langley do not complete on the due date they will be liable for £2,000 per week or part of a week."

20. In the meantime, Mr Gallagher certified that the second payment was due under the contract, and wrote to Mr Boston on 19 September confirming to him that it was payable by him by that date.
21. Included in the evidence is a copy letter dated 18 September from Mr Michael Sobell, whom Mr Boston describes as his legal adviser. It was addressed to Roy Welling Associates. He returned one copy of the building contract, saying that Mr Boston wanted various amendments made to it, including a wish that it should deal expressly with bonuses and penalties and an objection to the deletion of clause 7b of the Articles of the JCT Form, the point being that Mr Boston apparently wished to retain the right to refer disputes to the court. The correspondence makes no further reference to this request, there is no discussion in it about any amendments to the form of contract and Mr Welling's witness statement is to the effect that he never received Mr Sobell's letter: the first time he saw it was when Mr Boston's solicitors sent him a copy in about July 2003. He said that, had he received it in September 2001, he would have discussed it with Mr Boston. What is clear, as the judge found, is that Mr Boston never signed any contract in JCT Form.
22. In the meantime, B & L continued with the building works. There was a site meeting on 17 January 2002 to discuss defects. It was attended by, amongst others, Mrs Boston, Mr Gallagher and representatives of B & L. Various alleged defects were discussed, the outcome being that Mr Gallagher was to issue a full list to all parties, programmes for rectifying them would be advised and they would be made good within a reasonable time. Evidence in relation to the conduct of the building works was provided in a witness statement from Mr Paul McMahon, B & L's contracts director, and he explained that Mr Gallagher issued 52 instructions in his capacity as architect. He further explained how Mr Gallagher and Mr Welling followed the procedure in the JCT Form for the issue of interim certificates as to the amount due to B & L from time to time and that on each occasion Mr Welling wrote to Mr Boston saying that the certified sums were payable within 14 days. He said that Mr Boston was late in paying them, but I understand he paid all but the final certified sum, and Mr McMahon explains that he also made retentions out of the payments in accordance with the terms of condition 30 of the JCT Form. The evidence includes copies of all the certificates, all but two of which referred to the contract sum as being the £436,923 mentioned in the letter of 12 June. B & L's case as outlined in its evidence was, in effect, that even though Mr Boston may never have signed his copy of the JCT Form of contract, all parties – B & L, Mr Welling, Mr Gallagher and Mr Boston – had acted as if a contract in such form was in place. He asserts that it was only upon the commencement of the adjudication reference that Mr Boston challenged this.
23. The judge explained that the last certificate issued by Mr Gallagher, No, 11, was dated 17 July 2002. He said it recorded the gross value of work completed by B & L as £660,800 and certified the net sum due for payment as being £115,995, although our copy appears to show a net sum of £127,515 as so due. The judge said that Mr Boston's case, as explained in his witness statement, was that he then agreed with Mr McMahon that "in return for payment to him of £50,000, Bryen & Langley would not seek any further payment before completing their work." Mr Boston claimed that this was recorded in a letter he then wrote, which we do not have but from which the judge quoted. The thrust of it was that the £50,000 was being paid on terms that B & L would complete the outstanding works immediately, and there would also be an attempt by all parties to resolve their differences at a meeting, failing which there would need to be an arbitration. B & L's stance was that, by contrast, the £50,000 had

merely been paid on account of the certified sum. Mr Boston paid nothing further and so in due course B & L referred to the adjudicator their claim for £65,995 (a figure suggesting that the net amount of the 11<sup>th</sup> certificate was, as the judge said, £115,995).

24. The final piece of evidence I should mention comes from Mr Amey, B & L's solicitor, who made a witness statement on 22 July 2004. He exhibited a copy letter dated 1 May 2003 from Mr Welling to Mr McMahon enclosing what Mr Welling described as "a copy of the Contract Appendix for your records." The enclosed document purports to be an agreement in JCT Form between Mr Boston and B & L but is undated and unsigned. It states the contract sum as £436,923. It follows the form of the original tender document, although it specifies 5 October 2001 as the date for completion.
25. After explaining the course and outcome of the adjudication, the judge said that the issue as to the adjudicator's jurisdiction was short. It was common ground between the parties that the letter of 12 June 2001 evidenced the making of a contract between B & L and Mr Boston and the only issue was whether or not that contract incorporated the JCT Form. The judge dealt with the arguments in paragraphs 21 to 24 of his judgment and concluded that it did not. He accepted the arguments of Mr Bowsher for Mr Boston that the letter was in the nature of a preliminary agreement that looked forward to the signing of an agreement in the future that would incorporate the JCT Form and he agreed with Mr Bowsher that the contract the letter evidenced did not itself do so. The letter in terms envisaged that the project might not proceed (see its paragraph 2), which the judge regarded as making little sense if the acceptance of the terms of the letter bound each side to a contract in JCT Form. The judge was also impressed by the point that the details of the bonus scheme remained to be agreed and that the JCT Form contained blanks and options which needed to be completed and exercised before it was in terms sufficiently certain to constitute a contract. He concluded, therefore, that the contract evidenced by the letter did not constitute a contract in JCT Form, although he made no findings as to the terms of the contract that it did evidence.

### *The appeal*

#### *A. Did the contract incorporate the JCT Form?*

26. My summary of the facts might suggest that B & L would have an arguable case that by 2003 Mr Boston was estopped by convention from denying that he was tied to B & L by a contract in JCT Form. That was not, however, the case that B & L sought to make before the judge, which is perhaps not surprising bearing in mind that it was seeking summary judgment under CPR Part 24. Its case was, and remains, simply that the letter of 12 June 2001 evidenced the making of a contract in the JCT Form.
27. Mr Sampson, for B & L, said that Mr Welling's tender invitation spelt out in specific terms the provisions of a contract in the JCT Form. That was the basis on which tenders were invited and the specified terms left nothing to be agreed apart from the price and the contract period. He said that by the time of the 12 June letter *all* terms had been agreed, the two outstanding terms being specified in paragraph 1. He acknowledged that paragraph 1 referred to the contract having been "varied to include levelling of the floors – the cost of which has yet to be ascertained," but rejected the suggestion that this was a feature that still remained to be agreed such as to reduce the state of play to one in which the parties were still in a mere state of negotiation. All the terms of the contract for which B & L had tendered had by then been agreed, and he said this was merely a typical variation to the terms of that contract which would be agreed during its course. That submission can be said to be supported by the fact that B & L's fax of 11 June had referred to the proposed floor works as being a variation requiring a 17-week contract period. The letter of 12 June still, however, proposed a 16-week period. It was, therefore, confirming the terms of the basic contract and treating the floor works as an extra to be negotiated.

28. Mr Sampson also rejected the suggestion that the bonus scheme mentioned in paragraph 4 of the letter was another term of the building contract that remained to be agreed. He said that the bonus scheme proposal was no more than a proposal to discuss a variation of a contract whose terms were by then agreed, a variation in which both sides had an interest. I might add that paragraph 3 of the letter had just said that "The Contract Documents will be drawn up shortly" and so can be said to point away from any thought that they could only be drawn up once the bonus scheme details had been agreed. It can also be said that it would be odd if Mr Boston were regarding the proposed bonus scheme as central to the basic building contract. Time was from his viewpoint of the essence, the letter reflects that B & L was to have immediate access to the property and it is obvious that he wanted prompt action.
29. Mr Sampson's submission was, therefore, that by the time of the letter of 12 June all the terms of the building contract had been agreed. His initial submission was that the letter amounted to an acceptance of an offer made by B & L's tender, as subsequently varied by agreement, and so created the building contract upon which B & L sued. He accepted, however, that paragraph 2 of the letter introduced a new provision which had not been the subject of prior agreement, and he revised his submission to one to the effect that the letter amounted to a contractual counter-offer which B & L accepted by its conduct in embarking upon the project. He of course recognised that the letter expressly envisaged the future signing of a formal contract in JCT Form but pointed out that there was nothing either in that, or in the parties' prior negotiations, to suggest that they were operating on a "subject to contract" basis. If they had been, that would of course have been fatal to B & L's case. But Mr Sampson submitted that the mere fact that the parties envisage the formalisation of their agreement by way of a formal contract does not preclude the conclusion, if the facts justify it, that they are intending an immediate contractual commitment to each other on the terms later to be incorporated into that formal contract.
30. For that last proposition, Mr Sampson referred us to the decision of this court in *Harvey Shopfitters Ltd v. ADI Ltd* [2003] EWCA Civ 1757; [2004] 2 All E.R.982. The facts of that case bore a striking similarity to those of the present one. The appellant builders had tendered to carry out certain works in accordance with a 1984 JCT form of contract. The employers' architects told the appellants that the tender was acceptable, the appellants started work on 6 July 1998 and on the next day the architects wrote them a letter confirming the employers' intention to enter into a contract with them at the tender price. The letter said the contract documents were being prepared and it also specified the main terms. The letter continued:
- "I have been instructed by our client to request that you accept this letter as authority to proceed. If, for any unforeseen reason, the contract should fail to proceed and be formalised, then any reasonable expenditure by you in connection with the above will be reimbursed on a quantum meruit basis. Any such payment would strictly form the limit of our client's commitment and our client would not be subject to any further payment of compensation for damages for breach of contract."
31. The work continued but no formal IFC 84 contract was ever signed. It was common ground that there was nothing left for the parties to agree. The work proceeded to completion and the appellants obtained an adjudicator's award in for their final account. The litigation arose because on the appellants' bid to enforce the award they amended to assert for the first time a claim to a quantum meruit. The Recorder rejected the claim, holding that, by the letter of 7 July 1998, the parties had entered into a contract in IFC 84 form. This court dismissed the appeal, Latham LJ saying in paragraph 9:

"The recorder was entitled to conclude, as Dyson J had done in [*Stent Foundations Ltd v. Carillion Construction (Contracts) Ltd (formerly Tarmac Construction*

*(Contracts) Ltd* (2000) 78 Con LR 188], that the mere fact that the letter giving instructions to proceed envisages the execution of further documentation, does not preclude the court from concluding that a binding contract was none the less entered into, provided that all the necessary ingredients of a valid contract are present. ...Having concluded that the parties had agreed to a fixed-sum contract under IFC 84 conditions, it is not surprising that the recorder held that the words in question, construed conjunctively, mean what they say. In other words, the only circumstance in which the appellants were to be entitled to a quantum meruit was if the contract did not proceed and was not finalised. The contract did proceed."

32. Mr Sampson said the same principle applies here. He might perhaps have added that the present case is arguably a stronger one than the *Harvey* case. In *Harvey*, the quantum meruit entitlement was to exist if "the contract should fail to proceed and be formalised ...". On one view, that could be said to mean that the quantum meruit entitlement was to exist if formal contracts were not signed, which they were not. This court appears, however, to have agreed with the recorder that the two conditions in the relevant phrase had to be construed conjunctively and that it was sufficient that the contract had proceeded, even if it had not been formalised (or finalised, as Latham LJ put it). In the present case, paragraph 2 of the letter of 12 June was in simpler form. It referred to B & L's right to recover certain costs "should the project not proceed" but neither counsel suggested that that was a reference to a failure to sign formal contracts. Mr Bowsher, for Mr Boston, accepted that the "project" *did* proceed, and that it did so as soon as B & L started work on it in June, with which Mr Sampson agreed. Mr Bowsher's further submission was that the costs referred to in paragraph 2 were merely costs in respect of any preparatory work carried out by B & L prior to commencement of such work. Again, I understood Mr Sampson to agree.
33. Paragraph 2 does, of course, pose a theoretical obstacle in the path to the conclusion that an acceptance by conduct of the terms of the letter constituted an immediate binding contract in JCT Form. If each side was thereupon so bound, in what circumstances was paragraph 2 contemplating that the project might not proceed? If a binding contract was created, then B & L was obliged to do the work, just as Mr Boston was obliged to pay for it. It might not be a contract in respect of which specific performance would be available, but a breach by either side would give rise to a claim for damages. How is paragraph 2 to be squared with that? Mr Sampson's answer was that paragraph 2 was focusing merely on that limited period between the writing of the letter and commencement by B & L of work on the property. His submission was that during that period Mr Boston was impliedly retaining a right to resile, in which event he would compensate B & L for their reasonable costs of any preparatory work they had performed. Once, however, B & L started work on the site, the project would have "proceeded" within the meaning of paragraph and at that point the crossing of the contractual Rubicon would be complete.
34. Mr Bowsher's submission, for Mr Boston, was that, whilst the letter amounted to the making by Mr Boston of a contractual offer, which was accepted by B & L's conduct in proceeding with the preparation for the work and the work itself, it was not and could not be a contract in JCT Form. It was a merely a contract whose terms entitled B & L to a proper reward for work carried out. He said that it could not be a contract in JCT Form, because the letter showed that the terms of any such contract still remained to be agreed, namely terms as to the floor levelling and as to the bonus scheme. He said that, at 12 June, there was still uncertainty as to the contract period: was it 16 or 17 weeks? He said that the standard form of JCT contract required blanks to be completed and options to be exercised. His submission was the familiar (and, in principle, correct) one that, until all terms are agreed, there can be no final and binding contract. He also relied upon events subsequent to 12 June, pointing in particular to Mr Boston's letters to Mr Gallagher and to Mr Welling in August and September by which he conveyed that he did not regard himself as subject to a contract in JCT Form.

35. As between the rival submissions, I prefer and accept Mr Sampson's. For the reasons he advanced, I accept that, by 12 June 2001, all the terms of a building contract in JCT Form had been agreed. So far as possible, all relevant blanks and options had been filled and exercised by Mr Welling's initial tender invitation on the basis of which B & L tendered; and by 12 June the contract price and period had also been agreed. I agree with Mr Sampson that the points about the floor levelling variation and bonus scheme cannot be regarded as elements of the building contract that still remained to be negotiated and agreed: they were simply variations to be negotiated under it. I disagree with Mr Bowsher that Mr Boston's subsequent internal statements to his own advisers can be relevant, let alone decisive, as to whether a contract had been concluded in June 2001. B & L's case is that a contract had been concluded by the offer contained in the 12 June letter and by B & L's acceptance of it by their prompt commencement of work and Mr Bowsher agrees with that. The only difference between the parties is as to its terms, and for reasons I have given I regard them as incorporating the JCT Form. Paragraph 2 of the letter does pose a difficulty although it is again agreed that the "reasonable costs" to which it refers relate only to B & L's preparatory costs incurred before actual commencement of the work. It is agreed that once B & L started their work, the contract had "proceeded", and I also agree with Mr Sampson that the best rationalisation of the latter part of paragraph 2 is that Mr Boston was impliedly reserving a right to resile from the contract until such time as B & L had actually started work. He did not, of course, do so.

36. There remains the point that particularly impressed the judge, namely that the 12 June letter envisaged a formal contract being signed in the future, being a formal contract that would incorporate the JCT Form, and so it was inconsistent to regard the contract created by the letter and its acceptance as itself incorporating that Form. That is a view with which it is perhaps quite easy to have instinctive sympathy, but it is one with which, on the facts of the present case, I respectfully disagree. The mere fact that two parties propose that their agreement should be contained in a formal contract to be drawn and signed in the future does not preclude the conclusion that they have already informally contractually committed themselves on exactly the same terms. Of course, if they negotiate on a "subject to contract" basis such a conclusion *will* be precluded. But otherwise it will not, or at least may not. This court in *Harvey* was not applying any novel principle of law. In *Rossiter v. Miller* (1878) 3 App. Cas. 1124, at 1151, Lord Blackburn said:

"So long as they are only in negotiation either party may retract; and though the parties may have agreed on all the cardinal points of the intended contract, yet, if some particulars essential to the agreement still remain to be settled afterwards, there is no contract. The parties, in such a case, are still only in negotiation. But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed by the parties does not, by itself, shew that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not. But as soon as the fact is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed."

37. Parker J made a statement to similar effect in *Von Hatzfeldt-Wildenburg v. Alexander* [1912] 1 Ch. 284, at 288, 289:

"It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction

already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal contract can be ignored.”

38. The decision in *Harvey* is an example of a case in which the court found that the creation of the further, formal contract was not a condition of the bargain the parties had finally concluded. It was no more than an expression of their desire as to manner in which the transaction upon which they had agreed should go through. In my judgment, the same conclusion can and should be drawn as to the parties’ intentions in the present case. The commercial reality was that, by 12 June 2001, they had agreed all the terms, including the terms of the JCT Form, and when B & L started work on the property in June they were doing so on those terms. In my judgment, the judge was in error in his conclusion that the contract the parties concluded in June 2001 did not incorporate the JCT Form. I prefer the view that it did.

#### *B. Unfair Terms in Consumer Contracts Regulations 1999*

39. On the footing that the June 2001 contract did incorporate the JCT Form, Mr Bowsher submitted that the judge was wrong to reject his argument that the adjudication provisions in such contract were unfair terms for the purposes of the Unfair Terms in Consumer Contracts Regulations 1999 (“the Regulations”). The Regulations superseded, but are to much the same effect as, an earlier set of 1994 Regulations, and were made in order to give effect to Council Directive 93/13/EEC. If Mr Bowsher is right in his submission based on the 1999 Regulations, then the consequence would be that the adjudication provisions were not binding on Mr Boston (see Regulation 8). The Regulations apply to “unfair terms in contracts concluded between a seller or a supplier and a consumer” (Regulation 4(1)), and Mr Sampson conceded that a building contractor and an employer such as Mr Boston are a supplier and a consumer for the purposes of the Regulations.

40. Regulation 5, headed “Unfair Terms”, provides, so far as material:

“(1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.

(2) A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.

(3) Notwithstanding that a specific term or certain aspects of it in a contract has been individually negotiated, these Regulations shall apply to the rest of the contract if an overall assessment of it indicates that it is a pre-formulated standard contract.

(4) It shall be for any seller or supplier who claims that a term was individually negotiated to show that it was.

(5) Schedule 2 to these Regulations contains an indicative and non-exhaustive list of the terms which may be regarded as unfair....”

41. Regulation 6, headed "Assessment of unfair terms", provides so far as material:

"(1) Without prejudice to regulation 12 [not material for present purposes], the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all other terms of the contract or of another contract on which it is dependent."

42. Schedule 2 to the Regulations, headed "Indicative and Non-Exhaustive List of Terms which may be Regarded as Unfair", includes terms which have the object or effect of:

(b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him; ...

(i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract; ...

(q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract."

43. Mr Bowsher identified two features of the JCT Form that, so he said, "contrary to the requirement of good faith, [caused] a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of [Mr Boston]" (Regulation 5(1)). They are Article 5 and clauses 30.1.1.4, 30.1.1.5 and 41A. Article 5 and clause 41A provide for the resolution of disputes by adjudication. The other clauses provide that unless the employer issues a withholding notice specifying the amount that it intends to withhold from an amount due under a certificate, that amount must be paid without deduction. He said that none of these provisions had been individually negotiated, they were inherently unfair to consumers such as Mr Boston and they were therefore not binding on Mr Boston. At the heart of Mr Bowsher's submission is the proposition that the purpose behind the introduction of such provisions into building contracts was, if only temporarily, to assist the contractor's cashflow at the expense of the employer. Mr Bowsher referred us to May LJ's remarks to this effect in paragraph 2 of his judgment in *Pegram Shopfitters Limited v. Tally Weijl (UK) Limited* [2004] 1 BLR 65. He also placed reliance on the obiter conclusions of HH Judge Toulmin CMG QC in paragraphs 129 to 132 of his judgment in *Picardi v. Cuniberti and another* [2003] 1 BLR 487 to the effect that clauses such as are now in question are unfair and cause a significant relevant imbalance. The tide on this question does not, however, flow in only one direction. In *Lovell Projects Ltd v. Legg and Carver* [2003] 1 BLR 487, HH Judge Moseley QC explained in paragraph 29 of his judgment why he did not regard the adjudication provisions in the contract before him as causing any significant relevant imbalance; and that in any event a term will only be unfair for the purposes of Regulation 5(1) if the imbalance it causes is "contrary to the requirement of good faith", which in the case before him it was not.

44. I do not propose to engage in any consideration of whether, on some sort of attempted objective assessment, the particular provisions to which Mr Bowsher refers do or do not cause a "significant imbalance" in the respective rights of B & L and Mr Boston to the detriment of Mr Boston. That is because, in my judgment, the performance of such an exercise will not, by itself, provide an answer to the question raised by Mr Bowsher's submission. As Regulation 5(1) makes clear, a term which has not been individually negotiated will only be relevantly "unfair" if it causes the relevant imbalance "contrary to the requirements of good faith." Regulation 6(1) requires the assessment of the unfairness of a contractual term to take account (inter alia) of "all the circumstances attending the conclusion of the contract ...". Lord Bingham of Cornhill explained in *Director General of Fair Trading v. First National Bank plc* [2002] 1 AC 481, at 491, that the "object of the [1994] Regulations and the Directive is to protect consumers against the inclusion of unfair and prejudicial terms in standard-form contracts into which they enter, ..." and at page 494 he further explained the requirement of "good faith" in the predecessor of Regulation 5(1) in the 1994 Regulations. He said:

"The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any factor listed in or analogous to those listed in Schedule 2 to the Regulations. Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice. Regulation 4(1) [whose terms were essentially the same as those of Regulation 5(1) of the 1999 Regulations] lays down a composite test, covering both the making and the substance of the contract, and must be applied bearing in mind the objective which the Regulations are designed to promote."

45. It follows, in my view, that in assessing whether a term that has not been individually negotiated is "unfair" for the purposes of Regulation 5(1) it is necessary to consider not merely the commercial effects of the term on the relative rights of the parties but, in particular, whether the term has been imposed on the consumer in circumstances which justify a conclusion that the supplier has fallen short of the requirements of fair dealing. The situation at which Regulation 5(1) is directed is one in which the supplier, who will normally be presumed to be in the stronger bargaining position, has imposed a standard-form contract on the consumer containing terms which are, or might be said to be, loaded unfairly in favour of the supplier. The *Picardi* case was one in which the terms had been imposed by the claimant architect (in that case, the supplier). In the *Lovell* case the terms had been imposed on the supplier by the employers' (i.e. the consumers') architect, the judge finding not only that they caused no significant imbalance to the employers, but that nor in the circumstances in which the contract came to be made was there any question of any lack of good faith or fair dealing by the supplier contractor. HH Judge Thornton QC arrived at a similar result, in like circumstances, in *Westminster Building Company Limited v. Beckingham* [2004] 1 BLR 265.

46. In my judgment, Mr Boston faces exactly the same difficulties in relation to his Regulation 5(1) argument as did the consumers in the *Lovell* and *Beckingham* cases. His problem is that the relevant provisions were not imposed upon him by B & L, the supplier. It was Mr Boston (the consumer), acting through his agent Mr Welling, who imposed them on the supplier, since they were specified in Mr Welling's original invitation to tender. I am prepared to assume that, in practice, Mr Boston played no part in the preparation of that invitation and that he did not receive any advice from Mr Welling on the provisions now in question; and it is clear that there was no individual negotiation over them with B & L. In principle, however,

Mr Boston had the opportunity to influence the terms on which the contractors were being invited to tender, even though he may not have taken it up; and there is therefore at least an argument available to B & L under Regulation 5(2) to the effect that the terms of which he now complains are not terms which fall within the first nine words of Regulation 5(1) at all. I specifically express no view on that last point, on which we had no argument, and assume that the terms do so fall. Even so, in light of the fact that it was Mr Boston, by his agent, who imposed these terms on B & L, I regard the suggestion that there was any lack of good faith or fair dealing by B & L with regard to the ultimate incorporation of these terms into the contract as repugnant to common sense. If they were to tender at all, B & L were being asked by Mr Boston to tender on (inter alia) the very terms of which Mr Boston now complains. It was not for B & L to take the matter up with him and ensure that he knew what he was doing: they knew that he had the benefit of the services of a professional, Mr Welling, to advise him of the effects of the terms on which he was inviting tenders. In my judgment, there was no lack of openness, fair dealing or good faith in the manner in which the June 2001 contract came to be made and in those circumstances I, like the judge, regard Mr Boston's case under the 1999 Regulations as not made out.

47. It follows that I would allow B & L's appeal against the judge's dismissal of its summary judgment application and claim.

### *C. Costs*

48. The hearing before the judge occupied a day, following which he reserved judgment. When he gave his judgment, and made orders dismissing both application and action, Mr Bowsher asked him to assess Mr Boston's costs summarily on the standard basis.
49. Mr Boston claimed costs in the sum of £20,608.53, including VAT, plus a further sum of £1,222, including VAT, in respect of a fee paid by Mr Boston to a Mr Malone, who had represented Mr Boston before the adjudicator and had provided what is claimed to have been relevant assistance to Mr Hough (Mr Boston's solicitor, of C.J. Hough & Co) in dealing with the claim in the TCC. Those figures totalled £21,830.58. Mr Malone's fee represented eight hours work at £130 per hour, involving "two meetings with solicitor and client, sourcing papers, correspondence and telephone conversations." As regards Mr Hough's costs, the supporting schedule did no more than list Mr Hough's charging rate, the hours he had devoted to different aspects of the case and counsel's brief fee. B & L's like schedule totalled £18,176.67, including VAT. The judge summarily assessed Mr Boston's costs at £21,750, representing a deduction of £80.58 explicable only by reference to the judge's apparent preference to order costs in a round sum.
50. Mr Sampson's criticism of that exercise is, as he submitted to the judge, that the costs should have been referred to a detailed assessment. His point to the judge was that a detailed assessment was justified by the size of the costs claimed and by the difficulty on a summary assessment of ascertaining the reasonableness of certain of the items claimed. He pointed to 12 hours of Mr Hough's time devoted to attendances on Mr Boston, plus whatever part of Mr Malone's eight hours was similarly devoted to like attendances; to 28 hours of Mr Hough's time on documents, which he said was apparently excessive for the purposes of an appeal turning essentially on a question of law, even though it involved the preparation of a 20-page witness statement for Mr Boston; and to six hours attendance on counsel, which he said was also apparently excessive. There is no dispute that, however the costs were to be assessed, it should be on the standard basis. Mr Sampson repeated the same points to us.
51. I do not consider that the judge can be criticised for assessing the costs summarily. That is the ordinary practice in cases occupying no more than a day and the judge was entitled to

hold, as he did, that it would be disproportionate to refer a bill of just under £22,000 to a detailed assessment. Having decided to assess them summarily, the judge was required to apply the two-stage approach explained by this court in paragraph 31 of *Lownds v. Home Office* [2002] EWCA Civ 365; [2002] 1 WLR 2450. That required him first to assess whether, on a global approach, the costs claimed were proportionate, having regard to the various considerations identified in CPR Part 44.5(3). The judge did not say in terms that he regarded the costs claimed as so proportionate but I infer that he did so regard them. That was a judgment which, if not strictly an exercise of discretion, this court ought not to disturb unless satisfied that it was plainly wrong and I am not so satisfied.

52. Having concluded that the costs claimed were, overall, not disproportionate, the guidance in *Lownds* then required the judge to satisfy himself that “each item should have been reasonably incurred and the cost for that item should have been reasonable.” In performing that exercise the judge had to resolve any doubt as to whether any item was reasonably incurred, or was reasonable in amount, in favour of the paying party, B & L (see CPR Part 44.4(2)). In my judgment, it was at this point in the exercise that criticism can be made of the judge’s approach. Mr Sampson made legitimate points about elements of Mr Boston’s costs summary, being points which required the judge to focus on the apparent reasonableness or otherwise of the items in dispute and the costs claimed for them and to make an assessment of what it would be reasonable and proportionate for B & L to pay in respect of them.
53. Given the extreme paucity of the material before the judge supporting the claimed costs, that was not an easy exercise; and, on a summary assessment, it was necessarily going to require something of a rough and ready approach. But where in my judgment the judge fell into error was that he made no proper attempt to meet and assess Mr Sampson’s points. The way he dealt with them was to compare B & L’s costs summary with Mr Boston’s summary, find (as was the case) that they were broadly similar and that the number of hours of work done on B & L’s side was also broadly similar and to conclude from that that Mr Boston’s costs should be assessed in (for practical purposes) the full sum for which he claimed.
54. In my judgment, that was an incorrect approach. A reference to the paying party’s costs summary may perhaps provide a helpful cross-check in the course of the assessment exercise, but I consider that it is wrong in principle for a judge to conclude that, because the paying party’s costs are much the same as the receiving party’s, the latter’s costs can be assumed to be costs which it is reasonable for the paying party to pay. The exercise ignores the possibility that the comparator may include items which were not reasonably incurred or for which the costs were unreasonable and overlooks that the work done by one party is not necessarily to be equated to that done by the other party. The judge’s task is to focus on the heads of costs he is being asked to assess and to form the best judgment he can as to what proportion of them it is reasonable for the paying party to pay. In the present case, this required an independent consideration by the judge of the three items of which Mr Sampson made particular criticism. The judge gave them no such consideration but, in effect, simply awarded Mr Boston his costs on the indemnity basis.
55. In my judgment, the judge therefore misdirected himself in his approach to the assessment of Mr Boston’s costs. I would also allow the appeal against the judge’s costs order. Were I not anyway disposed to allow the main appeal, I would propose that this court should perform afresh the summary assessment of costs. That may not, however, be necessary.

**Lord Justice Clarke :**

56. I agree with both the conclusions and the reasoning of Rimer J on each aspect of the case. I wish to add a few words of my own only on the question whether the parties entered into a contract on the terms of the JCT Form. I do so because we are differing from the judge.

57. The essential reasons which have led me to the conclusion that the parties entered into a binding agreement on the terms of the JCT Form are these.

i) The invitation to tender, which was prepared on behalf of Mr Boston, was drafted on the express footing that the tenders were to be based on the detailed terms of the JCT Form. Where there was a choice in the JCT Form the invitation made it clear how the form was to be completed. For example the provisions for the reference of any dispute or difference to an adjudicator were included.

ii) B & L tendered on that basis. Negotiations ensued. The price was agreed at £436,923 and on 11 June B & L faxed its confirmation of the price adding that if they were instructed to level the floor there would be a variation which would result in an extra's week's work, making 17 weeks instead of the 16 weeks agreed in principle.

iii) On 12 June Mr Welling wrote the letter to B & L on behalf Mr Boston which Rimer J has quoted. It was correctly accepted by Mr Bowsher on behalf of Mr Boston that the letter contained an offer on his behalf which was accepted when B & L began the work. The only issue between the parties was thus the terms of the contract which came into existence on that acceptance.

iv) In my opinion it makes no sense to hold that it was simply agreed that B & L were entitled to a proper reward for work carried out. That seems to me to disregard both the context in which the letter of 12 June was written and the terms of the letter itself.

v) As to context, before the letter was written the parties had agreed the essential terms of the contract. The tender was on the basis of the detailed invitation to tender and thus on the basis of the terms of the JCT Form as set out in the invitation to tender. The JCT Form could have been filled out to include the detailed nature of the work, the price and the agreed period of 16 weeks. There was nothing further to agree.

vi) The first sentence of paragraph 1 of the letter makes it clear that it was Mr Boston's intention to proceed with "the works" and to do so "in accordance with your Tender and subsequent amendments as appended [ie to the tender] in the sum of £436,923 for a Contract Period of 16 weeks, possession 18<sup>th</sup> June 2001". There is no suggestion that it was at any stage the intention of either party that the work would be carried out on any basis other than that in the tender, subject no doubt to any later variations that might be agreed.

vii) The second sentence of paragraph 1 adds that "the Contract has been varied to include the levelling of the floors – the cost of which has yet to be ascertained". That sentence suggests that the agreement had been reached on a specific basis, subject to a variation in respect of the levelling of the floors which would be costed in the future. Construed in the light of what had gone before, it seems to me that it was agreed in principle that the 16 weeks would be extended to cater for that work.

viii) Paragraph 2 simply provides for the contract to be executed and is to my mind a reference to the formal written contract on the JCT Form which the parties had contemplated from the outset would be the basis upon which the work would be carried out.

ix) There was some debate as to the meaning of the second part of paragraph 2. It is not easy to understand but it plainly contemplated some kind of interim payment if the project did not proceed. Here the project did proceed and both parties agree that there was a binding contract when work began, so that it is not necessary to decide precisely what the sentence means. If it were necessary to do so, I agree with Rimer J that Mr Boston was impliedly reserving a right to resile from the contract until such time as B & L had actually started work.

x) Paragraph 3 simply confirms that the contract documents were to be drawn up shortly. For the reasons given by Rimer J, it does not follow from the fact that the parties intended to sign a formal contractual document that they had not entered into contractual relations on particular terms. All depends on the circumstances.

xi) Paragraph 4 refers to a bonus scheme which Mr Boston had offered but had not been agreed. I agree with Rimer J that the bonus scheme was simply a possible variation of the contract to be negotiated under it.

xii) There is nothing in the wording of the letter that suggests that Mr Boston was offering to pay for unspecified (or even specified) work on a *quantum meruit* basis.

xiii) Like the terms of any contract, the terms of the letter must be construed in their context. As Rimer J correctly puts it in paragraph 38 above, the commercial reality was that, by 12 June, the parties had agreed all the terms, including the terms of the JCT Form, and when B & L started the specified work in August they accepted the offer contained in the letter on those terms and carried out the work on the basis of them. It makes no commercial sense to hold that when they started the specified work they did so on a simple *quantum meruit* basis.

58. For these reasons, which are essentially the same as those given by Rimer J, I agree that the contract was made on the terms of the JCT Form including the adjudication clause. I therefore agree that the appeal should be allowed on that point. I also agree with Rimer J that the judge reached the correct conclusion under the Unfair Terms in Consumer Regulations 1999. As to costs, I agree with Rimer J's reasoning, although this is not, so far as I can see, a live question because the effect of allowing the appeal on the first point will presumably have the effect that the order for costs must be set aside in any event.

59. Since writing the above I have had an opportunity of seeing Pill LJ's judgment in draft and simply wish to add that I agree with it.

**Lord Justice Pill :**

60. I agree that the appeal should be allowed on both issues.

61. I agree with Rimer J's reasoning and conclusion on the incorporation of the JCT Form and add a comment only in relation to the relevance of the second part of the paragraph, which Rimer J has numbered 2, in the letter of 12 June 2001 set out in paragraph 11 of his judgment.
62. On 12 June, it was known that the fit-out works for which B & L had tendered could not start immediately. B & L were on site doing other work in the circumstances set out in paragraph 16 of the judgment. In those circumstances it was predictable that an arrangement would be made (as in *Harvey*) as to what was to happen if the contract work did not proceed.
63. I agree with Rimer J that the effect of the relevant words was to give Mr Boston an option to resile from the contract until B & L had commenced the contract work and, in the event of him doing so, to give limited protection to B & L. They were to recover reasonable costs but not "loss or profit or any overhead recovery." The words do not, in my view, lead to the conclusion that incorporation of the JCT Form depended on the creation of a further, formal contract.
64. I too would uphold the judge's finding on the issue under the 1999 Regulations.
65. As to costs, I agree with the conclusion of Rimer J. This court should, in my view, be slow to review a judge's acceptance of a party's figures on a summary assessment but there were in this case aspects of the claim, in particular the role of Mr Malone, which required some investigation and, if the figures were to be accepted, some explanation of the acceptance. As stated by Rimer J at paragraph 55, however, the practical significance of the issue may be small.